

The Renco Group, Inc.

Claimant

v.

The Republic of Peru

Respondent

(UNCT/13/1)

PERU'S REPLY ON WAIVER

17 August 2015



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

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The Renco Group, Inc. v The Republic of Peru

PERU'S REPLY ON WAIVER

1. The Republic of Peru (“Peru”) hereby submits its Reply on Waiver pursuant to Article 23(3) of the UNCITRAL Arbitration Rules and Article 10.18.2 of the Peru-United States Trade Promotion Agreement, in accordance with the Tribunal’s Decision Regarding Respondent’s Request for Relief dated 2 June 2015 (“Decision”), and Procedural Orders Nos. 3 and 4 dated 20 June 2015 and 6 July 2015, respectively, and in response to the Counter-Memorial on Waiver submitted by The Renco Group, Inc. (“Renco”) on 10 August 2015.

I. THE TREATY REQUIREMENT

2. Renco’s Counter-Memorial on Waiver demonstrates a flagrant disregard for Renco’s obligations under the Peru-United States Trade Promotion Agreement (the “Treaty”) governing this proceeding underscores once again its disregard for rules, both in word and in deed. Renco’s Counter-Memorial also reveals once again its pattern of blaming others for its own failures to follow the laws of Peru as well as the applicable Treaty.

3. The plain language of Article 10.18.2 of the Treaty requires a comprehensive waiver of “*any right*,” to both “initiate” and “continue,” “before *any* administrative tribunal or court under *the law of any Party*, or other dispute settlement procedures, *any proceeding* with respect to *any measure* alleged to constitute a breach referred to in Article 10.16.”¹

4. The object and purpose of Article 10.18 is to encourage potential claimants to seek to resolve their disputes before local courts before resorting to arbitration under the Treaty, thus avoiding a multiplicity of proceedings and granting the State certainty that there will be an end to the dispute.² Accordingly, the wording of the “waiver must be clear, explicit and categorical,”³ as the *Waste Management* tribunal observed, and, as highlighted by the *Methanex* tribunal, there should be “*absolute certainty*, as to what the investor claimant was or was not waiving.”⁴

5. Indeed, under the Treaty, there can be no reservations or carve-outs of any right nor is there any exception for defensive actions. The sole exception is expressly set forth in Article 10.18.3 of the Treaty and concerns the right to “initiate or continue an action that seeks interim injunctive relief.”⁵ As explained in Peru’s Memorial on Waiver, this limited exception does not apply in the instant case, and Renco has not and cannot argue otherwise.⁶

6. Article 10.18.2 reflects a “no U-turn” structure which allows claimants to pursue domestic or contractually-agreed remedies for up to three years – counted from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge of the

¹ Peru-United States Trade Promotion Agreement, entered into force 1 Feb. 2009 (the “Treaty”), Art. 10.18.2 (RLA-1).

² Peru’s Memorial on Waiver dated 10 July 2015, (“Memorial on Waiver”) ¶¶ 12-14.

³ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 18 (RLA-102).

⁴ *Methanex Corporation v. United States of America* (UNCITRAL) Final Award on Jurisdiction and Merits dated 3 Aug. 2005, Part II – Ch. F ¶ 25 (emphasis added) (RLA-12).

⁵ Treaty, Art. 10.18.3 (RLA-1).

⁶ Memorial on Waiver ¶¶ 10, 53-55.

loss or damage – *before* they file a notice of arbitration.⁷ After the notice of arbitration is filed together with the written waiver, however, the door to domestic or other remedies closes and cannot be reopened. In the words of Caplan and Sharpe, provisions such as Article 10.18 of the Treaty provide “claimant with a one way path to investor-State arbitration.”⁸ The Treaty correspondingly imposes no limit on the capacity of a respondent state to raise objections with regard to violations of the waiver requirement, as Peru did in this arbitration pursuant to applicable procedures.

7. Despite the object and purpose of the Treaty and the plain language of the waiver requirement, Renco has attempted to invent a new exception to the waiver requirement by claiming that local proceedings are permissible, despite the plain language of the Treaty, if they are “defensive” in nature. There is no such exception, and Renco’s factual allegations are thus inapposite and, in any event, inaccurate. As Peru discusses below, Renco has violated the Treaty in word and in deed, with serious and fatal implications for Renco’s case.

II. WRITTEN REQUIREMENT VIOLATIONS

8. Renco has violated the waiver requirement of the Treaty with respect to written waivers because (A) the Renco waiver is not comprehensive and (B) there is no DRP waiver despite the nature of Renco’s claims.

A. Renco’s Waiver Is Not Comprehensive

9. The written waivers submitted by Renco with its Notice of Arbitration and Amended Notice of Arbitration fail to comply with the waiver requirement of Article 10.18.2 of the Treaty, because they contain the following reservation of rights:

To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant *reserves the right* to bring such claims *in another forum* for resolution on the merits.⁹

10. Renco’s reservation of rights directly contradicts the ordinary meaning of Article 10.18, which requires that a written waiver be comprehensive, as detailed above and in Peru’s Memorial on Waiver. Renco, however, has carved out of its waiver the right to “initiate [i.e., “bring”¹⁰] before any administrative tribunal or court under the law of any Party, or other dispute

⁷ Treaty, Art. 10.18.1, Art. 10.18.2 (RLA-1).

⁸ L. M. Caplan and J. K. Sharpe, “United States” in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013) 755, at 829 (RLA-96); *see also* Mark Kantor, *Little Has Changed in the New US Model Bilateral Investment Treaty*, 27(2) ICSID Review 335, 343-344 (2012) (“The 2004 Model BIT and recent US investment agreements do not contain a procedural requirement that a claimant exhaust local remedies in the host State before commencing investor–State arbitration, in contrast to the customary international law requirement that a State’s nationals exhaust such remedies before the State may assert that national’s claims internationally. Instead, those agreements have contained a ‘no u-turn’ provision, under which the claimant (and, if the claimant is bringing the claim on behalf of a controlled local enterprise, that enterprise) must irrevocably waive any right to initiate or continue in any administrative tribunal, court or other dispute settlement procedures any proceeding with respect to any measure alleged to constitute a breach of the investment agreement The US Government declined to add a procedural exhaustion of remedies requirement into the 2012 US Model BIT. Instead, the ‘No U-Turn’ provision found in Model BIT Article 26.2 remains unchanged”) (RLA-108).

⁹ Amended Notice of Arbitration ¶ 67 (emphasis added). *See also* Notice of Arbitration ¶ 78 (“To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimants reserve the right to bring such claims in another forum for resolution on the merits.”).

¹⁰ Amended Notice of Arbitration ¶ 67; Notice of Arbitration ¶ 78.

settlement procedures, [i.e., “in another forum”¹¹] proceeding[s] with respect to [...] measure[s] alleged to constitute a breach referred to in Article 10.16.”¹²

11. Renco’s reservation of rights also conflicts with the Treaty’s goal of preventing U-turns. If claimants were allowed, as Renco would like, to initiate arbitration under the Treaty and then, if the arbitration is unsuccessful, resort to local courts, the objective of encouraging foreign investors to use local and contractually-agreed dispute settlement mechanisms before internationalizing the dispute would be undermined. Likewise, the objective of providing certainty and finality for States would not be realized. Moreover, as noted in the Memorial on Waiver and not rebutted in Renco’s Counter-Memorial,¹³ if Renco’s reservation of rights were permissible, it could lead to a rush to treaty arbitration in order for claimants to take advantage of the usually longer domestic statute of limitations, which is exactly what has happened here.¹⁴

12. Renco is incorrect to contend that its reservation of rights does not run afoul of the Treaty because it is “superfluous and simply states the obvious.”¹⁵ Renco’s suggestion that Article 10.18 is violated only when a claimant actively pursues other proceedings¹⁶ is contrary to both the express language of Article 10.18, which makes the waiver a requirement of Peru’s consent, as well as the very nature of the waiver requirement, which seeks to prevent the initiation or continuation of other proceedings *in parallel to* or *after* the Treaty arbitration is concluded.

13. Renco’s argument that, even if it did violate the waiver requirement, any such violation would be inconsequential to jurisdiction, is based solely on two NAFTA cases, *Ethyl v. Canada* and *Thunderbird v. Mexico*, which are clearly distinguishable from the instance case. In *Ethyl*, the claimant submitted the required written waivers on its own behalf and on behalf of its investment with its statement of claim, instead of with its notice of arbitration. The question before the tribunal was whether Article 1121’s requirement that the waiver “shall be included *in the submission of a claim to arbitration*” meant with the notice of arbitration or the statement of claim.¹⁷ It was in this context that the *Ethyl* tribunal “conclude[d] that jurisdiction here is not absent due to Claimant’s having provided the consent and waivers necessary under Article 1121 with its Statement of Claim rather than with its Notice of Arbitration.”¹⁸ The facts in *Thunderbird* were exactly the same as in *Ethyl*, that is,

¹¹ Amended Notice of Arbitration ¶ 67; Notice of Arbitration ¶ 78.

¹² Treaty, Art. 10.18.2(b) (RLA-1).

¹³ Memorial on Waiver ¶ 27.

¹⁴ In the case at hand, the statute of limitations for claims for breach of the Share Transfer Agreement (the “Contract”) and the Guaranty Agreement (the “Guaranty”), on which Renco bases many of its claims, is ten years. Breach of contract claims are actions *in personam*, which according to Article 2001 of the Peruvian Civil Code have a statute of limitations of ten years. Peruvian Civil Code, Art. 2001(1) (“Except where provided otherwise, the statute of limitations is: 1. – Ten years for actions *in personam*, real actions, actions derived from an enforcement order or the nullity of a legal act.”) (RLA-106).

