

**PCA CASE N° 2019-46**

**IN THE MATTER OF AN ARBITRATION  
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE  
TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PERU AND THE  
UNITED STATES OF AMERICA**

- and -

**THE UNCITRAL ARBITRATION RULES 2013**

- between -

**THE RENCO GROUP, INC.**

- and -

**THE REPUBLIC OF PERU**

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**DECISION ON EXPEDITED  
PRELIMINARY OBJECTIONS**

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**The Arbitral Tribunal**

Judge Bruno Simma (Presiding Arbitrator)  
Prof. Horacio A. Grigera Naón  
Mr. J. Christopher Thomas QC

**Secretary to the Tribunal**  
Mr. Martin Doe Rodríguez

**Assistant to the Tribunal**  
Dr. Heiner Kahlert

**30 June 2020**

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**GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS**

<b>Centromin</b>	Empresa Minera Del Centro Del Peru S.A.
<b>Claimant (or Renco)</b>	The Renco Group, Inc.
<b>Claimant's Comments on NDP Submission</b>	Claimant's Comments on the Non-Disputing State Party Submission of the United States of America, dated 20 March 2020
<b>Consultation Agreement</b>	Consultation Agreement, dated 10 November 2016
<b>Counter-Memorial on Preliminary Objections</b>	Claimants' Counter-Memorial on Preliminary Objections dated 21 February 2020
<b>DR-CAFTA</b>	Dominican Republic-Central America-United States Free Trade Agreement, dated 5 August 2004
<b>DRP (or Doe Run)</b>	Doe Run Peru S.R.LTDA
<b>DRRC</b>	Doe Run Resources Corporation
<b>Facility</b>	Smelting and refining complex in La Oroya, Peru
<b>FET</b>	Fair and equitable treatment
<b>Framework Agreement</b>	Framework Agreement, dated 14 March 2017
<b>Guaranty Agreement</b>	Guaranty Agreement executed on 21 November 1997
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ILC Articles on State Responsibility</b>	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts
<b>INDECOPI</b>	National Institute for the Defence of Free Competition and the Protection of Intellectual Property
<b>Memorial on Preliminary Objections</b>	Respondent's Memorial on Preliminary Objections dated 20 December 2019
<b>MEM</b>	Ministry of Energy and Mines
<b>Metaloroya</b>	Empresa Minera Metaloroya La Oroya S.A.

<b>NDP Submission</b>	Non-Disputing State Party Submission of the United States of America, dated 7 March 2020
<b>NAFTA</b>	North American Free Trade Agreement, entered into force on 1 January 1994
<b>Notice of Arbitration and Statement of Claim</b>	Notice of Arbitration and Statement of Claim dated 23 October 2018
<b>PAMA</b>	<i>Programa de Adecuación y Manejo Ambiental</i> or Environmental Adjustment and Management Program
<b>PCA</b>	Permanent Court of Arbitration
<b>Procedural Agreement</b>	Procedural Agreement between The Renco Group, Inc. and the Republic of Peru, dated 10 June 2019
<b><i>Renco I</i></b>	<i>The Renco Group v. Republic of Peru</i> , ICSID Case No. UNCT/13/1
<b><i>Renco II</i> (or Treaty Case)</b>	<i>The Renco Group, Inc. v. Republic of Peru</i> , PCA Case No. 2019-46 (the instant proceedings)
<b><i>Renco III</i> (or Contract Case)</b>	<i>The Renco Group, Inc. and Doe Run Resources Corp. v. Republic of Peru and Activos Mineros S.A.C.</i> , PCA Case No. 2019-47
<b>Respondent (or Peru)</b>	Republic of Peru
<b>Respondent's Comments on NDP Submission</b>	Peru's Comments on the Non-Disputing State Party Submission of the United States of America, dated 20 March 2020
<b>Stock Transfer Agreement</b>	Contract of Stock Transfer executed on 23 October 1997
<b>Treaty</b>	Trade Promotion Agreement between the Republic of Peru and the United States of America, dated 12 April 2006, entered into force on 1 February 2009
<b>UNCITRAL Arbitration Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)
<b>US</b>	United States of America
<b>VCLT</b>	Vienna Convention on the Law of Treaties

## I. INTRODUCTION

1. The Claimant in this arbitration is The Renco Group, Inc. (the “**Claimant**” or “**Renco**”), a legal entity incorporated under the laws of the State of New York, the United States of America, with its registered office at One Rockefeller Plaza, 29th Floor, New York, NY 10020, U.S.A.
2. The Claimant is represented in these proceedings by Mr. Edward Kehoe, Ms. Isabel Fernandez de la Cuesta, Mr. Aloysius Llamzon, Mr. Cedric Soule, and Mr. David Weiss of King & Spalding LLP, 1185 Av. of the Americas, 34th Floor, New York, NY 10036, U.S.A.
3. The Respondent is the Republic of Peru (the “**Respondent**” or “**Peru**”).
4. The Respondent is represented in these proceedings by Mr. Jonathan Hamilton, Ms. Andrea Menaker, and Mr. Francisco Jijón, of White & Case LLP, 701 Thirteenth Street, NW Washington, D.C. 20005-3807, U.S.A.
5. A dispute has arisen between the Claimant and Respondent (collectively, the “**Parties**”) concerning the Claimant’s alleged investment in Doe Run Peru S.R.LTDA, a company incorporated under the laws of Peru. According to the Claimant, the Government of Peru breached the Trade Promotion Agreement between the Republic of Peru and the United States of America, dated 12 April 2006, entered into force on 1 February 2009 (hereafter, the “**Treaty**”), with respect to the Claimant’s investment, causing damages to the Claimant.<sup>1</sup> The Respondent denies the Claimant’s allegations as to the violations of the Treaty and damages in their entirety.<sup>2</sup>
6. The merits of such allegations are not the subject of the present decision. This decision addresses certain preliminary matters, namely the Respondent’s application of 20 December 2019 that the Tribunal dismiss the Claimant’s claims pursuant to Article 10.20.5 of the Treaty on the basis that the Tribunal lacks jurisdiction over them.

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<sup>1</sup> Notice of Arbitration and Statement of Claim, dated 23 October 2018.

<sup>2</sup> Memorial on Preliminary Objections, 20 December 2019, ¶ 2.

## II. PROCEDURAL HISTORY

### A. Commencement of the Arbitration and Constitution of the Tribunal

7. On 12 August 2016, the Claimant served upon the Government of the Republic of Peru two notices of its intention to submit a claim to arbitration (the “**Notices of Intent**”) to bring arbitration proceedings against the Respondent, one under the Treaty and the other containing related claims arising under the Contract of Stock Transfer executed on 23 October 1997 (the “**Stock Transfer Agreement**”), and the Guaranty Agreement executed on 21 November 1997 (the “**Guaranty Agreement**”).
8. On 10 November 2016, 90 days following the Respondent’s receipt of the two Notices of Intent, the Parties executed a Consultation Agreement. On 14 March 2017, the Parties executed a subsequent Framework Agreement to facilitate the negotiated settlement of the disputes during a specific timeframe. The Framework Agreement was first extended to 31 March 2018 and subsequently extended indefinitely until 10 October 2018 when the Respondent informed the Claimant of its intent to terminate the Agreement.
9. By Notice of Arbitration and Statement of Claim dated 23 October 2018 (“**Notice of Arbitration and Statement of Claim**”), the Claimant commenced arbitration proceedings against the Respondent, pursuant to Article 10.16 of the Treaty and Article 3 of the UNCITRAL Arbitration Rules.
10. In its Notice of Arbitration and Statement of Claim, the Claimant appointed Professor Horacio A. Grigera Naón as the first arbitrator. Professor Grigera Naón’s contact details are as follows:

**Professor Horacio A. Grigera Naón**  
5224 Elliott Road  
Bethesda, Maryland 20816  
United States of America
11. In its Response to the Notice of Arbitration dated 14 January 2019, the Respondent appointed as arbitrator Mr. J. Christopher Thomas QC, whose contact details are as follows:

**Mr. J. Christopher Thomas QC**  
1200 Waterfront Centre  
200 Burrard Street, PO Box 48600  
Vancouver, British Columbia V7X 1T2  
Canada

12. On 10 June 2019, Renco, Doe Run Resources Corporation, Peru, and Activos Mineros S.A.C. executed a Procedural Agreement (the “**Procedural Agreement**”), by which the Parties agreed that (i) the instant arbitration would be coordinated with the arbitration brought under the Stock Transfer Agreement and Guaranty Agreement, *The Renco Group, Inc. and Doe Run Resources Corp. v. Republic of Peru and Activos Mineros S.A.C.*, PCA Case No. 2019-47 (“**Renco III**” or the “**Contract Case**”), (ii) the same tribunal would be constituted to hear both arbitrations, and (iii) both arbitrations would be conducted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) (the “**UNCITRAL Arbitration Rules**”).
13. By letter dated 17 October 2019, the Parties appointed as presiding arbitrator Judge Bruno Simma, whose contact details are as follows:

**Judge Bruno Simma**  
Iran-United States Claims Tribunal  
Parkweg 13  
2585 JH The Hague  
The Netherlands

14. On 3 December 2019, the Parties agreed to the administration of the proceedings by the Permanent Court of Arbitration (the “**PCA**”).

## **B. The Respondent’s Preliminary Objections**

15. On 4 December 2019, the Respondent submitted a two-page letter dated 3 December 2019, by which it “notifie[d] its request for the Tribunal to decide on an expedited basis certain objections that the dispute is not within the Tribunal’s competence”, pursuant to Article 10.20.5 of the Treaty. The Respondent’s letter reads in full as follows:

The Parties to the referenced proceedings have agreed to hold a procedural session on January 14, 2020, with respect to (1) *The Renco Group, Inc. v. Republic of Peru* (the “Treaty Case”), and (2) *The Renco Group, Inc. and Doe Run Resources Corp. v. Republic of Peru and Activos Mineros S.A.C.* (the “Contract Case”) (collectively, the “Cases” or the “Arbitrations”). The Parties, through counsel, are engaged in discussions related to comprehensive procedural agreements. In this context, Respondents, as applicable, hereby give notice regarding certain objections, and will continue discussions regarding procedural matters, including with respect to such objections.

### **A. Treaty Case**

With respect to the Treaty Case, in its initial Response dated January 14, 2019, although under no obligation to do so and subject to a reservation of rights, Respondent referenced various jurisdictional objections, including without limitation that the claims were precluded because they do not meet temporal requirements. Respondent hereby notifies its request for



the Tribunal to decide on an expedited basis certain objections that the dispute is not within the Tribunal's competence, pursuant to the Peru-United States Trade Promotion Agreement (the "Treaty").

Article 10.20.5 of the Treaty provides as follows:

In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

Respondent's objections directly relate to the Tribunal's competence, which is subject to rigid temporal requirements. Pursuant to Article 10.1.3, "this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement." Here, the Treaty entered into force on February 1, 2009. In addition, pursuant to Article 10.18.1, "[n]o claim may be submitted to arbitration under the Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage." Here, Claimant filed its Notice of Arbitration and Statement of Claim in the Treaty Case (the "Treaty Statement of Claim") on October 23, 2018. The Parties also have entered into certain relevant agreements.<sup>1</sup> [FN1: *See, e.g.*, Framework Agreement (as Amended), March 14, 2017 (Doc. R-10).]

Taking into account the foregoing, as Respondent will plead in further detail, Claimant's claims do not meet the Treaty's temporal requirements. As set forth in the Treaty Statement of Claim, the measures that Claimant alleges to have breached the Treaty occurred either before the Treaty's entry into force and Claimant first acquired or should have first acquired, knowledge concerning a breach and loss or damage arising therefrom before the relevant prescription period. To the extent that the Treaty Statement of Claim references allegations that arose after the relevant time period, claims based thereon appear to be impermissible as well for related reasons. To the extent that Claimant argues, despite the Treaty, that Respondent should not be allowed to make such objections, Respondent will address such argument at the appropriate time.

## **B. Contract Case**

With respect to the Contract Case, in the initial Response to the Notice of Arbitration and Statement of Claim in the Contract Arbitration dated January 14, 2019, although under no obligation to do so and subject to a reservation of rights, Respondents referenced deficiencies and set forth certain threshold objections, including without limitation with respect to the relevant parties and scope of the agreement to arbitrate. Respondents seek to be heard on such issue as a preliminary matter in the Contract Case in order to resolve or define the scope of the proceeding.

## **C. Procedural Implications**

Counsel to the Parties have been engaged in discussions regarding procedural matters and have agreed to continue such discussions with respect to the foregoing in the days ahead.

Respondents will continue to endeavor to advance on procedural matters before the anticipated procedural session. For the avoidance of doubt, Respondents reserve the right to articulate and expand upon the issues set forth herein at the appropriate time in accordance with applicable instruments, laws and rules, and reserve all rights with respect to these proceedings.<sup>3</sup>

16. On 6 December 2019, the Tribunal invited the Claimant to submit its comments in respect of the Respondent's letter.
17. By letter dated 10 December 2019, the Claimant asserted that "Respondent's December 3, 2019 communication does not satisfy the pleading requirements necessary to trigger the application of Article 10.20.5 of the [Treaty]. Accordingly, Claimant respectfully requests that the Tribunal find that Peru has failed to—and can no longer—invoke the expedited review procedure under Article 10.20.5 of the Treaty."<sup>4</sup> In the alternative, the Claimant proposed a schedule for written submissions and a hearing on the Respondent's preliminary objections.
18. On 17 December 2019, the Tribunal ordered the Respondent to submit a Memorial by 20 December 2019 "setting forth its Article 10.20.5 objections in full, with all supporting evidence and legal authorities" and provided the Claimant until 21 February 2020 to submit a Counter-Memorial responding to the Respondent's objections.
19. On 20 December 2019, the Respondent submitted its Memorial on Preliminary Objections under Article 10.20.5 of the Treaty (the "**Memorial on Preliminary Objections**").
20. On 2 January 2020, the PCA, acting on behalf of the Tribunal, circulated drafts of the Terms of Appointment and Procedural Order No. 1 for the Parties' comments.
21. On 10 January 2020, the Parties submitted their joint comments on the Draft Terms of Appointment and Draft Procedural Order No. 1, together with a proposed intermediate timetable to the Tribunal. The Claimant proposed that the Tribunal establish the procedural calendar for the entire arbitration, while the Respondent proposed that the procedural calendar for additional phases, if any, be established following a Hearing on Article 10.20.5 Objections and Bifurcation. The Parties also agreed to the appointment of Dr. Heiner Kahlert as Assistant to the Tribunal.

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<sup>3</sup> Respondent's Letter to the Tribunal, 3 December 2019 (C-13).

<sup>4</sup> Claimant's Letter to the Tribunal, 10 December 2019 (C-14).

22. On 14 January 2020, a first procedural meeting was held via telephone conference during which the Parties agreed, and the Tribunal confirmed, that the procedural calendar for subsequent phases, if any, would be decided at the conclusion of the initial phase.
23. On 19 January 2020, having considered the Parties' comments, the Tribunal circulated revised drafts of the Terms of Appointment and Procedural Order No. 1 to the Parties.
24. On 28 January 2020, the Parties submitted their comments on outstanding issues with respect to Procedural Order No. 1.
25. On 3 February 2020, the Tribunal issued the Terms of Appointment and Procedural Order No. 1.
26. On 21 February 2020, the Claimant submitted its Counter-Memorial on Article 10.20.5 Objections (the "**Counter-Memorial on Preliminary Objections**").
27. On 27 February 2020, following consultation with the Parties as to their availability, the Tribunal set the date of 13 June 2020 for a Hearing on Article 10.20.5 Objections in Washington, D.C.
28. On 7 March 2020, the United States of America (the "**US**") made a non-disputing State party submission (the "**NDP Submission**").
29. On 20 March 2020, the Parties each submitted their respective comments on the US non-disputing State party submission (the "**Respondent's Comments on NDP Submission**" and the "**Claimant's Comments on NDP Submission**", respectively).

### **C. Hearing on Preliminary Objections**

30. By respective letters dated 15 May 2020, the Parties proposed that the Hearing on Preliminary Objections take place by videoconference over two days rather than in person in Washington, D.C.
31. On 19 May 2020, the Tribunal confirmed that the Hearing on Preliminary Objections would take place by videoconference on 12-13 June 2020 and circulated a Draft Procedural Order No. 2 concerning the organization of the hearing for the Parties' comments.
32. By their respective communications of 28 May, 1 June, and 2 June 2020, the Parties submitted their comments on Draft Procedural Order No. 2.
33. On 3 June 2020, the Tribunal issued Procedural Order No. 2.

34. On 5 June 2020, a pre-hearing videoconference was held in order to discuss the organization of the Hearing on Preliminary Objections.
35. The hearing on Respondent’s preliminary objections under Article 10.20.5 of the Treaty (the “**Hearing on Preliminary Objections**”) was held by videoconference over two days, 12 to 13 June 2020. The following persons attended the hearing:

Tribunal:	Judge Bruno Simma	Presiding Arbitrator
	Professor Horacio A. Grigera Naón	Arbitrator
	Mr. J. Christopher Thomas QC	Arbitrator
Claimants:	Mr. Joshua Weiss	The Renco Group
	Mr. Matthew Wohl	The Doe Run Company
	Mr. Edward Kehoe	King & Spalding
	Mr. David Weiss	King & Spalding
	Mrs. Isabel Fernandez de la Cuesta	King & Spalding
	Mr. Aloysius Llamzon	King & Spalding
	Mr. Cedric Soule	King & Spalding
	Mrs. Heleina Formoso	King & Spalding
	Mrs. Luisa Gutierrez Quintero	King & Spalding
Respondents:	Mr. Ricardo Ampuero	Republic of Peru
	Mr. Shane Martínez del Aguila	Republic of Peru
	Mr. Jonathan Hamilton	White & Case
	Ms. Andrea Menaker	White & Case
	Mr. Francisco Jijón	White & Case
	Mr. Jonathan Ulrich	White & Case
	Ms. Estefania San Juan	White & Case
Registry:	Mr. Martin Doe Rodriguez	Senior Legal Counsel, PCA
	Ms. Isabella Uría	Assistant Legal Counsel, PCA
	Ms. Alejandra Martinovic	Case Manager, PCA
Assistant to the Tribunal:	Dr. Heiner Kahlert	Assistant to the Tribunal

Others:	Mr. David Kasdan	Court Reporter
	Mr. Dante Rinaldi	Court Reporter
	Mr. Leandro Iezzi	Court Reporter
	Ms. Luciana Sosa	Court Reporter
	Ms. Silvia Colla	Interpreter
	Mr. Daniel Giglio	Interpreter
	Mr. Jason Aoun	Law in Order
	Ms. Amber Jade	Law in Order

36. At the conclusion of the Hearing, pursuant to paragraph 13.1 of Procedural Order No. 2, the Tribunal and the Parties conferred as to the need, if any, for further submissions and agreed that no post-hearing written submissions were needed.

### III. FACTUAL BACKGROUND

#### A. Background of the Dispute

37. The instant dispute arises with respect to Renco’s alleged investment in Doe Run Peru S.R.LTDA (“**DRP**”), a mining and mineral processing company incorporated under the laws of Peru, which in 1997 acquired a smelting and refining complex in La Oroya, Peru (the “**Facility**”).<sup>5</sup>
38. In the early 1990s, Peru decided to privatize the Facility, which at that time was held by State-owned Empresa Minera Del Centro Del Perú S.A. (“**Centromin**”).<sup>6</sup>
39. In January 1997, in accordance with extant Peruvian environmental regulations, Centromin had prepared, and the Ministry of Energy and Mines (“**MEM**”) adopted, an Environmental Remediation and Management Program (*Programa de Adecuación y Manejo Ambiental*, or “**PAMA**”) to govern the future operation of the Facility.<sup>7</sup> The PAMA devised a series of environmental projects “aimed at remediating, mitigating, and preventing environmental degradation to be completed over a period of ten years”.<sup>8</sup> The PAMA included sixteen projects with a ten-year deadline.<sup>9</sup> Following MEM’s adoption of the PAMA, Centromin transferred its interest in the Facility to a newly-established State-owned entity, Empresa Minera Metaloroya La Oroya S.A. (“**Metaloroya**”), created to facilitate the privatization of the Facility.<sup>10</sup>
40. On 10 July 1997, Renco and its affiliate, Doe Run Resources Corporation (“**DRRC**”), were awarded a public tender for Metaloroya. To facilitate the acquisition of the Facility, they established DRP and DRP acquired the Facility pursuant to the Stock Transfer Agreement of 23

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<sup>5</sup> Memorial on Preliminary Objections, ¶¶ 2, 12; Counter-Memorial on Preliminary Objections, ¶ 13. *See also* Memorandum of Understanding between Peru, Doe Run Peru, Doe Run Cayman Ltd., and Doe Run Cayman Holdings LLC, 27 March 2009, ¶¶ 1.1-1.3 (C-41); Michael Fumento, “Green Activists Threaten Peruvian Golden Goose” 18 March 2004 (C-5); Hearing Transcript, 12 June 2020, 15:5-8.