¹⁵ Claimant’s Counter-Memorial Concerning Peru’s Waiver Objections dated 10 Aug. 2015 (“Counter-Memorial on Waiver”), ¶ 55. Renco’s reservation of the right to bring claims in another forum cannot be compared to Peru’s statement in its Memorial on Waiver that “Peru, as always, reserves all of its rights, including in regard to Renco’s claims in this arbitration, which are factually and legally meritless.” Peru is not seeking to qualify a more general statement with this reservation, as Renco is doing with its waiver reservation. Peru is merely stating that it will respond to Renco’s substantive claims in later submissions.

¹⁶ Counter-Memorial on Waiver ¶ 66.

¹⁷ North American Free Trade Agreement (NAFTA), Chapter Eleven, Article 1121(3), (CLA-11); *Ethyl Corporation v. The Government of Canada* (UNCITRAL) Award on Jurisdiction dated 24 June 1998, ¶ 91 (CLA-103).

¹⁸ *Ethyl Corporation v. The Government of Canada* (UNCITRAL) Award on Jurisdiction dated 24 June 1998, ¶ 91 (CLA-103). *Ethyl* was the first case submitted to arbitration under NAFTA Chapter Eleven, and the tribunal observed at the outset of its ruling on waiver that it had “not gained any insight into the reason for the formalities prescribed by Article 1121,” that is to say, the parties in that case presumably did not brief the tribunal on the object and purpose of the waiver requirement.

the claimant submitted the requisite waivers with its particularised statement of claim, instead of with its notice of arbitration.¹⁹ In neither case did the claimant make reservations in its waivers, fail to submit a waiver on behalf of the required entity, or initiate or continue any action in violation of the waiver, either before or after it was submitted.

14. Notably, since the publication of the 2004 US Model BIT, the United States has amended the waiver language in its treaties, including in Article 10.18.2 of the Treaty and in the DR-CAFTA, which provisions state that the waiver must accompany “*the notice of arbitration.*”²⁰ More importantly for this case, the title of the waiver provision also was amended by inserting in the title of Article 10.18 of the Treaty (as well as in the equivalent provisions of the DR-CAFTA and the US Model BIT), the word “*Consent.*”²¹ This clarification leaves no room for doubt that the Treaty’s waiver requirement is not a mere “procedural” or “formal” requirement that can be remedied at any time by unilateral action taken by the claimant, but rather is a condition to the State’s consent to arbitrate and, therefore, to the jurisdiction of the tribunal.

15. Moreover, Renco’s argument that “if the Tribunal dismisses Renco’s claims on jurisdictional or admissibility grounds, Renco is free to attempt to bring such claims before a different tribunal that may have jurisdiction to hear such claims ” cannot render its waiver compliant with the Treaty.²² The Treaty is clear that the *only* permissible reservation to the waiver is the one set forth in the text of Article 10.18.3. Renco cannot unilaterally determine that other, unstated reservations apply or that a future court or tribunal would find that a claim brought after this Tribunal dismissed its claim for lack of jurisdiction or admissibility was not barred by its written waiver; that decision would be for any future court or tribunal to make, and Renco cannot predetermine the outcome of that decision by inserting language into its waiver.

16. Renco’s reliance on *Waste Management II* in this regard is misplaced. Contrary to Renco’s contention, the tribunal in that case did not hold that “a waiver provision should not be interpreted in a manner that bars the investor from ever having its claims heard on the merits in any forum.”²³ The claimant in *Waste Management II* was not seeking to make a U-turn to initiate other means of dispute resolution or otherwise seeking to retain the right to do so. Rather, the claimant in *Waste Management II* was refiled a NAFTA arbitration after its first NAFTA case was dismissed by the *Waste Management* tribunal for lack of jurisdiction due to an ineffective written waiver.²⁴ Respondent’s objection in *Waste Management II* was that the decision of the first *Waste Management* tribunal dismissing the case for lack of jurisdiction was *res judicata*, precluding the claimant from bringing another NAFTA arbitration. In other words, the respondent argued that the NAFTA “allows a Claimant a single opportunity to vindicate a NAFTA claim before a Chapter 11 tribunal.”²⁵ *Waste*

¹⁹ *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Award dated 26 Jan. 2006, ¶ 116 (CLA-19).

²⁰ 2004 U.S. Model Bilateral Investment Treaty (2004 US Model BIT), Art. 26.2(b) (emphasis added) (RLA-15).

²¹ The title of Article 10.18 is “Conditions and Limitations on Consent of Each Party,” as compared with the NAFTA Article 1121 title of “Conditions Precedent to Submission of a Claim to Arbitration.”

²² Counter-Memorial on Waiver ¶ 55.

²³ Counter-Memorial on Waiver ¶ 59.

²⁴ *Waste Management Inc. v. United Mexican States II* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal concerning Mexico’s Preliminary Objection concerning the Previous Proceedings dated 26 Jun. 2002 ¶¶ 8-13, 16 (RLA-103).

²⁵ *Waste Management Inc. v. United Mexican States II* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal concerning Mexico’s Preliminary Objection concerning the Previous Proceedings dated 26 Jun. 2002 ¶ 17 (RLA-103).

Management II did not concern the meaning of the waiver requirement, but instead the *res judicata* effect of the decision of a previous NAFTA tribunal. In fact, Article 1121, NAFTA's waiver provision, did not even apply in that case, given that Article 1121 (as is also the case with Article 10.18 of the Treaty) does not require claimants to "waive their right to initiate or continue" dispute settlement procedures under the NAFTA itself.²⁶

17. The *Consolidated Softwood Lumber* case is also instructive in this regard. In that case, when one of the claimants sought to withdraw its claim on the eve of the jurisdictional hearing, and indicated that it might refile its NAFTA Chapter Eleven claim with the hope of obtaining a tribunal more to its liking, the tribunal terminated that claimant's claim against the United States, but refused to declare whether it did so with or without prejudice to reinstatement.²⁷ The tribunal explained that it was not competent to under either the NAFTA or the UNCITRAL Arbitration Rules to make any such determination;²⁸ rather, any subsequently constituted tribunal would have the sole authority to determine the *res judicata* or other effect of the termination for jurisdictional or admissibility purposes.²⁹ The same holds true here. To the extent that this Tribunal dismisses Renco's claims for lack of jurisdiction or admissibility, and Renco chooses to bring these same claims in another forum, that forum will have the sole authority to determine whether Renco's claims are barred by the waiver which it was required to submit in order to commence this Treaty claim. Whatever decision that future court or tribunal might make, is irrelevant to whether this Tribunal is or is not competent to decide Renco's claims; that decision depends upon Renco having submitted a waiver that fully complies with the Treaty, which it has failed to do.

18. Finally, Renco is wrong to suggest that so long as the claimant has not acted in violation of the waiver, the conformity of the written waiver with the Treaty's requirements is not grounds to dismiss the claim for lack of jurisdiction.³⁰ As an initial matter, while an investment treaty tribunal can dismiss a claim when a claimant is pursuing parallel proceedings in violation of its written waiver, the written waiver is also intended to protect against the initiation of *future* proceedings, after the tribunal has become *functus officio*. It would deprive the State of important protections of the Treaty if the waiver requirement were interpreted to merely prohibit claimants from taking simultaneous action in violation of the waiver requirement, but to allow those claimants to reserve for themselves the ability to take such action in the future. Contrary to Renco's suggestion that the *Waste Management* tribunal was solely concerned that the claimants were engaged in other proceedings in violation of the written waivers that they had submitted. On the contrary, the tribunal found that the language of the written waivers did not comply with the treaty's requirements.³¹ With respect to the qualification included in the claimant's waiver in *Waste Management*, the tribunal observed that "[i]f

²⁶ North American Free Trade Agreement (NAFTA), Chapter Eleven, Article 1121(2)(b), (CLA-11).

²⁷ *Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America* ("*Consolidated Softwood Lumber*"), Order for the Termination of the Arbitral Proceedings with respect to Tembec et al. dated 10 Jan. 2006, ¶ 1.3 (RLA-116).

²⁸ *Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America* ("*Consolidated Softwood Lumber*"), Order for the Termination of the Arbitral Proceedings with respect to Tembec et al. dated 10 Jan. 2006, ¶ 1.3 (RLA-116).

²⁹ *Id.* ("[T]he question whether or not the termination as to Tembec is with or without prejudice to reinstatement is to be considered and decided upon by the Article 1120 tribunal, if any, to which Tembec may seek to resubmit the aforementioned NAFTA claims notwithstanding, inter alia, the provisions of Article 1121(1)(b) of the NAFTA, Tembec's waiver made thereunder and the provisions of Article 1126(8) of the NAFTA.")

³⁰ Counter-Memorial on Waiver ¶¶ 65-66.

³¹ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶¶ 5, 27-28, 30-31 (RLA-102).

the Claimant [as Renco as done here], upon formulating its waiver, had clearly adopted the interpretation it now maintains, it would not have *conditioned its waiver* with the terms as it did.”³² The Tribunal then concluded that it “[could] not deem as valid the *waiver tendered* by the Claimant *in its submission of the claim to arbitration*, in view of its having been *drawn up with additional interpretations*, which have failed to translate as the effective abdication of rights mandated by the waiver.”³³

B. Renco Fails To Waive DRP’s Rights

19. In addition to its failure to submit a sufficient waiver on its own behalf, Renco also failed to submit any waiver at all on behalf of DRP, in violation of Article 10.18.2, which requires written waivers by both the claimant and its enterprise, where claims are made “on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.”³⁴

20. The Treaty’s requirement of a waiver by the enterprise reflects its structure, which is not found in most other BITs, but is common to treaties based on the NAFTA and the 2004 and 2012 US Model BITs,³⁵ that allows claimants to bring claims on behalf of an enterprise that constitutes the claimant’s investment in the host State that the claimant owns or controls.³⁶ As is often the case with BITs, the Treaty grants certain investors standing to bring claims in connection with an investment.³⁷ The Treaty defines “investment” similarly to most BITs,³⁸ including direct or indirect ownership or control of “(a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans;”³⁹ among other assets.⁴⁰ Unlike many BITs, however, the Treaty – as well as the NAFTA and US Model BITs – differentiates between claims that the investor claimant makes *on its own behalf for loss or damage incurred directly by it* (Article

³² *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 28 (emphasis added) (RLA-102).