<sup>6</sup> Memorandum of Understanding between Peru, Doe Run Peru, Doe Run Cayman Ltd., and Doe Run Cayman Holdings LLC, 27 March 2009, ¶ 1.1 (C-41). *See also* Response to Notice of Arbitration, ¶ 5; Hearing Transcript, 12 June 2020, 16:8-13.

<sup>7</sup> Contract of Stock Transfer executed on 23 October 1997, Clause 5 (R-1). *See also* Michael Fumento, “Green Activists Threaten Peruvian Golden Goose” 18 March 2004 (C-5).

<sup>8</sup> Response to Notice of Arbitration, ¶ 6; Counter-Memorial on Preliminary Objections, ¶¶ 18-19.

<sup>9</sup> Counter-Memorial on Preliminary Objections, ¶ 19.

<sup>10</sup> Response to Notice of Arbitration, ¶ 7. *See also* Memorandum of Understanding between Peru, Doe Run Peru, Doe Run Cayman Ltd., and Doe Run Cayman Holdings LLC, 27 March 2009, ¶ 1.1 (C-41).

October 1997 and DRP's subsequent merger with Metaloroya on 30 December 1997.<sup>11</sup> The acquisition was predicated on shared, but distinct, responsibilities between DRP and Centromin with respect to the PAMA established to mitigate existing environmental issues associated with the Facility.<sup>12</sup>

41. On 19 October 1999,<sup>13</sup> 10 April 2001,<sup>14</sup> 25 January 2002,<sup>15</sup> and 29 May 2006,<sup>16</sup> DRP requested and was granted modifications and extensions with respect to the requirements set out in the PAMA.
42. Beginning in 2007, certain plaintiffs, residents of La Oroya, brought suit against various defendants, including Renco and DRRC, in United States courts, seeking damages for personal injury arising from alleged exposure to toxic substances and environmental contamination from the Facility.<sup>17</sup>
43. On 1 February 2009, the Trade Promotion Agreement between the Republic of Peru and the United States of America entered into force.
44. On 5 March 2009, DRP requested—and on 10 March 2009, MEM rejected—an extension to complete the final of the sixteen PAMA-mandated projects.<sup>18</sup>

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<sup>11</sup> Contract of Stock Transfer executed on 23 October 1997 (**R-1**). *See also Renco I*, Witness Statement of Dennis Sadlowski, 19 February 2014, ¶¶ 7, 20 (**C-42**); Memorandum of Understanding between Peru, Doe Run Peru, Doe Run Cayman Ltd., and Doe Run Cayman Holdings LLC, 27 March 2009, ¶ 1.1 (**C-41**); Response to Notice of Arbitration, ¶ 7; Counter-Memorial on Preliminary Objections, ¶ 20.

<sup>12</sup> Contract of Stock Transfer executed on 23 October 1997, ¶¶ 3.1-4.2 (**R-1**). *See also* Response to Notice of Arbitration, ¶ 12; Counter-Memorial on Preliminary Objections, ¶¶ 21-23.

<sup>13</sup> Directorial Resolution No. 17 8-99-EM/DG concerning the amendment of the action and investment schedule of the PAMA dated 19 October 1999.

<sup>14</sup> Directorial Resolution No. 133-2001-EM-DGAA concerning modifying the PAMA for La Oroya Metallurgical Complex dated 10 April 2001.

<sup>15</sup> Directorial Resolution No. 28-2002-EM/DGAA.

<sup>16</sup> Ministerial IW. No. 257-2006-MEM/DM, dated 29 May 2006.

<sup>17</sup> Response to Notice of Arbitration, ¶ 12; Memorial on Preliminary Objections, ¶ 2; Hearing Transcript, 12 June 2020, 17:1-8. *See A.O.A., et al. v. Doe Run Resources Corp., et. al.*, (E.D. Mo. Case No. 4:11-cv-00044-CDP) (**R-20**).

<sup>18</sup> Letter from J. F. G. Isasi Cayo (Ministry of Energy & Mines) to J. Carlos Huyhua (Doe Run Peru), 10 March 2009 (**C-6**); Letter from J. Carlos Huyhua (Doe Run Peru) to P. Sanchez (Ministry of Energy & Mines), 5 March 2009 (**C-7**).

45. On 23 March 2009, the Government of Peru and DRP concluded a Memorandum of Understanding that an extension to complete the final PAMA project would be provided to Doe Run Peru.<sup>19</sup> The Respondent never signed the Memorandum.
46. On 3 June 2009, DRP closed the Facility.<sup>20</sup>
47. In September 2009, the Peruvian Congress passed a law granting DRP an extension of 30 months to complete the final PAMA project. According to the Claimant, despite this legislation, MEM repeatedly refused to provide an extension for the completion of the final PAMA project, obstructed DRP's ability to secure financing, and launched a "smear campaign" against Renco and DRP to damage DRP's reputation and prevent it from security financing.<sup>21</sup>
48. In February 2010, DRP's creditors placed DRP into involuntary bankruptcy before Peru's National Institute for the Defence of Free Competition and the Protection of Intellectual Property ("INDECOPI").<sup>22</sup>
49. On 16 August 2010, INDECOPI publicly announced the commencement of DRP's bankruptcy, guided by a board of creditors.<sup>23</sup>
50. On 14 September 2010, MEM asserted a US\$ 163 million claim as creditor against DRP on the basis of DRP's "unfulfilled PAMA investments".<sup>24</sup> The credit claim endowed MEM with one third of all voting rights on the board of creditors.<sup>25</sup>

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<sup>19</sup> Memorandum of Understanding between Peru, Doe Run Peru, Doe Run Cayman Ltd., and Doe Run Cayman Holdings LLC, 27 March 2009 (C-41).

<sup>20</sup> Letter from Doc Run Peru to OSINERGMIN, dated 3 June 2009.

<sup>21</sup> Counter-Memorial on Preliminary Objections, ¶¶ 33-38. In support of its claims that the Government of Peru launched a "smear campaign", the Claimant refers to a series of statements made by Peruvian government officials in press releases and public interviews. *See, e.g.*, Terry Wade and Patricia Velez, "Peru's Garcia says Doe Run license being canceled" *Reuters*, 28 July 2010 (C-8) (in which then-President of Peru Alan Garcia stated that Doe Run Peru "plays games" and "abuses the country"); "Peru Cancels Doe Run's operating license" *Agencia Peruana de Noticias Andina*, 28 July 2010 (C-9) (in which then-President Garcia is reported to have said that the Government of Peru would "not allow a firm to blackmail the country" in reference to Doe Run Peru).

<sup>22</sup> Response to Notice of Arbitration, ¶ 19, *referring to, e.g.*, Cormin Notice Regarding Doe Run Peru's Bankruptcy to INDECOPI, 18 February 2010. *See also* Counter-Memorial on Preliminary Objections, ¶ 39.

<sup>23</sup> Response to Notice of Arbitration, ¶ 19.

<sup>24</sup> Response to Notice of Arbitration, ¶ 21; Counter-Memorial on Preliminary Objections, ¶ 39.

<sup>25</sup> Counter-Memorial on Preliminary Objections, ¶ 40.



51. DRP opposed MEM's request to INDECOPI for recognition of its credit against DRP in a challenge brought before INDECOPI.<sup>26</sup> Thereafter, DRP filed a constitutional *amparo* suit with the Superior Court of Justice of Lima in 2010, followed by two subsequent appeals in 2011.
52. In 2012, DRP filed a contentious administrative action with the Specialized Administrative Contentious Tribunal of Lima and filed a cassation action in 2014.<sup>27</sup>
53. In April 2012, DRP submitted a restructuring plan to the board of creditors, which was subsequently rejected.<sup>28</sup> Thereafter, the board voted to place DRP into liquidation, which is ongoing.<sup>29</sup>
54. On 3 November 2015, the Supreme Court of Peru summarily dismissed DRP's final appeal on the matter of MEM's asserted credit against DRP.<sup>30</sup>

#### **B. The *Renco I* Arbitration**

55. On 4 April 2011, Renco and DRP commenced arbitration proceedings against Peru pursuant to Chapter 10 of the Treaty, asserting substantially identical claims as Renco puts forward in this arbitration ("***Renco I***"). In their Notice of Arbitration and Statement of Claim, Renco and DRP made the following waiver:

Finally, as required by Article 10.18(2) of the Treaty, Renco and its affiliate DRP 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 proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, except for proceedings for interim entitled to relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. 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.<sup>31</sup> [Emphasis added.]

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<sup>26</sup> Response to Notice of Arbitration, ¶ 21; Counter-Memorial on Preliminary Objections, ¶ 42.

<sup>27</sup> Response to Notice of Arbitration, ¶ 21; Counter-Memorial on Preliminary Objections, ¶ 43.

<sup>28</sup> Response to Notice of Arbitration, ¶ 20.

<sup>29</sup> Response to Notice of Arbitration, ¶ 20. *See also* Doe Run Peru S.R.L. Creditors' Meeting Minutes of 9 and 12 April 2012, at 38-40; 43-46; 48-49.

<sup>30</sup> *See* Ryan Boysen, "Supreme Court Won't Hear Case on 'Nonsensical' Renco Trial" *Law360*, 10 October 2017 (**R-32**). *See also* Counter-Memorial on Preliminary Objections, ¶ 44.

<sup>31</sup> *Renco I*, Notice of Arbitration and Statement of Claim, 4 April 2011, ¶ 78 (**R-12**).

56. On 9 August 2011, Renco submitted an Amended Notice of Arbitration and Statement of Claim in *Renco I*, in which it withdrew DRP as second claimant and made the following waiver in equivalent terms as in its prior Notice of Arbitration and Statement of Claim:

Finally, as required by Article 10.18(2) of the Treaty, Renco waives its right to initiate or 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, except for proceedings for interim entitled to relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. 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.<sup>32</sup> [Emphasis added.]

57. On 3 October 2014, Peru raised an objection to the *Renco I* tribunal's jurisdiction based on Renco's failure to properly fulfil the waiver requirement established in Article 10.18.2 of the Treaty.<sup>33</sup>
58. On 15 July 2016, the tribunal in *Renco I* issued a Partial Award dismissing Renco's claims for lack of jurisdiction on account of the reservation of rights contained in Renco's waiver rendering it non-compliant with the requirements of Article 10.18.2 of the Treaty.<sup>34</sup> The tribunal further held as follows:

The Tribunal has concluded that Renco failed to comply with the formal requirement of Article 10.18(2) and that it has no power to allow Renco to cure this defect (as noted above, one member of the Tribunal did not join in this conclusion) or to sever the reservation of rights. However, the consequences for Renco may be extreme in the following scenario. If Renco should decide to file a new Notice of Arbitration accompanied by a "clean" waiver, Peru may be minded to argue that Renco's claims have become time-barred because more than three years have elapsed since Renco first acquired knowledge of the breaches alleged under Article 10.16(1) of the Treaty.

In these circumstances, while the possible operation of a 3 year time bar on the facts of this case cannot change the analysis of Article 10.18(2)(b) (i.e. the analysis must be the same, even if the objection had been raised at the outset of the arbitration), the question which arises is whether Peru's conduct with regard to the late raising of its waiver objection rises to the level of an abuse of rights. The test to be applied is whether Peru has sought to raise this objection for an improper motive or — as Renco puts it, whether Peru is seeking to evade its duty to arbitrate Renco's claims under the Treaty rather than ensure that its waiver rights are respected or that the waiver provision's objectives are served.

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<sup>32</sup> *Renco I*, Amended Notice of Arbitration and Statement of Claim, 9 August 2011, ¶ 67 (R-12).

<sup>33</sup> *Renco I*, Peru's Comments on the Non-Disputing Party Submission, 3 October 2014 (C-31); Peru's Submission on Matters Arising from the Hearing on Waiver, 23 September 2015 (C-38). See also Counter-Memorial on Preliminary Objections, ¶ 132.

<sup>34</sup> *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (L. Yves Fortier, Toby T. Landau, Michael J. Moser (President)) (C-3/R-8/RLA-24).

Having considered the issue with great care, the Tribunal has concluded that, in raising its waiver objection, Peru has sought to vindicate its right to receive a waiver which complies with the formal requirement of Article 10.18(2)(b) and a waiver which does not undermine the object and purpose of that Article. In so finding, the Tribunal does not accept the contention that Peru's waiver objection is tainted by an ulterior motive to evade its duty to arbitrate Renco's claims. Indeed, Peru has no duty to arbitrate Renco's claims under the Treaty unless Renco submits a waiver which complies with Article 10.18(2)(b).

In reaching this conclusion, the Tribunal does not wish to rule out the possibility that an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco's claims were now time-barred under Article 10.18(1). To date, Peru has suffered no material prejudice as a result of the reservation of rights in Renco's waiver. However, Renco would suffer material prejudice if Peru were to claim in any subsequent arbitration that Renco's claims were now time-barred under Article 10.18(1).

While this Tribunal cannot prevent Peru from exercising in the future what it then considers to be its legal rights, the Tribunal can, and it does, admonish Peru to bear in mind, if that scenario should arise, Renco's submission that Peru's conduct with respect to its late raising of the waiver objection constitutes an abuse of rights. In the unanimous view of the Tribunal, justice would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011.<sup>35</sup>

59. By letter dated 21 July 2016, Renco sought Peru's agreement that the prescription period established in Article 10.18.1 of the Treaty was suspended during the *Renco I* proceedings.<sup>36</sup> Peru responded on 12 August 2016 that it reserved its rights with respect to this question.<sup>37</sup>
60. The tribunal in *Renco I* issued its Final Award concluding the proceedings on 9 November 2016.<sup>38</sup>

### **C. The Instant Arbitration**

61. On 12 August 2016, while the *Renco I* proceedings were still underway, Renco served Peru with a new Notice of Intent.<sup>39</sup>

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<sup>35</sup> *Renco I*, Partial Award, ¶¶ 184-188.

<sup>36</sup> Letter from Renco to Peru, dated 21 July 2016 ("In light of the Tribunal's Award on Jurisdiction dated July 15, 2016 in the above referenced matter, The Renco Group, Inc. requests that the Republic of Peru advise in writing whether it accepts that time stopped running for purposes of Article 10.18(1) of the Treaty when Renco filed its Amended Notice of Arbitration in the above referenced case on August 9, 2011.").

<sup>37</sup> Memorial on Preliminary Objections, ¶ 16. *See* Letter from Peru to Renco, 12 August 2016.

<sup>38</sup> *The Renco Group v. Republic of Peru*, Final Award, dated 9 November 2016 (ICSID Case No. UNCT/13/1) (C-11).

<sup>39</sup> Notice of Intent to Commence Arbitration, 12 August 2016 (C-10).

62. On 10 November 2016, Renco and Peru entered into a Consultation Agreement, which included a provision that, during the consultation period, the Article 10.18.1 prescription period would be suspended.<sup>40</sup>
63. On 20 October 2018 the consultation period ended.
64. On 23 October 2018, Renco initiated the present arbitration proceedings against Peru.<sup>41</sup>

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<sup>40</sup> Consultation Agreement, 10 November 2016 (**R-9**). The Consultation Agreement was amended and extended thereafter throughout the consultation period. *See* Amendment to Consultation Agreement, 27 February 2017 (**C-32**); Framework Agreement, 14 March 2017 (**R-10**); Framework Agreement Addendum, 15 March 2018 (**C-33**); Second Framework Agreement Addendum, 31 May 2018, countersigned by Respondent on 5 September 2018 (**C-34**).

<sup>41</sup> Notice of Arbitration and Statement of Claim, dated 23 October 2018.

#### IV. KEY LEGAL PROVISIONS

65. The Treaty was signed on 12 April 2006 and entered into force on 1 February 2009.
66. Articles 10.20.4, 10.20.5, and 10.20.6 of the Treaty pertain to preliminary objections by respondent parties:

##### **Article 10.20**

##### *Conduct of the Arbitration*

[...]

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.
- (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).
  - (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
  - (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
  - (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.
5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or

award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

67. Article 10.1.3 establishes a non-retroactivity requirement:

**Article 10.1.3**  
*Scope and Coverage*

[...]

3. For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

68. Article 10.18 establishes limitations on the Contracting Parties' consent to arbitration, including a temporal prescription:

**Article 10.18**

*Conditions and Limitations on Consent of Each Party*

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

[...]

69. Pursuant to the Vienna Convention on the Law of Treaties (the "VCLT"),<sup>42</sup> the foregoing provisions of the Treaty are to be interpreted as follows:

**Article 28**

*Non-retroactivity of treaties*

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which

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<sup>42</sup> Peru is a party to the VCLT. While the US is not, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. NDP Submission, n. 13 *referring to* Letter from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, October 18, 1971, *reprinted in* 65 DEP'T ST. BULL. 684, 685 (1971).

took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

[...]

### **Article 31**

#### *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

### **Article 32**

#### *Supplementary means of interpretation*

1. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
  - (a) leaves the meaning ambiguous or obscure; or
  - (b) leads to a result which is manifestly absurd or unreasonable.

70. In addition, the Treaty is to be applied in accordance with the rules set forth in the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (the “**ILC Articles on State Responsibility**”), Articles 13 and 14 of which read as follows:

### **Article 13**

#### *International obligation in force for a State*

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

**Article 14**

*Extension in time of the breach of an international obligation*

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.



**V. SUMMARY OF THE PARTIES' POSITIONS AND REQUESTS FOR RELIEF**

**A. Summary of Respondent's Preliminary Objections**

71. The Respondent raises preliminary objections to the Tribunal's jurisdiction in accordance with procedures established under Article 10.20.5 of the Treaty, which provides an expedited mechanism for resolving disputes as to a tribunal's competence. The Respondent raises its objections pursuant to Articles 10.1.3 and 10.18.1 of the Treaty, requesting that the Tribunal dismiss these proceedings in their entirety.<sup>43</sup>
72. **First**, the Respondent raises an objection under Article 10.1.3 ("Scope and Coverage") of the Treaty, which precludes any Party from raising claims relating "to any act or fact that took place or any situation that ceased to exist before the date of entry into force of [the Treaty]".<sup>44</sup>
73. **Secondly**, the Respondent raises an additional objection under Article 10.18.1 ("Conditions and Limitations on Consent of Each Party") of the Treaty, which precludes a claimant from raising claims later than three years following "the date on which the claimant first acquired, or should have acquired, knowledge of the breach alleged" and knowledge that the claimant "has incurred loss or damage". In the present case, the Respondent submits that this prescription period bars any claims by the Claimant under the Treaty based on alleged breaches arising before 13 November 2013, even if construed "in the manner most favorable to Claimant".<sup>45</sup>
74. The Respondent asserts that the Claimant raises its claims in violation of the aforementioned Treaty provisions, contending that, in its Notice of Arbitration and Statement of Claim, the Claimant has alleged only facts which predate the entry into force of the Treaty or the earliest dates for which claims would not be prescribed. Consequently, the Respondent argues that all three of the Claimant's claims violate the Treaty's temporal requirements and should be dismissed.<sup>46</sup>
75. Additionally, the Respondent submits that the Claimant failed to adhere to Treaty requirements in *Renco I*, resulting in its dismissal, and is not entitled, in the present proceedings, "to benefit

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<sup>43</sup> Memorial on Preliminary Objections, ¶ 2.