³³ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 31 (emphasis added) (RLA-102).

³⁴ Treaty, Art. 10.16.1(b) (emphasis added) and Art. 10.18.2(b)(i) (RLA-1); see Memorial on Waiver, ¶¶ 29-37.

³⁵ 2012 U.S. Model Bilateral Investment Treaty (2012 US Model BIT), Art. 24 (RLA-95); 2004 U.S. Model Bilateral Investment Treaty (2004 US Model BIT), Art. 24 (RLA-15).

³⁶ European BITs and earlier US BITs, for instance, do not adopt this structure. See, e.g., Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment dated 14 Nov. 1991 (“US-Argentina BIT”), Art. VII (RLA-114); Agreement between the Government of the United Kingdom of the Great Britain and Northern Ireland and the Government of the Republic of Peru for the Promotion and Protection of Investments dated 8 Oct. 1993, Art. 10 (RLA-113).

³⁷ Treaty, Art. 10.28 (providing that “claimant means an investor of a Party that is a party to an investment dispute with another Party.”) (RLA-1).

³⁸ Compare, for example, with Argentina-US BIT, Art. 1 (RLA-114).

³⁹ Treaty, Art. 10.28 (RLA-1).

⁴⁰ Renco’s reference to “Basic principles of International Investment Law,” “Numerous awards from investment treaty tribunals,” and the book “Principles of International Investment Law” (2 ed.) by Dolzer and Schreuer concern the interpretation of the definition of investment rather than the type of rules set forth in Article 10.16(1) of the Treaty. See Counter-Memorial on Waiver, ¶¶ 32, 45. This is clear from a reading of the entire paragraph from which Renco quotes only the two last sentences: “Most investment treaties offer a solution that gives independent standing to shareholders: *the treaties include shareholding or participation in a company in their definitions of ‘investment.’* In this way, it is not the locally incorporated company that is treated as a foreign investor; rather, the participation in the company becomes the investment. Even though the local company may be unable to pursue the claim internationally, the foreign shareholder in the company may pursue the claim in its own name. Put differently, even if the local company is not endowed with investor status, the investor’s participation therein is seen as the investment. The shareholder may then pursue claims for adverse action by the host state against the company that affects its value and profitability. Arbitral practice illustrating this point is extensive.” R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2 ed.) (2012) at 57 (emphasis added) (CLA-97).

10.16.1(a)) and claims that the investor claimant makes “*on behalf of an enterprise* of the respondent that is a juridical person that the claimant owns or controls directly or indirectly” for *loss or damage that the enterprise has incurred* (Article 10.16.1(b)).⁴¹ Accordingly, the Treaty contains particular rules for claims concerning an investment that takes the form of ownership or control of an enterprise – including the requirement of a waiver for the enterprise. According to the principle of effectiveness, such rules cannot be read out of the Treaty; they must be given meaning.⁴²

21. By Renco’s own admission, “Doe Run Peru is an enterprise owned and controlled by Renco,”⁴³ and, despite Renco’s recently developed arguments to the contrary,⁴⁴ Renco *is* making claims for loss or damage to DRP in this arbitration. This is apparent from the fact that Renco’s claims are indistinguishable from the claims Renco made on behalf of DRP in the Notice of Arbitration under Article 10.16.1(b).⁴⁵ The purported removal of Article 10.16.1(b) as a basis for its claims in the Amended Notice of Arbitration cannot change reality, as Peru has shown.⁴⁶ Renco’s claims continue to refer to losses and damage to DRP, including allegations that Peru “increased the amount of *time and money that DRP was required to spend*,”⁴⁷ forced “*Doe Run Peru to undergo* an extremely lengthy and expensive process with respect to its request for an extension of its PAMA deadline,”⁴⁸ increased the “*cost and complexity of Doe Run Peru’s environmental obligations*,”⁴⁹ required “*Doe Run Peru to channel 100 percent of its revenues* into a trust account,”⁵⁰ and asserted a “*US\$ 163 million claim against Doe Run Peru* in the INDECOPI Bankruptcy Proceedings.”⁵¹ Renco has not contested that its claims are based on such alleged losses; in fact, it recognizes that at least part of its claims are based on “measures that Peru [allegedly] has *inflicted on Doe Run Peru*.”⁵²

22. It is instructive to compare Renco’s claims with the following example by the United States of a situation where claims are of the type that must be brought on behalf of the enterprise, as under Article 10.16.1(b) of the Treaty:

[I]f a NAFTA Party violated Article 1109(1)’s requirement that “all transfers relating to an investment of an investor of another Party in the territory of the Party . . . be made freely and without delay,” the investor might be able to claim under Article 1116 [Article 10.16.1(a) of the Treaty] an injury stemming from interference with its right to be paid corporate dividends, and the investor might be able to claim *under Article 1117* [Article 10.16.1(b) of the Treaty] *an injury relating to its enterprise’s inability to make payments necessary for the day-to-day conduct of the enterprise’s operations*.⁵³

⁴¹ Treaty, Art. 10.16(1)(b) (RLA-1).

⁴² Decision as to the Scope as to the Respondent’s Preliminary Objections under Article 10.20.4 dated 18 Dec. 2014 ¶ 177; *see also* Memorial on Waiver, n. 80.

⁴³ Memorial, ¶ 220.

⁴⁴ Counter-Memorial on Waiver, ¶ 40.

⁴⁵ *See* Memorial, table at page 11.

⁴⁶ Memorial on Waiver, ¶¶ 31-33.

⁴⁷ Amended Notice of Arbitration ¶ 46 (emphasis added).

⁴⁸ Memorial ¶ 371 (emphasis added).

⁴⁹ Memorial ¶ 321 (emphasis added).

⁵⁰ Memorial ¶ 332 (emphasis added); *see also id.* ¶¶ 359-360.

⁵¹ Memorial ¶ 340 (emphasis added); *see also id.* ¶¶ 381, 388, 391, 409, 412(v).

⁵² Counter-Memorial on Waiver, ¶ 52.

⁵³ Seventh Submission of the United States of America in *Pope and Talbot Inc. v. Government of Canada* dated 6 Nov. 2001, ¶ 8 (emphasis added) (RLA-119) (cited by L. M. Caplan and J. K. Sharpe, “United States” in C. Brown (ed.), *Commentaries*

23. Contrary to this, Renco argues that “a claimant may assert claims on its own behalf regarding injuries to the enterprise, without needing to provide an enterprise waiver.”⁵⁴ Renco’s reliance on an article by Jennifer Thornton cited by Peru in its Memorial on Waiver is misplaced, however, because Renco fails to cite the relevant paragraph in its entirety.⁵⁵ Without Renco’s omissions, Ms. Thornton’s article confirms that Renco was obligated to bring its claims for injury to DRP under Article 10.16.1(b) and accompany such claims with a waiver for DRP. The paragraph in question, quoted in its entirety,⁵⁶ states:

The waiver provisions in NAFTA Article 1121 and CAFTA-DR Article 10.18.2 cross-reference the standing provisions in NAFTA Articles 1116 and 1117 and CAFTA-DR Article 10.16.1(a) & (b), respectively. These provisions distinguish between claims brought by an investor on its own behalf and claims brought by an investor on behalf of locally incorporated enterprises. Compare NAFTA Article 1116 (“Claim by an Investor of a Party on Its Own Behalf”) and CAFTA-DR Article 10.16.1(a) (“the Claimant, on its own behalf, may submit to arbitration under this Section a claim”), with NAFTA Article 1117 (“Claim by an Investor of a Party on Behalf of an Enterprise”) and CAFTA-DR Article 10.16.1(b) (“the Claimant, on behalf of an enterprise of the respondent”). In this respect, both agreements establish the right of shareholders to bring claims for injury to their locally incorporated investments, thus eliminating the standing issue identified in *Barcelona Traction*. See Daniel M. Price, “An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement,” 27 *Int’l Law* 727 (1993), p. 732 (“*Article 1117* is intended to resolve the *Barcelona Traction* problem by permitting the *investor* to assert a claim for *injury to its investment* even where the *investor itself* does not suffer loss or damage independent from that of the injury to *its investment*”). The waiver provision in NAFTA Article 1121(1)(b) muddled this distinction to a certain extent, by requiring investors bringing claims under NAFTA Article 1116 to submit waivers on behalf of their locally incorporated enterprises, *even though such claims are limited to claims for direct injury to the investor*. See NAFTA Article 1121(1)(b). The waiver provision in CAFTA-DR Article 10.18.2 reaffirms the *distinction between claims by investors for direct injury and claims by investors for injury to their investments*. It requires a Claimant to submit only its own written waiver when bringing a claim for direct injury to its interests (CAFTA-DR Article 10.18.2(b)(i)), while *requiring a Claimant to submit its own written waiver, as well as the written waiver of the enterprise that it owns or controls, when bringing a claim for injury to its locally incorporated enterprise* (CAFTA-DR Article 10.18.2(b)(ii)).⁵⁷

on Selected Model Investment Treaties (2013) 755, at 825 (RLA-96)). In the same submission, at paragraph 4, the United States government also explained that: “Where the *investment* is a separate legal entity, such as an *enterprise*, any *damage to the investment* will be a *derivative loss to the investor*, and the investor will have standing to bring a *claim under Article 1117* [Article 10.16.1(b) of the Treaty]. Where the investment is not a separate legal entity, any damage to the investment will be a *direct loss to the investor*, and the investor will have standing to bring a claim under Article 1116 [Article 10.16.1(a) of the Treaty].” (emphasis added). *Id.*

⁵⁴ Counter-Memorial on Waiver, ¶ 48 (original emphasis removed).