<sup>44</sup> Treaty, Art. 10.1.3.

<sup>45</sup> Memorial on Preliminary Objections, ¶¶ 2, 42.

<sup>46</sup> Memorial on Preliminary Objections, ¶¶ 2, 21.

from its improper submission of claims [in *Renco I*] to improperly extend the prescription period”.<sup>47</sup>

**B. Respondent’s Request for Relief**

76. In its Memorial on Preliminary Objections, Respondent requests that the Tribunal find that “Renco has [...] violated the Treaty and failed to establish the requirements for Peru’s consent to arbitrate under the Treaty” and “render an award dismissing Renco’s claims, with an award of costs in favor of Peru, and such further and other relief as the Tribunal may deem appropriate.”<sup>48</sup>

**C. Summary of Claimant’s Position on Respondent’s Preliminary Objections**

77. The Claimant rejects the Respondent’s preliminary objections in their entirety.
78. **First**, the Claimant contends that the Respondent failed to properly invoke the expedited review procedure available under Article 10.20.5 of the Treaty. The Claimant advances that “Article 10.20.5 requires a respondent to make and brief its objections within 45 days of the tribunal’s constitution” and that this deadline fell on 3 December 2019.<sup>49</sup> According to the Claimant, the Respondent’s 3 December 2019 Letter to the Tribunal was insufficient to trigger the expedited review mechanism as it provided only a “vague and unclear” notice of intent to raise “certain objections” and was “devoid of any factual bases or legal analysis”.<sup>50</sup> Consequently, the Claimant submits that the Respondent’s objections are inadmissible.
79. **Secondly**, the Claimant advances that the Respondent’s objections arising under Article 10.1.3, that the Claimant’s claims are “deeply rooted” in facts and acts predating the entry into force of the Treaty and therefore fall outside of this Tribunal’s jurisdiction, are meritless.<sup>51</sup> The Claimant contends that each of its claims arises out of facts and events that occurred during or after March 2009 and therefore do not violate the non-retroactivity principle.<sup>52</sup>

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<sup>47</sup> Memorial on Preliminary Objections, ¶ 2.

<sup>48</sup> Memorial on Preliminary Objections, ¶¶ 106-107.

<sup>49</sup> Counter-Memorial on Preliminary Objections, ¶ 3.

<sup>50</sup> Counter-Memorial on Preliminary Objections, ¶ 3, *referring to* Respondent Letter to the Tribunal, 3 December 2019 (C-13).

<sup>51</sup> Counter-Memorial on Preliminary Objections, ¶ 4.

<sup>52</sup> Counter-Memorial on Preliminary Objections, ¶ 5.

80. **Thirdly**, the Claimant contends that the Respondent's objections that the Claimant's claims are time-barred by the three-year prescription period under Article 10.18.1 lack merit. The Claimant notes that the text of the Article is silent on whether the pendency of timely arbitration proceedings suspends the time limitation period with respect to any later resubmission to arbitration following a dismissal without prejudice. However, according to the Claimant, a "good faith interpretation" of the Article in accordance with principles of the Vienna Convention on the Law of Treaties "leads to the undeniable conclusion that the three year limitations period under Article 10.18.1 was suspended during the pendency of the *Renco I* arbitration".<sup>53</sup>
81. **Fourthly**, the Claimant argues, in the alternative, that the Respondent is not entitled to rely on its Article 10.18.1 objections because, in light of its conduct in *Renco I*, its objections constitute an "abuse of rights".<sup>54</sup> The Claimant emphasizes that, despite multiple opportunities to raise its waiver objection throughout the proceedings, Peru waited three and a half years to raise this objection. The Claimant further points out that the *Renco I* tribunal unanimously condemned this conduct as prejudicial to the Claimant should the Respondent proceed to raise a prescription defence in subsequent arbitration proceedings.<sup>55</sup>
82. **Finally**, the Claimant advances that its denial of justice claim is not time-barred. According to the Claimant, it is "well settled that a denial of justice claim arises when local remedies are exhausted".<sup>56</sup> Therefore, the Claimant submits that the breach underpinning the claim did not occur until 3 November 2015, within three years of the initiation of this arbitration, when the Supreme Court of Peru denied DRP's appeal with respect to its claims that the Ministry of Energy and Mines asserted an improper US\$ 163 million credit against DRP when it entered bankruptcy.<sup>57</sup>

**D. Claimant's Request for Relief**

83. In the Counter-Memorial on Preliminary Objections, Claimants request that the Tribunal render an interim award ordering the following relief:

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<sup>53</sup> Counter-Memorial on Preliminary Objections, ¶ 7.

<sup>54</sup> Counter-Memorial on Preliminary Objections, ¶ 8.

<sup>55</sup> Counter-Memorial on Preliminary Objections, ¶¶ 8-10.

<sup>56</sup> Counter-Memorial on Preliminary Objections, ¶ 11.

<sup>57</sup> Counter-Memorial on Preliminary Objections, ¶ 11.

1. Declare that Peru's 10.20.5 objections are not admissible, and permit Renco to submit its full Memorial in this case
2. In the alternative, deny Peru's 10.20.5 objections, and permit Renco to submit its full Memorial in this case.
3. In all cases, order Peru to pay for Renco's costs in connection with this phase of the proceeding, including legal fees.<sup>58</sup>

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<sup>58</sup> Counter-Memorial on Preliminary Objections, ¶ 180.

## VI. THE NON-DISPUTING PARTY SUBMISSION

84. On 7 March 2020, the US, as a non-disputing State party to the Treaty, made a written submission pursuant to Article 10.20.2 of the Treaty. The US notes that it does not take a position on how its interpretation of the relevant Treaty provisions applies to the facts of this case and that “no inference should be drawn from the absence of comment on any issue not addressed”.<sup>59</sup>
85. **First**, the US proffers its interpretation of Article 10.18.1, according to which the limitation period within which a claimant must bring a claim is three years after the date on which “claimant first acquired, or should have first acquired, knowledge of the breach”.<sup>60</sup>
86. The US avers that the Claimant bears the burden of proof to establish jurisdiction and must present relevant facts to establish that each of its claims falls within the three-year period.<sup>61</sup> Additionally, the US describes this limitation period as “clear and rigid”, not to be modified by any “suspension, prolongation or other qualification”, and that the knowledge that triggers the limitation period can only occur on a single date, when the breach first occurs.<sup>62</sup>
87. The US defines knowledge of “incurred loss or damage” to mean knowledge of the existence of such loss or damage, even if it cannot be quantified until a later date, and “incur” to mean “to become liable or subject to”, which includes losses or damages that are not immediate.<sup>63</sup>
88. The US defines “breach” as an act of a State “not in conformity with what is required of it by that obligation”, and because responsibility of a State cannot be invoked for non-final judicial acts unless domestic remedies are “obviously futile or manifestly ineffective” then “non-final judicial acts have not ripened into the type of final act that is sufficiently definite to implicate state responsibility”.<sup>64</sup> As such, the US submits that the three-year limitation period does not begin to run until the date the “claimant acquired, or should have acquired, knowledge that either the breach has occurred—*i.e.*, when all available domestic remedies have been exhausted, unless

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<sup>59</sup> NDP Submission, ¶ 2.

<sup>60</sup> NDP Submission, ¶ 3.

<sup>61</sup> NDP Submission, ¶ 3.

<sup>62</sup> NDP Submission, ¶ 4.

<sup>63</sup> NDP Submission, ¶ 5.

<sup>64</sup> NDP Submission, ¶ 6.

obviously futile or manifestly ineffective—or the claimant or enterprise has incurred loss or damage, whichever is later.”<sup>65</sup>

89. **Secondly**, in relation to non-retroactivity under Article 10.1.3 of the Treaty, the US states that a State’s conduct prior to entry into force of the Treaty may be relevant to determining if said State breached an obligation, but that there must exist conduct after the date of entry into force that itself constitutes a breach.<sup>66</sup> Pre-entry into force conduct alone, even if left unremedied, does not suffice.<sup>67</sup>

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<sup>65</sup> NDP Submission, ¶ 7.

<sup>66</sup> NDP Submission, ¶¶ 8-9.

<sup>67</sup> NDP Submission, ¶ 9.

## VII. THE TRIBUNAL'S REASONING

90. The Tribunal has carefully reviewed all of the arguments and evidence presented by the Parties during the preliminary phase of these proceedings. Although the Tribunal may not address all such arguments and evidence in full detail in its reasoning below, the Tribunal has nevertheless considered and taken them into account in arriving at its decision.

### A. The Sufficiency of Respondent's Submissions to Trigger the Article 10.20.5 Expedited Review Mechanism

91. Article 10.20.5 of the Treaty provides that a respondent wishing to exercise the expedited review mechanism must so request no later than 45 days after the constitution of the tribunal.

92. On 19 October 2019, Judge Simma accepted his appointment as President of the Tribunal and the Tribunal was fully constituted,<sup>68</sup> triggering the Article 10.20.5 time limits.<sup>69</sup>

93. On 3 December 2019, forty-five days following Judge Simma's appointment as President of the Tribunal, the Respondent sent a letter to the Tribunal in which it gave "notice regarding certain objections".<sup>70</sup>

94. The Claimant contends that the Respondent's 3 December 2019 letter to the Tribunal failed to satisfy the requirements to trigger the Article 10.20.5 expedited review mechanism as the Respondent did not provide the necessary factual bases or legal analysis to invoke this review procedure until it submitted its Memorial on Preliminary Objection on 20 December 2019.<sup>71</sup> On the other hand, the Respondent argues that its "notice" was all that was required to trigger the Article 10.20.5 expedited review mechanism.

#### 1. Claimant's position

95. The Claimant argues that the Respondent's 3 December 2019 letter failed to trigger the expedited review mechanism, because it failed to clearly articulate its objections and their legal bases.<sup>72</sup> Rather, according to the Claimant, the Respondent's letter provided only "vague notice of

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<sup>68</sup> See Email from Judge Simma, 19 October 2019 (C-12).

<sup>69</sup> Counter-Memorial on Preliminary Objections, ¶ 50.

<sup>70</sup> Respondent's Letter to the Tribunal, 3 December 2019 (C-13).

<sup>71</sup> Counter-Memorial on Preliminary Objections, ¶ 50.

<sup>72</sup> Hearing Transcript, 12 June 2020, 127:9-22; Hearing Transcript 13 June 2020, 190:2-5.

objections”.<sup>73</sup> The Claimant contends that, as a result of this failure, the Respondent is unable now to avail itself of this expedited review procedure.<sup>74</sup>

96. The Claimant contends that the Respondent mischaracterizes the Claimant’s position and clarifies that it does not argue that, in order to trigger the Article 10.20.5 mechanism, the Respondent was required to submit a full Memorial, but rather that the Respondent failed to meet even the lower bar required for a “request” for such proceedings.<sup>75</sup> To this end, the Claimant emphasizes that the Respondent’s 3 December 2019 letter “giv[ing] notice regarding certain objections” did not constitute a “request” to trigger the expedited review mechanism under Article 10.20.5 of the Treaty.<sup>76</sup>
97. The Claimant submits that, according to an interpretation of Article 10.20.5 “in good faith and in accordance with the ordinary meaning of its terms, in the context of the Treaty as a whole”,<sup>77</sup> the Respondent was required to make a request that clearly articulated and briefed its objections.<sup>78</sup> The Claimant notes that the provision “does not establish a procedure by which the respondent may give notice of an objection before submitting it to the tribunal”, but rather requires the Respondent to issue its request for expedited review of its objections within a narrow time limit of 45 days, upon which the Tribunal is thereafter required to issue a decision within 150 days.<sup>79</sup>
98. Relying on the finding in *Feldman v. Mexico*, the Claimant argues that “delivery of a notice of intent to submit a claim to arbitration does not satisfy the requirement of having to ‘make a claim’.”<sup>80</sup> The Claimant rejects the Respondent’s contention that there exists a fundamental difference between initiating an arbitration and issuing an objection in an already initiated arbitration. According to the Claimant, in either event, a Party raising an objection must provide

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<sup>73</sup> Claimant’s Letter to the Tribunal, 10 December 2019, p. 2 (C-14).

<sup>74</sup> Claimant’s Letter to the Tribunal, 10 December 2019, p. 1 (C-14).

<sup>75</sup> Counter-Memorial on Preliminary Objections, ¶ 51.

<sup>76</sup> Respondent’s Letter to the Tribunal, 3 December 2019 (C-13).

<sup>77</sup> Claimant’s Letter to the Tribunal, 10 December 2019, p. 2 (C-14). *See also* Counter-Memorial on Preliminary Objections, ¶ 51.

<sup>78</sup> *See* Memorial on Preliminary Objections, ¶ 97.

<sup>79</sup> Claimant’s Letter to the Tribunal, 10 December 2019, p. 2 (C-14). *See also* Hearing Transcript, 12 June 2020, 127:24-128:9.

<sup>80</sup> Counter-Memorial on Preliminary Objections, ¶ 52, *referring to Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Submission of the United States of America on Preliminary Issues, 6 October 2000, ¶ 14 (CLA-1).



a basis for the objection it submits.<sup>81</sup> The Claimant further notes that, when the Respondent has previously filed objections under expedited review mechanisms analogous to the Article 10.20.5 mechanism, it briefed its objections clearly and within the limitation period, as required.<sup>82</sup> The Claimant notes that the US NDP Submission did not contradict this interpretation of Article 10.20.5.<sup>83</sup>

99. In addition, the Claimant contends that it would be “severely prejudiced” should the Respondent be able to trigger the expedited review “without actually submitting its objections to the tribunal for decision” as the Article requirements already shorten the amount of time within which the Claimant must respond to the Respondent’s objections and the Tribunal must issue its decision – a total of 150 days from the Respondent’s request.<sup>84</sup> The Claimant argues that the drafters of the Treaty would not have “intended to give the respondent such an unfair procedural advantage” in a review mechanism that may result in the dismissal of the Claimant’s entire case.<sup>85</sup>
100. The Claimant proffers that it was not until the Respondent submitted its Memorial on Preliminary Objections on 20 December 2019, more than two weeks following the expiry of the limitation period, that it fully presented its objections.<sup>86</sup> The Claimant additionally notes that the Respondent had more than one year to prepare an adequate submission to trigger the Article 10.20.5 procedure, since the Claimant submitted its Notice of Arbitration and Statement of Claim on 23 October 2018.<sup>87</sup>
101. Finally, the Claimant argues that the object and purpose of Article 10.20.5 supports its interpretation of the provision’s language. Referring to *Jin Hae Seo v. Republic of Korea*, the Claimant notes that the US explained that clauses identical to Article 10.20.5 of the Treaty were included in all of its recent trade agreements in order “to efficiently and cost-effectively address certain preliminary objections”.<sup>88</sup> The Claimant submits that the object and purpose of the

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<sup>81</sup> Counter-Memorial on Preliminary Objections, ¶ 52.

<sup>82</sup> Counter-Memorial on Preliminary Objections, ¶ 53.

<sup>83</sup> Claimant’s Comments on NDP Submission, ¶¶ 4-5.

<sup>84</sup> Claimant’s Letter to the Tribunal, 10 December 2019, p. 2 (C-14).

<sup>85</sup> Claimant’s Letter to the Tribunal, 10 December 2019, p. 3 (C-14).

<sup>86</sup> Counter-Memorial on Preliminary Objections, ¶ 50.

<sup>87</sup> Counter-Memorial on Preliminary Objections, ¶ 54.

<sup>88</sup> Claimant’s Letter to the Tribunal, 10 December 2019, p. 3 (C-14).

provision therefore supports the requirement that the Respondent “is meant to submit and fully brief all of its objections within the 45-day deadline”.<sup>89</sup>

## 2. Respondent’s position

102. The Respondent submits that, in its 3 December 2019 letter to the Tribunal, the Respondent requested that the Tribunal decide on its preliminary objections in accordance with the expedited review procedure available under Article 10.20.5 of the Treaty.<sup>90</sup> According to the Respondent, the language of the provision requires only that the Respondent submit a “request” within the prescribed period in order to invoke the expedited review mechanism. The Respondent submits that the language in its 3 December 2019 letter to the Tribunal clearly indicates that it was issuing such a request, stating that “Respondent hereby notifies its request for the Tribunal to decide on an expedited basis certain objections that the dispute is not within the Tribunal’s competence”.<sup>91</sup>
103. The Respondent contends that the Claimant errs in arguing that the Respondent is required to submit a full brief in the first instance in order to trigger Article 10.20.5 procedures. According to the Respondent, no language indicating that a full brief is required is present in the Treaty text.<sup>92</sup>
104. The Respondent submits that the *RDC v. Guatemala* case, upon which the Claimant relies, actually cuts in favour of the Respondent, as in that case Guatemala successfully initiated expedited review of its preliminary objections by first filing a three-page letter containing its

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<sup>89</sup> Claimant’s Letter to the Tribunal, 10 December 2019, p. 3 (C-14). The Claimant further highlights that in a number of cases within which the expedited review mechanism, identical to that available under the Treaty, was exercised, the respondents in those cases fully briefed all of their objections within the 45-day deadline. *See* Claimant’s Letter to the Tribunal, 10 December 2019, p. 3 (C-14), referring to *Jin Hae Seo v. The Republic of Korea*, HKIAC Case No. 18117, Submission of the United States of America, 19 June 2019, ¶¶ 2-5 (Ex. A); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶¶ 3-5 (Ex. B); *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶¶ 37-39 (Ex. C); *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 17-20 (Ex. D); *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶¶ 13-17 (Ex. E); *Jin Hae Seo v. The Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019, ¶¶ 10-11 (Ex. F). *See also* Hearing Transcript, 12 June 2020, 129:4-12.

<sup>90</sup> Memorial on Preliminary Objections, ¶ 93.

<sup>91</sup> Memorial on Preliminary Objections, ¶ 96, citing Respondent’s Letter to the Tribunal, 3 December 2019 (C-13).

<sup>92</sup> Memorial on Preliminary Objections, ¶ 97.

request and submitting a full brief thereafter.<sup>93</sup> The Respondent further contends that the Claimant improperly relies on *Feldman v. Mexico*, which is inapposite to the present dispute as its holding relates to requirements for submitting claims, not to requirements for submitting objections pursuant to an expedited procedure.<sup>94</sup> In this connection, the Respondent considers it noteworthy that the US maintained its silence in its NDP Submission on the question of the sufficiency of the Respondent's submission to trigger the Article 10.20.5 expedited review mechanism, including with respect to the relevance of the *Feldman v. Mexico* tribunal under the North American Free Trade Agreement (“NAFTA”).<sup>95</sup>

105. Finally, the Respondent submits that it is irrelevant that Peru has had “more than a year” to prepare a submission on its preliminary objections, as the Treaty sets the relevant timeframe based on the date of the Tribunal's constitution and not on the date on which the Claimant issued its Notice of Arbitration and Statement of Claim.<sup>96</sup> The Respondent submits that the Claimant's objections are not aimed at efficiency or cost-effectiveness but rather represent an attempt to “prolong the pacing of objections for its own tactical purposes”.<sup>97</sup>
106. Consequently, the Respondent argues that it properly raised its Article 10.20.5 objections, and the Tribunal has the authority to decide on these objections.<sup>98</sup>

### 3. The Tribunal's analysis

107. The Tribunal has taken note of the Parties' contentions regarding the admissibility of the Respondent's objections under Article 10.20.5 of the Treaty. The Treaty's terms require a “request [that] the tribunal [...] decide on an expedited basis [...] any objection that the dispute is not within the tribunal's competence.” The Treaty also imposes a deadline for the Tribunal to “issue a decision or award on the objection(s)” counted in “days after the date of the request.”
108. In the view of the Tribunal, and as accepted by the Claimant, a “request” under this provision need not be equated to a full “memorial” on the objections to be decided. However, the Claimant

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<sup>93</sup> Memorial on Preliminary Objections, ¶ 101, referring to *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Letter from Guatemala to ICSID, 29 May 2008, ¶¶ 1, 3 (RLA-12).