⁵⁵ Counter-Memorial on Waiver, ¶ 48.

⁵⁶ For avoidance of doubt, the parentheticals referencing the Treaty Articles identical to those of the CAFTA have been added.

⁵⁷ J. Thornton, “The Modified Waiver Provision in CAFTA-DR Article 10.18.2” in C. Giorgetti (ed.), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (2012), at 501-502 n. 63 (emphasis added) (RLA-97).

24. Renco's claims are not independent from the injury allegedly suffered by DRP and thus do not constitute the type of claim that requires only a written waiver by the investor. Renco's claims are claims that must be brought under Article 10.16.1(b) and be accompanied by a written waiver by the investor and the enterprise.

25. Thornton states that the NAFTA Article 1121(1)(b) "muddied" the distinction between claims on behalf of the investor itself (Article 1116 of the NAFTA) and on behalf of the enterprise (Article 1117 of the NAFTA). Article 1121 of the NAFTA provides as follows:

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor and, *where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise*, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.⁵⁸

26. The italicized text above "muddied" the distinction between Articles 1116 and 1117, as Thornton states, because it could be interpreted to mean that an investor could claim for loss or damage to the enterprise under both Article 1116 and 1117. In fact, this was the interpretation adopted by the *Pope & Talbot* and *UPS* tribunals.⁵⁹ The *Pope & Talbot* tribunal, in particular, explicitly stated that Canada's contention that the investor could not claim under Article 1116 for losses incurred indirectly by virtue of damages to its investment was undermined by the above italicized language of Article 1121(1)(b).⁶⁰ In the words of the *Pope & Talbot* tribunal, the italicized language of Article

⁵⁸ North American Free Trade Agreement (NAFTA), Chapter Eleven, Art. 1121(1) and (2) (CLA-11).

⁵⁹ *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Damages dated 31 May 2002 ¶ 80 (CLA-86); *United Parcel Service of America Inv. v. Government of Canada* (UNCITRAL) Award on the Merits dated 24 May 2007 ¶¶ 34-35 (CLA-87).

⁶⁰ *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Damages dated 31 May 2002 ¶ 80 (CLA-86). The *UPS* tribunal adopted by reference the reasoning of the *Pope & Talbot* tribunal. *United Parcel Service of America Inv. v. Government of Canada* (UNCITRAL) Award on the Merits dated 24 May 2007 ¶ 35 (CLA-87).

1121(1)(b) made “clear[] that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns. In the present case, therefore, where the investor is the sole owner of the enterprise (which is a corporation, and thus an investment within the definitions contained in Articles 1139 and 201), it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116.”⁶¹ Because these findings are based on language that was removed and does not appear in Article 10.18 of the Treaty (or the DR-CAFTA and US Model BITs), these NAFTA cases do not support Renco’s position.⁶² Indeed, they support Peru’s position because they are an example of a problem which the drafters of the Treaty addressed by the removal of the italicized language.

27. Furthermore, it is notable that Article 1116 of the NAFTA provides that even when an investor brings a claim on its own behalf (as opposed to bringing the claim on behalf of the enterprise pursuant to Article 1117), if it is making claims for loss or damage to an interest in an enterprise that it owns or controls, it must submit waivers for both itself and the enterprise. Accordingly, in each of the NAFTA cases relied upon by Renco – *Mondev*, *UPS*, *Pope & Talbot*⁶³ – where the tribunal found that the claim was properly submitted on the investor’s own behalf pursuant to NAFTA Article 1116, fully compliant waivers had been submitted by both the claimant and the enterprise.⁶⁴ As the *Mondev* tribunal thus observed, the claimant’s failure to formally bring its claims as claims on behalf of the enterprise under Article 1117 of the NAFTA was immaterial because the claimant had submitted “an express waiver not only on its own behalf but also on behalf of LPA [the local enterprise]” and, thus, “no question of the sufficiency of the[] proceedings arise[d] under Article 1121 of NAFTA” –i.e., NAFTA’s waiver requirement. Because the existence of a valid waiver perfected its jurisdiction, the *Mondev* tribunal stated that, had it not dismissed the case on the merits, it would have been prepared to treat the claimant’s claims “as in truth brought under Article 1117,” making an award payable directly to the investment. Similarly, the *UPS* tribunal remarked that “the distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an entirely almost formal one, without any significant implication for the substance of the claims or the rights of the parties.”⁶⁵ Such is not the case here, where Peru has been deprived of a written waiver on behalf of DRP.

28. To the extent that Renco was entitled to bring claims for loss or damage to DRP, it must bring those claims pursuant to Article 10.16.1(b) of the Treaty and they must be accompanied by a written waiver for DRP.⁶⁶

⁶¹ *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Damages dated 31 May 2002 ¶ 80 (CLA-86).

⁶² See Counter-Memorial on Waiver, ¶ 46.

⁶³ See Counter-Memorial on Waiver, ¶ 46 and n. 46.

⁶⁴ *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award dated 11 Oct. 2002 ¶¶ 85 (explaining that waivers were tendered for the investor and the investment) (CLA-82); *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Statement of Claim dated 25 Mar. 1999 ¶ 3 (containing waivers by the investor and the investment) (Exh. R-45); *United Parcel Service of America Inv. v. Government of Canada* (UNCITRAL) Statement of Claim dated 19 Apr. 2000 ¶ 4 (containing waivers by the investor and the investment) (Exh. R-46).

⁶⁵ *United Parcel Service of America Inv. v. Government of Canada* (UNCITRAL) Award on the Merits dated 24 May 2007 ¶ 35 (CLA-87).

⁶⁶ Contrary to Renco’s assertion, this is entirely consistent with Peru’s position in its Preliminary Objection under Article 10.20.4. See Counter-Memorial on Waiver, ¶ 51. In the Article 10.20.4 objection, Peru observes that Renco only has submitted claims on its own behalf, which is uncontested. That does nothing to undermine Peru’s objection that the claims it

29. Renco's reliance on *TECO v. Guatemala*, moreover, is misplaced.⁶⁷ Unlike Renco, TECO did not own or control a local enterprise. Rather, TECO held a 30 percent ownership interest in a consortium, which, in turn, held an 80 percent ownership interest in a Guatemalan electricity company.⁶⁸ Accordingly, TECO, as a minority shareholder, could not have brought a claim under Article 10.16(1)(b) of the DR-CAFTA, which, like Article 10.16.1(b) of the Treaty, requires the "claimant [to] own[] or control[] directly or indirectly" the local enterprise.⁶⁹ For the same reason, the *TECO* tribunal did not address a "flow through" of damages in circumstances where the claimant purports to seek compensation for its alleged own injuries resulting from measures undertaken by the host State vis-à-vis an investment *which the claimant owns and controls*.⁷⁰

30. The requirement of a written waiver for DRP also is consistent with the object and purpose of the waiver requirement, in particular, the Treaty's objective of avoiding multiplicity of proceedings, ensuring that the same facts and losses are not the subject of multiple proceedings in multiple fronts. As Peru explained in its Memorial on Waiver, if a claimant that owned or controlled a local enterprise were permitted to arbitrate under the Treaty without submitting a waiver for its enterprise when its claims are based on loss or damage to that enterprise, that objective would be rendered meaningless because the local enterprise could initiate and continue actions in its own name in other fora.⁷¹ Moreover, the investor could use its ownership or control to direct the local enterprise to initiate or continue proceedings that the investor itself would be barred from initiating or continuing pursuant to its own waiver under Article 10.18.2(b)(i), resulting in circumvention of the same.⁷²

31. Likewise, if a claimant were allowed to bring claims for loss or damage to the local enterprise under Article 10.16.1(a), as Renco attempts to do here, Article 10.26.2 of the Treaty also would be rendered meaningless. Article 10.26.2 provides that any award rendered pursuant to an Article 10.16.1(b) claim be paid to the enterprise, thus ensuring that a majority shareholder that owns or controls the enterprise and brings a claim on its behalf does not recover the entirety of the award to the detriment of the enterprise's creditors.⁷³ In this case, if Renco were permitted to characterize its claim as one made pursuant to Article 10.16.1(a), in addition to avoiding the waiver requirement for DRP, to the extent that Renco prevailed in the arbitration, it would obtain recovery for the totality of DRP's losses, at the expense of DRP's creditors. Because DRP is currently in bankruptcy, this would

makes should have been submitted on behalf of DRP and accompanied by a waiver from DRP. If such claims had been submitted by DRP and accompanied by DRP's waiver, the Tribunal still would lack jurisdiction over Renco's claim, because DRP has acted in violation of that waiver, as discussed herein. Moreover, if Renco's claims had been submitted on behalf of DRP, Peru's Article 10.20.4 objections would remain, because that would not change the identity of the parties to the Contract, Guaranty, or the St. Louis lawsuits.

⁶⁷ Counter-Memorial on Waiver, ¶¶ 13, 32, 47.

⁶⁸ *Teco Guatemala Holdings LLC v. The Republic of Guatemala* (ICSID Case No. ARB/10/17) Award dated 19 Dec. 2013 ¶¶ 4-6 (CLA-10).

⁶⁹ The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), Chapter 10, Art. 10.16(1)(b) (CLA-15).

⁷⁰ See *Teco Guatemala Holdings LLC v. The Republic of Guatemala* (ICSID Case No. ARB/10/17) Award dated 19 Dec. 2013 ¶ 336 (CLA-10).

⁷¹ Memorial on Waiver, ¶ 34.

⁷² Peru is not asking the Tribunal to treat Renco and DRP as if they were the same juridical person. Counter-Memorial on Waiver ¶ 50. Rather, Peru's position is based on the words of Article 10.16.1(b) of the Treaty which defines the enterprise as "a juridical person that the *claimant owns or controls* directly or indirectly."