<sup>94</sup> Memorial on Preliminary Objections, ¶ 102.

<sup>95</sup> Respondent's Comments, ¶¶ 107-108.

<sup>96</sup> Memorial on Preliminary Objections, ¶ 99.

<sup>97</sup> Memorial on Preliminary Objections, ¶¶ 94, 103.

<sup>98</sup> Memorial on Preliminary Objections, ¶ 104.

also argues—and the Tribunal concurs—that mere “notice” does not constitute a “request” under this article, either. Naturally, a request to decide an objection must state the objection to be decided.

109. The question is nevertheless where in this spectrum the Respondent’s 3 December 2019 letter falls. Beyond excerpting Articles 10.20.5, 10.1.3, and 10.1.8 of the Treaty and noting the 1 February 2009 date of the Treaty’s entry into force, the elaboration of the Respondent’s objections is limited to the following five sentences:

Here, Claimant filed its Notice of Arbitration and Statement of Claim in the Treaty Case (the “Treaty Statement of Claim”) on October 23, 2018. The Parties also have entered into certain relevant agreements.<sup>1</sup> [FN1: See, e.g., Framework Agreement (as Amended), March 14, 2017 (Doc. R-10).] [...] Claimant’s claims do not meet the Treaty’s temporal requirements. As set forth in the Treaty Statement of Claim, the measures that Claimant alleges to have breached the Treaty occurred either before the Treaty’s entry into force and Claimant first acquired or should have first acquired, knowledge concerning a breach and loss or damage arising therefrom before the relevant prescription period. To the extent that the Treaty Statement of Claim references allegations that arose after the relevant time period, claims based thereon appear to be impermissible as well for related reasons.

110. In the Tribunal’s view, it is clear that the Respondent’s letter did not comport with existing practice under this type of provision in other treaties based on the same model. Nor does it fit well with the expedited nature of the process which follows.
111. The Tribunal need not decide, however, whether prior practice under this provision accurately reflects the required content for a “request” to be admissible. Given the context surrounding the Respondent’s letter, and in particular the prior proceedings in *Renco I*, the Claimant cannot reasonably plead ignorance of the nature and content of the objections that were being submitted for expedited determination under Article 10.20.5. In any event, the Tribunal has decided to dismiss the Respondent’s objections on their substance, such that no ruling on the admissibility of the objections is ultimately required.

**B. The Respondent’s Preliminary Objections to the Tribunal’s Jurisdiction Pursuant to the Treaty’s Temporal Requirements**

112. According to Article 10.1.3 of the Treaty, it “does not bind any Party in relation to any act or fact that took place before the date of entry into force” and therefore, the Treaty may not be applied retroactively.<sup>99</sup>

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<sup>99</sup> Memorial on Preliminary Objections, ¶ 2; Counter-Memorial, ¶¶ 55-56. See also Hearing Transcript, 12 June 2020, 24:2-12.

113. Article 10.18.1 of the Treaty additionally proscribes the submission of claims to arbitration following three years after a claimant acquired, or ought to have acquired knowledge, of the respondent's alleged breach and the existence of loss or damage resulting from such breach.<sup>100</sup>
114. The Respondent contends that the Claimant's fair and equitable treatment ("FET") and indirect expropriation claims arise out of alleged facts and events that predate the Treaty's entry into force.<sup>101</sup> In addition, the Respondent submits that, in initiating the present arbitration on 23 October 2018, the Claimant has failed to abide by the Treaty's three-year prescription period, which began either on 23 October 2015 or, if "adjusted in the manner most favourable to the Claimant", on 13 November 2013.<sup>102</sup> Consequently, the Respondent argues that the Claimant's claims are time-barred under both Articles 10.1.3 and 10.18.1 of the Treaty, resulting in "the concomitant lack of jurisdiction of the tribunal".<sup>103</sup> The Respondent contends that it is incumbent upon the Claimant to prove "that it has complied with all requirements for submitting a claim under the Treaty" and that the Claimant has failed to meet this burden as to the Treaty's temporal requirements.<sup>104</sup>
115. For its part, the Claimant first submits that all of its claims arise out of facts or events that arose after the Treaty entered into force.<sup>105</sup> The Claimant also notes that it submitted its FET and indirect expropriation claims in *Renco I* within three years of first becoming aware of the Respondent's breaches of the Treaty and argues that, upon initiating the first arbitration proceedings, the limitation period was suspended, "such that Claimant's resubmission of its FET and indirect expropriation claims in *this* arbitration also is timely".<sup>106</sup> The Claimant contends that

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<sup>100</sup> Hearing Transcript, 12 June 2020, 24:15-20.

<sup>101</sup> Memorial on Preliminary Objections, ¶ 2.

<sup>102</sup> Memorial on Preliminary Objections, ¶ 2.

<sup>103</sup> Memorial on Preliminary Objections, ¶ 22, quoting *Renco I*, Second Non-Disputing Party Submission of the United States, 1 September 2015 (**R-12**), ¶ 15.

<sup>104</sup> Memorial on Preliminary Objections, ¶ 24. The Respondent further submits that the Claimant's Notice of Arbitration and Statement of Claim fails to provide sufficient evidence of its compliance with the Treaty's temporal requirements, and the Claimant cannot now, as it has signaled it intends to do, submit a more comprehensive factual account of its case in order to cure these defects. The Respondent points out that the Claimant was not required but chose to designate its original submission as a "Notice of Arbitration and Statement of Claim" which under the UNCITRAL Arbitration Rules, Article 20(2), "shall include" a statement of facts in support of a claimant's claim, and "should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them. Memorial on Preliminary Objections, ¶ 40, quoting UNCITRAL Arbitration Rules 2013, Art. 20(2).

<sup>105</sup> Hearing Transcript, 12 June 2020, 106:19-22.

<sup>106</sup> Counter-Memorial on Preliminary Objections, ¶ 76 [emphasis in original].

its denial of justice claim is also timely because the Supreme Court of Peru rendered its decision on DRP's appeal on 3 November 2015, within three years of the Claimant's initiation of the present arbitration on 23 October 2018.<sup>107</sup> Thus, the Claimant argues that all of its claims satisfy the temporal requirements prescribed by the Treaty and are therefore within the jurisdiction of the Tribunal.<sup>108</sup>

**1. The Respondent's objections arising under Article 10.1.3 of the Treaty**

**a) Respondent's position**

116. The Respondent's first objection to the Claimant's claims arises under Article 10.1.3, about which the Respondent argues that "[u]nder the plain meaning of Article 10.1.3, the Treaty does not cover – and, thus, the Contracting Parties have not consented to arbitrate – any claim that is predicated on alleged acts or facts that took place before the Treaty entered into force".<sup>109</sup>
117. The Respondent contends that tribunals have repeatedly held that their jurisdiction cannot be retroactively extended over facts or events occurring before an investment treaty's entry into force.<sup>110</sup>
118. The Respondent submits that the tribunal in *Berkowitz v. Costa Rica*,<sup>111</sup> applying an identical provision under the Dominican Republic-Central America-United States Free Trade Agreement ("**DR-CAFTA**"), held that the non-retroactivity rule enshrined in Article 10.1.3 equally applies to "later measures that are so intertwined with pre-Treaty acts and facts that they cannot be detached and adjudicated independently".<sup>112</sup> The Respondent notes that, similar to the circumstances from which the present dispute arises, the tribunal in *Berkowitz v. Costa Rica* declined to extend its jurisdiction to breaches occurring after the DR-CAFTA's entry into force because it found that these breaches were enacted in accordance with a regulatory regime

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<sup>107</sup> Counter-Memorial on Preliminary Objections, ¶ 78.

<sup>108</sup> Counter-Memorial on Preliminary Objections, ¶ 55.

<sup>109</sup> Memorial on Preliminary Objections, ¶ 26. *See also* Hearing Transcript, 12 June 2020, 13:25-14:2.

<sup>110</sup> Memorial on Preliminary Objections, n. 26, *citing* *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶ 67 (**RLA-6**); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002 (James Crawford, Stephen M. Schwebel, Ninian Stephen (President)), ¶ 70 (**RLA-8**).

<sup>111</sup> *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶ 253 (**RLA-36**).

<sup>112</sup> Memorial on Preliminary Objections, ¶ 27. *See also* Hearing Transcript, 12 June 2020, 33:6-18.

implemented by Costa Rica prior to the treaty's adoption.<sup>113</sup> The Respondent notes that, although the US kept its silence on whether the Claimant's claims violated the non-retroactivity requirement found in the Treaty, the US approvingly cited *Berkowitz v. Costa Rica* for the same standard which underpins its own arguments on the issue.<sup>114</sup>

119. The Respondent notes that the Treaty entered into force on 1 February 2009. In light of the foregoing considerations, the Respondent submits that this Tribunal's jurisdiction does not extend over alleged breaches occurring prior to this date or such breaches occurring thereafter that are "rooted in, and not independently actionable from the earlier alleged acts or facts".<sup>115</sup>

120. To this end, the Respondent argues that the Claimant's FET claim<sup>116</sup> and indirect expropriation claim are time-barred as they are "predicated on a dispute on DRP's compliance with its environmental obligations that predates the entry into force of the Treaty, and Renco has not alleged any measures in this regard later than 2009".<sup>117</sup> The Respondent contends that these claims were time-barred during the *Renco I* arbitration as well as in the present proceedings.<sup>118</sup>

(1) The Claimant's FET claim

121. **First**, the Respondent argues that the Claimant's FET claims that are predicated on facts or events which occurred prior to the Treaty's entry into force are automatically time-barred.

122. The Respondent submits that the majority of the Claimant's Statement of Facts section of its Notice of Arbitration and Statement of Claim presents facts and events which occurred prior to 1 February 2009.<sup>119</sup> The Respondent highlights the following relevant facts as presented in the

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<sup>113</sup> Memorial on Preliminary Objections, ¶ 28. *See also* Hearing Transcript, 12 June 2020, 35:2-4.

<sup>114</sup> Respondent's Comments on NDP Submission, ¶¶ 17-23.