⁷³ Article 10.26.2 provides that where a claim is submitted for loss or damage to a local enterprise "(a) an award of restitution of property *shall* provide that restitution be made *to the enterprise*; (b) an award of monetary damages and any applicable interest *shall* provide that the sum be *paid to the enterprise*; and (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law." Treaty, Art. 10.26.2 (emphasis added) (RLA-1).

allow Renco to take precedence over DRP's other creditors, circumventing the hierarchy of creditors in the bankruptcy proceedings. This is exactly the situation that the Treaty seeks to prevent through Articles 10.16.1(b) and 10.26.2,⁷⁴ and seems to be the result that Renco is seeking to get away with,⁷⁵ despite its supposed concern with DRP's fiduciary duty to its creditors.⁷⁶

32. Renco cannot be allowed to render two provisions of the Treaty, Articles 10.18.2(b) and 10.26.2, meaningless, the first of which forms the basis of Peru's consent to arbitrate disputes under the Treaty and, therefore, goes to the heart of the Tribunal's jurisdiction over Renco's claims.

III. LOCAL PROCEEDING VIOLATIONS

33. Renco also has violated the waiver requirement of the Treaty in deed because DRP chose to initiate and has continued two proceedings in Peru (the "Local Proceedings"), as discussed below. For the avoidance of doubt, Peru also addresses further below the background and procedural context of the Local Proceedings, indicating the inaccuracies and inapposite arguments articulated by Renco.

A. The Local Proceedings

34. DRP chose to initiate and has continued two Local Proceedings: a constitutional *amparo* action (the "First Proceeding") and an administrative action (the "Second Proceeding").⁷⁷ Renco's assertion that the waiver requirement of Article 10.18 is not implicated by the Local Proceedings "because Doe Run Peru was acting defensively to claims asserted by Peru against it, and because Peruvian bankruptcy law required it,"⁷⁸ are factually and legally meritless.

35. Renco's reliance on 'fork-in-the-road' jurisprudence in support of its argument is inapposite,⁷⁹ because Article 10.18.2 is not a 'fork-in-the-road' clause and does not require a choice between two proceedings.⁸⁰ As noted, the Treaty has a 'no U-turn' structure that allows DRP recourse to both local and treaty claims, but requires that it discontinue and not initiate any other claims once it has chosen to pursue arbitration. . The cases cited by Renco also fail to assist Renco, because the actions taken by DRP here cannot be compared with the actions taken by the claimants or their affiliates which were found not to have triggered the fork-in-the-road clause.⁸¹

⁷⁴ L. M. Caplan and J. K. Sharpe, "United States" in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013) 755, at 826 (commenting on the 2012 US Model BIT and noting that "by maintaining the distinction between the rights of shareholders and the corporation, the provision [Article 10.16.1(b)] prevents investors 'from stripping away a corporate asset –the claim– to the detriment of others with a legitimate interest in the asset, such as the enterprise's creditors'.") (RLA-96).

⁷⁵ Renco's arguments in its Counter-Memorial on Waiver indicate that circumventing Article 10.26.2 was Renco's objective. See Counter-Memorial on Waiver, ¶¶ 39, 44.

⁷⁶ Counter-Memorial on Waiver ¶¶ 20, 59, 89, 104.

⁷⁷ Memorial on Waiver ¶¶ 38-55, Annex A.

⁷⁸ Counter-Memorial on Waiver ¶ 22.

⁷⁹ Counter-Memorial on Waiver ¶¶ 105-107.

⁸⁰ Memorial on Waiver ¶¶ 12 *et seq.*

⁸¹ See *CMS v. Argentina*, Decision on Objections to Jurisdiction, dated 17 July 2003 ¶¶ 78-80 (ruling that the fork-in-the-road provision was not triggered because the parties, causes of actions, and instruments in the treaty arbitration and in the local proceedings were different, and failing to make any ruling on the claimant's contention that the provision was not triggered because the local proceedings were allegedly "defensive" in nature) (RLA-115); *Enron Corp., et al., v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated Jan. 14, 2004, ¶ 98 (dismissing respondent's objection that the "fork-in-the-road" provision had been triggered, because the local entity's decision to commence local

36. Contrary to Renco’s repeated mischaracterizations, neither of the Local Proceedings is “defensive,”⁸² nor does either of them “exist within the involuntary Doe Run Peru Bankruptcy Proceedings.”⁸³ By their very nature, “defensive” actions are not initiated by the party complaining that they are “defensive”; nor are they actions that may be discontinued at the option of the party that is “defending” against the action. The Local Proceedings, moreover, are autonomous judicial actions independent from DRP’s bankruptcy proceedings as a matter of Peruvian law. The connection to the recognition by the Commission for Bankruptcy Proceedings of the National Institute for the Defense of Competition and Intellectual Property (“INDECOPI”) of a credit of approximately US\$ 163 million held by the Ministry of Energy and Mines (the “MEM”) only underscores how the Local Proceedings overlap with Renco’s claims in the instant arbitration under the Treaty. Renco simply and utterly ignores the events leading up to the recognition of the MEM’s credit which are rooted in DRP’s flagrant violations of applicable environmental standards under Peruvian law and the obligations it assumed under the Contract to purchase the La Oroya Facility

37. Specifically, the First Proceeding is an *amparo* action filed by DRP against the MEM on 22 November 2010.⁸⁴ DRP lost in the first instance and on appeal,⁸⁵ and has filed a second appeal that remains pending.⁸⁶ *Amparo* actions judicial proceedings by which a party seeks protection from an alleged violation of a constitutional right.⁸⁷ They are governed by the Peruvian Code of Constitutional Procedure,⁸⁸ unlike bankruptcy proceedings, which Renco acknowledges are governed by the General Law of Bankruptcy Proceedings.⁸⁹ Consequently, they are neither “defensive” nor filed “in conjunction with [DRP’s] challenge of the proposed credit before INDECOPI,” as Renco contends.⁹⁰

38. The Second Proceeding is a contentious administrative action filed by DRP on 16 January 2012.⁹¹ DRP lost in the first instance and on appeal, and has filed a cassation appeal that remains pending.⁹² Renco errs in asserting that the Second Proceeding “is the equivalent of an appeal of the INDECOPI Tribunal’s decision and is the only means by which the final decision of an

proceedings opposing certain tax measures was “ordered by ENARGAS, the agency entrusted with the regulation of the gas sector”) (CLA-114); *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, ¶ 60 finding that the “fork-in-the-road” provision had not been triggered because the decision to initiate other proceedings was not “made entirely free and not under any form of duress”) (CLA-21); *Chevron Corp., v. The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012, ¶ 4.82 ruling that a “fork-in-the-road” provision was not triggered by claimant raising its rights as a “defense in response to another’s claim submitted to that court”) (CLA-84).

⁸² See e.g. Counter-Memorial on Waiver ¶¶ 10; 20-22, 24, 26, 69-70, 72, 21, 104, 109-111, 122.

⁸³ Counter-Memorial on Waiver ¶ 69.

⁸⁴ DRP Constitutional *Amparo* Action Complaint dated 22 Nov. 2010, at 3 (Exh. R-19).

⁸⁵ Lima, First Court Specialized on Constitutional Matters, Resolution No. 1 dated 11 Jan. 2011 (Exh. R-20); Superior Court of Justice, First Civil Chamber, Resolution N° 5 dated 18 Aug. 2011 (affirming the decision below) (Exh. R-22).

⁸⁶ DRP Constitutional Grievance dated 14 Sept. 2011 (Exh. R-23).

⁸⁷ Peruvian Code of Constitutional Procedure, Law No. 28237 dated 31 May 2004, Art. 1 (“The proceedings to which this title refers are intended to protect constitutional rights.”) (RLA-91).

⁸⁸ Peruvian Code of Constitutional Procedure, Law No. 28237 dated 31 May 2004, Art. 1 (RLA-91).

⁸⁹ See Counter-Memorial on Waiver ¶ 73 n. 83 (“Insolvency matters in Peru are governed by the General Law of Bankruptcy Proceedings (‘Ley General del Sistema Concursal’). Other bodies of law, such as the General Law of Companies (‘Ley General de Sociedades’), complement the General Law of Bankruptcy Proceedings (the ‘Bankruptcy Law’), and have subsidiary application.”).

⁹⁰ Counter-Memorial on Waiver ¶ 81.

⁹¹ Memorial on Waiver Annex A; Amended Notice of Arbitration and Statement of Claim ¶ 67.

⁹² Memorial on Waiver Annex A; Amended Notice of Arbitration and Statement of Claim ¶ 67.

administrative body, i.e., the INDECOPI Tribunal's decision recognizing the MEM credit, can be reviewed."⁹³ As a matter of Peruvian Law, a contentious administrative action is a voluntary and affirmative judicial action by which a party seeks to annul a public act.⁹⁴ Such actions are *not an appeal* of an administrative agency's decision.⁹⁵ They are can be initiated in connection with any State administrative action, and are not governed by the same laws as bankruptcy proceedings.⁹⁶

39. Furthermore, Renco's contention that DRP was under control of Right Business when DRP filed the Second Proceeding is certainly incorrect.⁹⁷ This is apparent from the document on which Renco relies, as well as from Renco's recognition that Right Business was appointed as liquidator several months *after* the initiation of the Second Proceeding.⁹⁸ Notably, Renco has continued to take an active role in the Second Proceeding through Doe Run Cayman Ltd. ("DRC"), Renco's wholly-owned subsidiary, which intervened as a *tercero coadyuvante*.⁹⁹ Renco also errs in dismissing participation as a *tercero coadyuvante* as "akin to an *amicus curiae* submission."¹⁰⁰ Whereas *amicus curia* are unrelated third parties that make submissions regarding particular issues to aid a a court's or tribunal's decision,¹⁰¹ a *coayudante* is an interested party that (i) has a substantive legal relationship with one of the parties; (ii) would be affected by the outcome of the litigation; and (iii) can perform procedural interventions in support of the party.¹⁰²

⁹³ Counter-Memorial on Waiver ¶ 96.

⁹⁴ See Peru, Constitution, Art. 148 ("Final administrative decisions are susceptible to challenge through the administrative contentions action.") (RLA-90); Peru, Law No. 27584, "Law that Regulates the Contentious Administrative Procedure," dated 29 Aug. 2008. Art. 25 ("In administrative contentious proceedings, claims may be raised to obtain [a] declaration of invalidity, total or partial, or ineffectiveness of administrative acts.") (RLA-94).

⁹⁵ Ramon A. Huapaya Tapia, TREATISE ON THE ADMINISTRATIVE CONTENTIOUS PROCESS 484 (Jurista Ed. 2006) ("[A]nalysis of the administrative contentious process should consider that it is not a 'review of legality' a 'cassation review,' or similar expressions . . . the contentious-administrative process is not a 'recourse' but is an authentic and full judicial process, a process between parties, for the protection of procedural administrative claims.") (RLA-110); Priori Posada, COMMENTARY ON THE ADMINISTRATIVE CONTENTIOUS PROCEEDING LAW 87 (ARA Ed. 4th 2009) ("The claim that an individual directs against the Administration will aim not only to review the legality of the administrative act—as in the old French system—declaring their validity or invalidity, but the right to effective judicial protection determines that the individual may raise a claim asking for effective protection from the subjective legal position which allegedly has been violated or threatened.") (RLA-111).

⁹⁶ Peru, Law No. 27584, "Law that Regulates the Contentious Administrative Procedure," dated 29 Aug. 2008. Art. 25 ("Under the provisions of this Law and in compliance with the requirements applicable specifically case requirements, a claim against any action taken in the exercise of administrative powers is admissible.") (RLA-94).

⁹⁷ See Counter-Memorial on Waiver ¶ 96 ("On January 18 [sic], 2012, *Right Business*, as legal representative of *Doe Run Peru*, filed a challenge to INDECOPI Resolution 1743-2011/SC1- INDECOPI before Fourth Contentious Administrative Transitory Court of Lima ("Fourth Administrative Court") by means of an 'accion contencioso administrativa.'") (emphasis added).

⁹⁸ Counter-Memorial on Waiver n. 120, ¶ 98.

⁹⁹ DRC Ltd. Request to Join the Proceedings of Administrative Law Action 368-2012 dated 23 May 2012 (Exh. R-17).

¹⁰⁰ Counter-Memorial on Waiver ¶¶ 6, 101.

¹⁰¹ Judicial Branch of Peru, Legal Dictionary ("The *amicus curiae* (friend of the court or friend of the court) is a Latin expression used to refer to presentations made by third parties to litigations who volunteer their opinion on some point of law or another related aspect, to assist the court with the resolution of the subject matter of the process.") (RLA-117); Ombudsman, *Amicus Curiae, What Is It And What Is Its Purpose?* Defender's Document Series No. 8, at 47-48 (2009) ("The *amicus curiae* is not a procedural party nor does it seek to displace or replace it. This type of intervention is appropriate in cases where public interest is at stake due to its collective significance (e.g., human rights) or those issues that go beyond the mere interest of the parties and that require further discussion, possibly through the expansion of participants in the judicial debate.") (Exh. R-42).

¹⁰² Peruvian Code of Civil Procedure, 8 Jan. 1993, Art. 97 ("Someone who has a substantial legal relationship with one of the parties, to whom the effects of the judgment of the claims in controversy in the proceeding will not apply, but who may be affected adversely if that party loses, can intervene in the process as a *coayudante* . . . The *coayudante* may perform procedural acts that are not in opposition to the party that it helps and do not involve provision of the law discussed") (RLA-107).

40. The facts thus clearly demonstrate that DRP, owned and controlled by Renco, chose to initiate and continue these proceedings without being under any obligation to do so. DRP was not “required” to initiate or continue the Local Proceedings, as Renco claims.¹⁰³ Indeed, Renco has failed to identify a single specific provision of Peruvian law imposing any such obligation. Moreover, Renco’s vague allusions to “special duties and obligations under Peruvian bankruptcy law,” and “fiduciary obligations under Peruvian law,” are inapposite,¹⁰⁴ as Peru’s General Law of Bankruptcy requires a debtor to conduct itself with “accuracy, probity, faithfulness and good faith,” not to exhaust all possible legal claims.¹⁰⁵ The possibility of creditors potentially “filing civil and criminal lawsuits against Doe Run Peru management” may well be a rational reason for DRP to choose to initiate or continue the Local Proceedings, but it does not amount to a legal obligation or requirement sufficient to violate the Treaty’s waiver requirement, especially when Renco and DRP had the option of pursuing action in Peru’s courts and later commencing a Treaty claim, in accordance with the Treaty’s no U-turn provision. .

B. The Background And Temporal Context

41. The Tribunal has sufficient information and evidence to decide on Peru’s waiver objection violation based on the insufficient language of the waivers and the basic procedural history of the Local Proceedings. It is not necessary to delve into the lengthy factual arguments that Renco has now set forth in its Counter-Memorial on Waiver.

42. To the extent that the Tribunal may nonetheless review and consider Renco’s effort to distract from its Treaty violations, Renco falsely purports to give a “fulsome” description of DRP’s bankruptcy,¹⁰⁶ and its Counter-Memorial purports to give context to the issue of waiver by omitting or misrepresenting facts. DRP is not a helpless victim, made “to lie supine as a railroad train turns over it.”¹⁰⁷ In fact, DRP affirmatively made decisions and took actions that led to its bankruptcy and violated the waiver requirement in the Treaty, as discussed below lest Renco’s contorted depiction of the background be given any credence whatsoever. Indeed, this dispute derives from Renco’s own disregard for rules it was bound to follow; its allegations are rooted in events that pre-date the entry into force of the Treaty; and its conduct has been devised to keep this case on a glacial pace that prevents even Peru’s basic objections from being heard, as Renco seeks to see how events, including the Local Proceedings unfold and hopes to invent Treaty violations along the way.

1. DRP’s Violation of Environmental Obligations

43. DRP’s bankruptcy, the First and Second Proceedings, Renco’s claims in this arbitration, and various other proceedings arise from DRP’s failure to implement the Environmental Remediation and Management Program (“PAMA”), an instrument required by Peruvian law that outlines actions and investments required to achieve compliance with applicable environmental regulations.¹⁰⁸

¹⁰³ See e.g. Counter-Memorial on Waiver ¶¶ 10, 22, 89.

¹⁰⁴ Counter-Memorial on Waiver ¶¶ 20, 59, 89, 104.

¹⁰⁵ Counter-Memorial on Waiver ¶ 80 n. 95.

¹⁰⁶ Counter-Memorial on Waiver ¶ 73.

¹⁰⁷ Counter-Memorial on Waiver ¶ 105.

¹⁰⁸ Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy dated 28 Apr. 1993, Art. 2 (Exh. C-37).

44. On 23 October 1997, DRP executed the Contract to purchase the La Oroya Facility.¹⁰⁹ DRP undertook to implement the PAMA for the La Oroya Facility, which previously had been approved by the Ministry of Energy and Mines (“MEM”), the entity in charge of reviewing and approving the PAMA for mining activities.¹¹⁰ Pursuant to the PAMA, DRP was obligated to conclude remediation and renovation projects within a maximum period of ten years.¹¹¹

45. During its operation of the La Oroya Facility, however, DRP requested numerous PAMA extensions,¹¹² including extensions beyond the legal maximum term of ten years.¹¹³ On 29 December 2004, Peru enacted a law to allow additional extensions under exceptional circumstances,¹¹⁴ which DRP successfully utilized.¹¹⁵ When the deadline under DRP’s exceptional extension was approaching, it requested yet another extension to comply with its obligation regarding the Sulfuric Acid Plant of the Copper Circuit.¹¹⁶ The MEM granted DRP the additional extension.¹¹⁷

46. Despite the MEM’s efforts to foster compliance with applicable environmental standards, DRP consistently failed to meet its PAMA obligations. The Supervisory Entity on Energy and Mining Investment (“OSINERGMIN”) accordingly maintained a sanction against DRP for its non-compliance with environmental regulations.¹¹⁸ DRP failed to comply with its environmental obligations over many years, and it was DRP that chose to close its operations of the La Oroya Facility on 3 June 2009.¹¹⁹

2. The DRP Drive To Bankruptcy

47. Renco’s description of DRP’s bankruptcy as “involuntary” is disingenuous.¹²⁰ Following DRP’s decision to suspend operations at the La Oroya Facility, DRP stopped paying

¹⁰⁹ Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A. “Metaloroya S.A.” (the “Contract”), 23 Oct. 1997 (Exh. C-2).

¹¹⁰ Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A. “Metaloroya S.A.” (the “Contract”), 23 Oct. 1997, Fifth Clause (Exh. C-2); Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy dated 28 Apr. 1993, Art. 2 (defining MEM as the competent authority) (Exh. C-37); Directorial Resolution No. 017-97-EM/DGM dated 13 Jan. 1997 (Exh. R-34). The PAMA was subsequently modified. *See* Directorial Resolution No. 325-97-EM/DGM dated 6 Oct. 1997 (Exh. R-35); Directorial Resolution No. 334-97-EM/DGM concerning the split of PAMA for the La Oroya Metallurgical Complex dated 16 Oct. 1997 (Exh. C-9).

¹¹¹ *See, e.g.*, Directorial Resolution No. 325-97-EM/DGM dated 6 Oct. 1997 (Exh. R-35).

¹¹² *See, e.g.*, Directorial Resolution No. 178-99-EM/DG concerning the amendment of the action and investment schedule of the PAMA dated 19 Oct. 1999 (C-69); Directorial Resolution No. 133-2001-EM-DGAA concerning modifying the PAMA for La Oroya Metallurgical Complex dated 10 Apr. 2001 (Exh. C-70).

¹¹³ DRP’s PAMA Proposal 2004-2011 dated 17 Feb. 2004 (Exh. C-22). DRP’s proposal expanded to 4 years beyond the 10-year maximum established under Peruvian law. Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy dated 28 Apr. 1993, Art. 9 (Exh. C-37).

¹¹⁴ Supreme Decree No. 046-2004-EM dated 29 Dec. 2004 (Exh. C-92).

¹¹⁵ DRP PAMA Exceptional Extension Request dated Dec. 2005 (Exh. C-90); Ministerial Resolution No. 257-2006-MEM/DM dated 29 May. 2006 (Exh. C-88).

¹¹⁶ Supreme Decree No. 075-2009-EM dated 29 Oct. 2009 (C-114).

¹¹⁷ Law No. 29410 Extending the Term for the Financing and Culmination of the “Sulfuric Acid Plant and Modification of the Copper Circuit” Project at the Metallurgical Complex of La Oroya dated 26 Sept. 2009 (Exh. C-23); Supreme Decree No. 075-2009-EM dated 29 Oct. 2009 (C-114).

¹¹⁸ *See, e.g.*, OSINERGMIN General Management Resolution No. 008018 dated 21 July 2010 (Exh. R-36).

¹¹⁹ Letter from Doe Run Peru to OSINERGMIN dated 3 June 2009 (Exh. C-180).

¹²⁰ *See, e.g.*, Counter-Memorial on Waiver ¶ 74.

creditors, who eventually sought recognition of their credits before INDECOPI.¹²¹ On 16 August 2010, INDECOPI published the commencement of DRP's bankruptcy in the official bulletin.¹²²

48. Notably, the DRP bankruptcy was not the first time Renco and its affiliates had used bankruptcy to evade obligations.¹²³

49. In connection with the possible restructuring of DRP, in April 2012, while the Local Proceedings were ongoing, DRP presented a restructuring plan to the Creditors' Board.¹²⁴ DRP, however, chose not to address various issues facing the La Oroya Facility and ignored concerns and observations made by the creditors regarding deficiencies in the restructuring plan.¹²⁵ Among other things, the plan proposed operations that would violate applicable environmental standards, as Renco itself admits.¹²⁶ DRP's decision to present such a proposal suggests an effort to build a Treaty case where none exists, rather than a serious attempt to gain support and approval for a restructuring plan.

50. Dissatisfied with the restructuring plan, 97% of Renco's creditors (including DRC) voted to place DRP in liquidation.¹²⁷ Renco's statement that "[t]he creditors, led by MEM, voted to put Doe Run Peru into liquidation proceedings under Right Business" is misleading, insofar as it does not mention that DRC was one of those creditors.¹²⁸ More than one year earlier, on 2 March 2011, INDECOPI recognized that DRC had a credit claim for US\$ 155,739,617.¹²⁹ DRC subsequently has fully and actively participated in DRP's bankruptcy as a 30% creditor on the Creditors' Board, including by repeatedly voting with the MEM and other creditors regarding the direction of DRP.¹³⁰

51. The liquidation is ongoing.¹³¹

¹²¹ See e.g., Cormin Notice Regarding Doe Run Peru's Bankruptcy to INDECOPI dated 18 Feb. 2010 (Exh. C-119); Ministry of Energy & Mines Claim Request to INDECOPI dated 14 Sept. 2010 (Exh. C-25).

¹²² INDECOPI Announcement, Official Bulletin dated 16 Aug. 2010 (Exh. C-207).

¹²³ See Roland Klose, Herky Jerk, *Doe Run's Owner Has Done This Before – And That Has Regulators Braced for Trouble*, Riverfront Times, dated 20 Feb. 2002 (Exh. R-43).

¹²⁴ Doe Run Peru S.R.L. Creditors' Meeting Minutes of 9 and 12 Apr. 2012, at 38-40 (Exh. R-38).

¹²⁵ Doe Run Peru S.R.L. Creditors' Meeting Minutes of 9 and 12 Apr. 2012, at 43-46 (recording concerns by various creditors regarding DRP's restructuring plan such as deficiencies in financing and environmental compliance) (Exh. R-38).

¹²⁶ Memorial ¶ 201 (asserting that in the context of DRP's restructuring plan "[t]he Ministry also continued to demand that, upon re-starting, the operations at La Oroya Complex must be in accordance with all environmental standards in force at the time, including the 80 µg/m³ SO₂ standard."); see also Letter from MEM to Renco dated 26 June 2012 ("With regard to environmental issues and the sustainability of any plan, the maximum permissible limits and environmental quality standards in force in Peru are applicable to all metal mining operation, which also reach the operations at the Metallurgical Complex of La Oroya.") (Exh. C-27).

¹²⁷ Doe Run Peru S.R.L. Creditors' Meeting Minutes of 9 and 12 Apr. 2012, at 48-49 (Exh. R-38).

¹²⁸ Counter-Memorial on Waiver ¶ 97; see also Memorial ¶ 203; Doe Run Peru S.R.L. Creditors' Meeting Minutes of 9 and 12 Apr. 2012, at 48-49 (Exh. R-38); Doe Run Peru S.R.L. Creditors' Meeting Minutes of 22 and 25 May 2012, at 59-60 (Exh. C-216).

¹²⁹ INDECOPI Resolution regarding Recognition of Credits of Doe Run Cayman Limited dated 2 Mar. 2011 (Exh. C-154). It has been alleged by other creditors that DRC's credit is unlawful. INDECOPI Resolution No. 1742-2011/SC1-INDECOPI dated 18 Nov. 2011 (explaining that Cormin alleges criminal acts, including fraudulent bankruptcy, in connection with DRC's credits but rejecting the challenge to DRC's credit because the allegations should be litigated in a criminal and/or civil court) (Exh. R-37).

¹³⁰ Doe Run Peru S.R.L. Creditors' Meeting Minutes of 22 and 25 May 2012 (97% vote appointing Right Business as liquidator, including DRC's vote) (Exh. C-216); Doe Run Peru S.R.L. Creditors' Meeting Minutes of 19 and 24 Sept. 2014, at 196 (96.9% vote appointing Profit as the new liquidator, including DRC's vote) (Exh. R-39); Doe Run Peru S.R.L. Creditors' Meeting Minutes of 19 Mar. 2015, at 268 (96.2% vote approving the bid bases for the sale of DRP's assets, including a DRC's vote) (Exh. R-40).

¹³¹ Doe Run Peru S.R.L. Creditors' Meeting Minutes of 19 Mar. 2015 (Exh. R-40).

3. Other Proceedings

52. Renco's coordinated strategy with respect to La Oroya and Peru is not limited to this arbitration and the Local Proceedings.¹³² Well before the Treaty entered into force, Peruvian citizens from La Oroya filed state law claims in the U.S. against Renco and certain of its affiliated companies and executives (but not against Peru, Activos Mineros, or DRP).¹³³ While Renco appears not to have disclosed the Treaty arbitration in the Local Proceedings in Peru, it expressly and promptly used the commencement of the Treaty arbitration to gain advantages in the U.S. litigation proceedings, which have been ongoing for many years. Among other things, Renco used this arbitration to persuade a federal judge to transfer the lawsuits from state to federal court.¹³⁴ Since that time, among other examples, Renco filed a motion requesting that Peruvian law apply to the U.S. litigation,¹³⁵ because "if the law of Peru governs on this issue, Article 1971 changes the shape of this litigation by moving to the forefront the issue of whether or not Doe Run Peru achieved compliance with the Stock Transfer Agreement and met its PAMA obligations. Defendants' case demonstrating its compliance with the Stock Transfer Agreement and the PAMA is *presented in its submission to the Panel arbitrating the dispute between Defendant Renco Group, Inc. and Peru.*"¹³⁶ Renco seeks to use different proceedings in different ways to advance its interest on diverse fronts, at prejudice to Peru.

C. The Procedural And Temporal Context

53. The temporal context of the pending waiver objection is noteworthy because it reveals Renco's violations and Peru's procedural diligence.

54. One month after DRP initiated the First Proceeding, Renco and DRP presented their Notice of Intent to Commence Arbitration on 29 December 2010, which stated Renco's intent to bring claims against Peru under the Treaty on its own behalf and on behalf of DRP.¹³⁷ DRP was continuing to pursue the First Proceeding, when, on 4 April 2011, Renco presented the Notice of Arbitration and Statement of Claim ("Notice of Arbitration") seeking to bring claims under the Contract, the

¹³² Public reports indicate that Renco has sought to lobby the U.S. government, including the State Department and the Congress, throughout this proceeding, including through the last reporting date of 1 July 2015. *See, e.g.*, Lobbying Report by Kasowitz, Benson, Torres & Friedman, LLP (Q2, 4/1 – 6/30, 2015 (listing incurred fees of US\$ 45,000 to "[m]onitor the trade promotion agreement between the United States and Peru") (Exh. R-41).

¹³³ Amended Notice of Arbitration and Statement of Claim ¶ 37. Peru contemporaneously issued a responsive letter to the U.S. Ambassador stating that Peruvian courts, and not U.S. courts should hear this case. *See* Letter from Peru's President of the Council of Ministers to Ambassador of the United States to Peru dated 31 Oct. 2007 (Exh. C-4).

¹³⁴ Memorandum Opinion, *A.O.A. v. Doe Run Resources Corp.*, Case: 4:11-cv-00059-CDP, June 22, 2011, at 1 (E.D. Missouri) ("Defendants The Renco Group Inc., DR Acquisition Corporation, Renco Holdings Inc., and Ira L. Rennet removed the case on January 7, 2011, claiming that plaintiffs' actions are related to an arbitration currently set between The Renco Group and the government of Peru, and that the cases are therefore removable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.") (RLA-35).

¹³⁵ Defendants' Reply to Plaintiffs' Memorandum In Opposition To Defendants' Motion For A Determination Of Foreign Law, *Reid v. Doe Run Resources Corp.*, Case No. 4:11-CV-00044CDP, September 15, 2014 (RLA-36); Memorandum and Order, *Reid v. Doe Run Resources Corp.*, No. 4:11-CV-00044-CDP (E.D. Mo. Feb. 11, 2015), ECF No. 284 (RLA-120); Defendants' Motion For Partial Reconsideration Of The Court's Order Of February 11, 2015, *Reid v. Doe Run Resources Corp.*, No. 4:11-CV-00044-CDP (E.D. Mo. Apr. 17, 2015), ECF No. 291 (RLA-121); Defendants' Reply To Plaintiffs' Opposition To Motion For Partial Reconsideration Of The Court's Order Of February 11, 2015, *Reid v. Doe Run Resources Corp.*, No. 4:11-CV-00044-CDP (E.D. Mo. May 7, 2015), ECF No. 298 (RLA-118).

¹³⁶ Defendants' Reply to Plaintiffs' Memorandum In Opposition To Defendants' Motion For A Determination Of Foreign Law, *Reid v. Doe Run Resources Corp.*, Case No. 4:11-CV-00044CDP, September 15, 2014, at 30-31 (RLA-36). Renco has submitted its Memorial from this arbitration in the U.S. lawsuits. *Id.* Exhibit 2.

¹³⁷ Notice of Intent to Commence Arbitration Under United States – Peru Trade Promotion Agreement dated 29 Dec. 2010.

Guaranty, and the Treaty, against Peru and Activos Mineros S.A.C. (“Activos Mineros”).¹³⁸ Due to defects in the Notice of Arbitration, Renco subsequently submitted Claimant’s Amended Notice of Arbitration and Statement of Claim on 9 August 2011 (“Amended Notice”), this time, excluding Activos Mineros as Respondent and DRP as Claimant.¹³⁹ On 9 September 2011, Peru submitted a preliminary response to the Amended Notice, reiterating concerns with respect to the waiver and the scope of consent.¹⁴⁰ DRP thereafter maintained the First Proceeding and also pursued the Second Proceeding, as discussed herein.

55. The constitution of the Tribunal in the present proceeding was suspended from 2011,¹⁴¹ and eventually resumed much later, leading to the constitution of the Tribunal on 8 April 2013 and the First Session regarding procedural issues on 18 July 2013. The Tribunal thereafter issued Procedural Order No. 1 on 22 August 2013. Pursuant to Procedural Order No. 1 and the UNCITRAL Rules, Peru timely notified certain objections within weeks after Renco filed its Memorial on Liability on 20 February 2014 and Peru notified its intention to make a submission pursuant to Article 10.20.4 of the Treaty within four weeks. As noted above, the waiver requirement includes no urgency requirement, but in any event Peru filed its objection as contemplated by applicable rules.

56. Ultimately, on 2 June 2015, the Tribunal ruled that it would “hear and decide as a preliminary issue in the arbitration the question of whether Renco has violated the waiver requirement contained in Article 10.18 of the Treaty” pursuant to Rule 23(3) of the UNCITRAL Rules.¹⁴²

57. Renco’s reference to “Peru’s unfounded claim of new urgency”¹⁴³ is inaccurate and irrelevant.

IV. IMPLICATIONS

58. Article 10.18 of the Treaty makes compliance with the waiver requirement a prerequisite to consent to arbitration under the Treaty and to the vesting of jurisdiction in the Tribunal, as Peru explained in its Memorial on Waiver.¹⁴⁴ The significance of a valid and sufficient waiver to Peru’s consent is not addressed, much less rebutted, by Renco.

59. On the contrary, Renco errs in arguing that failure to comply with the requirements of Article 10.18.2 of the Treaty is inconsequential or can be unilaterally remedied.¹⁴⁵ Article 10.18.2 is clear that the waiver requirements must be met at the time of the notice of arbitration, providing that “[n]o claim may be submitted to arbitration under this Section unless [...] the *notice of arbitration* is accompanied” by a waiver that meets the requirements set forth above.¹⁴⁶ Addressing the identical requirement of Article 10.18 of the CAFTA, the *Commerce Group* tribunal ruled that this language

¹³⁸ Claimants’ Notice of Arbitration and Statement of Claim dated 4 Apr. 2011.

¹³⁹ Claimant’s Amended Notice of Arbitration and Statement of Claim dated 9 Aug. 2011.

¹⁴⁰ See Letter from White & Case to King & Spalding, 9 Sept. 2011 (referring to “el ámbito de la renuncia obligatoria a otros procedimientos; y el alcance del consentimiento a arbitrar.”).

¹⁴¹ See, e.g., Letter from the Parties dated 18 June 2012.

¹⁴² Decision Regarding Respondent’s Requests for Relief dated 2 June 2015 ¶ 73.

¹⁴³ Counter-Memorial on Waiver ¶ 9.

¹⁴⁴ Memorial on Waiver ¶¶ 9-11, 15-16.

¹⁴⁵ Counter-Memorial on Waiver ¶¶ 10, 17, 65-67.

¹⁴⁶ Treaty, Art. 10.18.2 (emphasis added) (RLA-1).

means that compliance with the waiver requirement must be established from the filing of the notice of arbitration.¹⁴⁷ Likewise, the *Waste Management* tribunal determined that it was from the date of submission of the “notice of request for arbitration to the Secretary-General of ICSID [...] onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals.”¹⁴⁸

60. Moreover, consent being the cornerstone of jurisdiction, failure by the claimant to meet any of the requisites above is fatal to its case. The relevant jurisprudence confirms that failure to comply with the Treaty’s conditions on consent is not merely a procedural defect, as Renco contends.¹⁴⁹

- In *Railroad Development Corporation*, the tribunal observed with respect to the identical requirement of Article 10.18 of the DR-CAFTA, that all “the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected,” and without such consent the claimant’s case must be dismissed for lack of jurisdiction.¹⁵⁰
- In *Commerce Group*, the tribunal found that the waivers submitted by the claimant did not comply with the requirements of Article 10.18 of the DR-CAFTA, and concluded that “[i]f the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties’ CAFTA dispute.”¹⁵¹
- In *Detroit International Bridge Company*, the NAFTA tribunal dismissed the case for lack of jurisdiction upon finding that the written waivers were insufficient, stating: “[t]he lack of a valid waiver preclude[s] the existence of a valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprive[s] the Tribunal of the very basis of its existence.”¹⁵²

61. The implications of an insufficient waiver on consent are thus confirmed by decisions of DR-CAFTA tribunals interpreting an identical requirement,¹⁵³ as well as by decisions of NAFTA tribunals,¹⁵⁴ including the *Waste Management II* case, on which Renco relies.¹⁵⁵

¹⁴⁷ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶¶ 96-97 (RLA-22).

¹⁴⁸ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 19 (RLA-102).

¹⁴⁹ Counter-Memorial on Waiver ¶¶ 17, 65-67.

¹⁵⁰ *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5 dated 17 Nov. 2008 ¶¶ 56, 61 (RLA-20).

¹⁵¹ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶ 115 (RLA-22).

¹⁵² *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 321 (RLA-100).

¹⁵³ See, e.g., *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5 dated 17 Nov. 2008 (RLA-20); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 (RLA-22).

¹⁵⁴ See, e.g., *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 321 (RLA-100); *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶¶ 31 and s. IV (RLA-102).

¹⁵⁵ The tribunal in *Waste Management II* observed that “the first [*Waste Management*] Tribunal held that Claimant’s failure to lodge a valid waiver meant that it had no jurisdiction. The same would be true, evidently, of a failure by a claimant to

62. Renco also errs in relying on the *RDC v. Guatemala* decision in support of its argument that, if the Tribunal finds that Renco violated the waiver by virtue of DRP's initiation or continuation of the Local Proceedings, then only Renco's claims challenging the MEM's credit in the arbitration should be dismissed.¹⁵⁶ As an initial matter, Peru maintains its position that any violation of the waiver by the claimant vitiates the respondent State's consent to arbitrate and requires dismissal of the claimant's claim submitted to arbitration. Even accepting *arguendo* Renco's arguments to the contrary, however, a finding that DRP's initiation or continuation of the Local Proceedings violated the waiver requirement necessarily presupposes a finding by the Tribunal that DRP was obligated to submit a waiver. DRP, however, has failed to submit *any* waiver and, thus, Peru has not consented to arbitrate any of the claims that Renco has made that should have been made on behalf of DRP. Insofar as Renco has submitted claims to arbitration that properly were made on its own behalf, moreover, its own waiver fails to comply with the requirements of the Treaty, as set forth above, and those claims thus must also be dismissed for lack of jurisdiction.

V. REQUEST FOR RELIEF

63. For the foregoing reasons, Renco is in violation of the Treaty and has failed to establish the requirements for Peru's consent to arbitrate under the Treaty. Renco's claims accordingly must be dismissed for lack of jurisdiction.

64. The Republic of Peru respectfully requests that the Tribunal render an award dismissing Renco's claims, with an award of costs in favor of Peru.

Respectfully submitted,

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comply with Article 1121(a), that is, to consent to arbitration in accordance with the procedures set out. By contrast, merely procedural requirements which had to be satisfied in lodging an application would not necessarily go to jurisdiction but could be capable of subsequent correction by the Claimant.” *Waste Management Inc. v. United Mexican States II* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal concerning Mexico's Preliminary Objection concerning the Previous Proceedings dated 26 Jun. 2002 ¶ 33 (RLA-103).

¹⁵⁶ Counter-Memorial on Waiver ¶¶ 114-115.