<sup>115</sup> Memorial on Preliminary Objections, ¶ 29. *See also* Hearing Transcript, 12 June 2020, 33:15-34:1.

<sup>116</sup> Specifically, that Perú breached the Treaty by imposing additional environmental regulations on the DRP, requiring it to spend increased time and financial resources, but simultaneously denying sufficient extra time to comply. Memorial on Preliminary Objections, ¶¶ 60-61.

<sup>117</sup> Memorial on Preliminary Objections, ¶¶ 56, 58, 69; Hearing Transcript, 12 June 2020, 27:14-22, 38:5-12.

<sup>118</sup> Memorial on Preliminary Objections, ¶ 56. The Respondent emphasizes that the Claimant's articulation of its FET and indirect expropriation claims in its Notice of Arbitration and Statement of Claim "is practically identical" to that which it presented in its Statement of Claim in *Renco I*, dated 9 August 2011 (C-16). *See also* Memorial on Preliminary Objections, ¶ 59.

<sup>119</sup> Memorial on Preliminary Objections, ¶ 43.

Claimant's Notice of Arbitration and Statement of Claim, all of which took place prior to the entry into force of the Treaty:<sup>120</sup>

- "Early 1970s – Early 1990s": the Peruvian Government's operation of "One of the Most Polluted Smelter Sites in the World."<sup>121</sup>
- "Early 1990s" and "[in] 1994": lack of interest in the Facility due to environmental concerns.<sup>122</sup>
- In 1996, 1996, and 1997: Peru's alleged commitment to developing the PAMA for the facility.<sup>123</sup>
- From 1999 to 2003: following DRP's acquisition of the facility, the ensuing challenges to compliance with increasing environmental obligations imposed by MEM.<sup>124</sup>
- From 2003 to 2005 and in 2006: following DRP's realization that in the development of the Facility and sulfuric acid plants that significant additional work would be required to conform to environmental regulations, and the company's subsequent request for a five-year extension to complete the PAMA, MEM's grant of just under three years-extension and imposition of 14 new required projects.<sup>125</sup>
- By January 2007, January 2008, and December 2007: DRP's completion of all but one PAMA project.<sup>126</sup>

123. Specifically, the Respondent avers that the Claimant's FET claims that are predicated on allegations regarding MEM's imposition of new environmental obligations on DRP must be time-barred because these events occurred between 1999 and 2002.<sup>127</sup> Additionally, the Respondent emphasizes that any alleged breach by the Respondent with respect to MEM's grant of a PAMA

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<sup>120</sup> Memorial on Preliminary Objections, ¶¶ 43-51.

<sup>121</sup> Notice of Arbitration and Statement of Claim ¶ 11.

<sup>122</sup> Notice of Arbitration and Statement of Claim ¶ 14.

<sup>123</sup> Notice of Arbitration and Statement of Claim ¶¶ 18-19.

<sup>124</sup> Notice of Arbitration and Statement of Claim ¶¶ 21-22, 25, 27.

<sup>125</sup> Notice of Arbitration and Statement of Claim ¶¶ 32-34.

<sup>126</sup> Notice of Arbitration and Statement of Claim, ¶¶ 36-37.

<sup>127</sup> Memorial on Preliminary Objections, ¶ 61.



extension in 2006 or DRP's efforts to comply with its environmental obligations by 2007 cannot be arbitrated in the present proceedings.<sup>128</sup>

124. **Secondly**, the Respondent contends that the Claimant's FET claims based on allegations of fact occurring after the Treaty's entry into force are also time-barred as they arise out of a dispute that predates the adoption of the Treaty and are "rooted in, and not independently actionable from the earlier alleged acts or facts".<sup>129</sup>
125. The Respondent submits that the Claimant's remaining FET claims are based on (i) allegations regarding MEM's denial of an additional extension and (ii) allegations regarding the public comments of Peruvian government officials disparaging DRP.<sup>130</sup>
126. In respect of the first set of allegations, the Respondent notes that, upon failing to complete the final PAMA project, DRP requested a second extension on 5 March 2009, which the Claimant claims was unreasonably rejected by MEM in May 2009.<sup>131</sup> The Respondent additionally notes that the Claimant argues that, despite that in September 2009 the Congress of Peru passed legislation permitting such an extension, the Government of Peru undermined the benefits of this law by passing additional onerous regulations.<sup>132</sup>
127. With respect to the second set of allegations, the Respondent notes that the Claimant claims that Peruvian government officials breached the Treaty FET standard by issuing disparaging public statements in May 2009, July 2010, and August 2010, allegedly made to discredit DRP vis-à-vis its creditors.<sup>133</sup>
128. The Respondent submits that "[t]he denial of the 2009 PAMA extension and public statements by officials are intrinsically linked to Peru's efforts of more than a decade to enforce DRP's compliance with the obligations it acquired in 1997".<sup>134</sup> Consequently, according to the

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<sup>128</sup> Memorial on Preliminary Objections, ¶ 51.

<sup>129</sup> Memorial on Preliminary Objections, ¶ 29.

<sup>130</sup> Memorial on Preliminary Objections, ¶¶ 61-64.

<sup>131</sup> Memorial on Preliminary Objections, ¶ 62, *referring to* Notice of Arbitration and Statement of Claim, ¶¶ 63-64.

<sup>132</sup> Memorial on Preliminary Objections, ¶ 62, *referring to* Notice of Arbitration and Statement of Claim, ¶ 49.

<sup>133</sup> Memorial on Preliminary Objections, ¶ 64, *referring to* Notice of Arbitration and Statement of Claim, ¶¶ 47, 65; *Renco I*, Amended Notice of Arbitration and Statement of Claim, 9 August 2011, nn. 32-34 (**R-12**).

<sup>134</sup> Memorial on Preliminary Objections, ¶ 66.

Respondent, while the above set of facts occurred after the entry into force of the Treaty, they each “have deep roots in the pre-entry conduct” and are time-barred.<sup>135</sup>

(2) Claimant’s claims of indirect expropriation

129. The Respondent submits that the Claimant’s claim of indirect expropriation is also time-barred by Article 10.1.3 as “[t]he facts alleged by Renco relevant to this claim predate or are deeply rooted in facts that predate the Treaty’s entry into force”.<sup>136</sup>

130. **First**, according to the Respondent, the Claimant contends that the Government of Peru breached the Treaty’s protections by imposing increasingly onerous environmental obligations on DRP, while concurrently failing to provide DRP with reasonable extensions to fulfil these obligations or otherwise impeded the completion of these tasks when extensions were granted, by disparaging DRP’s reputation and frustrating its efforts to obtain financing.<sup>137</sup> The Respondent submits that the Claimant applies the same factual support for these claims as it employed with respect to its FET claim.<sup>138</sup> Consequently, the Respondent argues that this claim of breach is time-barred for the same reasons articulated above.

131. **Secondly**, the Respondent notes that the Claimant asserts that Peru violated the Treaty’s protections against indirect expropriation by “assert[ing] large and baseless credits that gave it unjustified, creditor voting rights in DRP’s bankruptcy proceeding” so that it might impede DRP’s reasonable restructuring efforts, force the company to liquidate, and divest Renco of “control of its investment, indirect ownership of its investment’s assets, and the entire economic value of its investment in Peru”.<sup>139</sup> The Respondent argues that, because the Claimant alleges that DRP filed for bankruptcy due to the alleged unfair treatment it suffered from Peru, the basis for its indirect expropriation claims in respect of DRP’s bankruptcy are “deeply rooted in pre-entry into force conduct” and are thus time-barred for the same reasons articulated above.<sup>140</sup>

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<sup>135</sup> Memorial on Preliminary Objections, ¶¶ 65-66.

<sup>136</sup> Memorial on Preliminary Objections, ¶ 69.

<sup>137</sup> Memorial on Preliminary Objections, ¶ 70, *citing* Notice of Arbitration and Statement of Claim, ¶ 68.

<sup>138</sup> Memorial on Preliminary Objections, ¶ 70.

<sup>139</sup> Memorial on Preliminary Objections, ¶ 71, *citing* Notice of Arbitration and Statement of Claim, ¶ 68.

<sup>140</sup> Memorial on Preliminary Objections, ¶ 73.

*b) Claimant's position*

132. The Claimant argues that its claims in the present arbitration arise out of breaches by the Respondent that occurred after the Treaty entered into force.
133. **First**, the Claimant contends that its FET claim that the Respondent breached Article 10.5 of the Treaty “is based on Respondent’s refusals, starting on March 10, 2009 (after the Treaty came into effect), to grant contractually required PAMA extensions to DRP, and Peru’s actions thereafter; as well as Peru’s ensuing disparaging public campaign against Claimant and DRP”.<sup>141</sup>
134. **Secondly**, the Claimant advances that its indirect expropriation claims that the Respondent breached Article 10.7 of the Treaty are based on the Respondent’s actions with respect to DRP’s bankruptcy proceedings, all of which took place in 2012, after the entry into force of the Treaty.<sup>142</sup>
135. **Thirdly**, the Claimant challenges the Respondent’s argument that the facts underpinning the Claimant’s claims that arose after the entry into force of the Treaty are “deeply rooted” in Peru’s conduct and policies that predate the Treaty and that, for this reason, Claimant’s claims are time-barred pursuant to Article 10.1.3.<sup>143</sup> The Claimant notes that the US NDP Submission supports the Claimant’s position that the Tribunal may consider facts prior to the Treaty’s entry into force to determine whether the Respondent committed a breach at a point after the Treaty entered into force.<sup>144</sup>
136. The Claimant points out that it bases its claims solely on Peru’s conduct occurring on or after 10 March 2009, a full month after the Treaty’s entry into force. The Claimant emphasizes that while DRP agreed to assume additional PAMA-imposed obligations and while MEM only partially granted DRP’s extension request in May 2006, the Claimant does not consider these facts to constitute wrongful conduct by Peru.<sup>145</sup> According to the Claimant, the Respondent’s violations of the Treaty began on 10 March 2009, when Peru rejected DRP’s request for an extension to

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<sup>141</sup> Counter-Memorial on Preliminary Objections, ¶ 57.

<sup>142</sup> Counter-Memorial on Preliminary Objections, ¶ 58.

<sup>143</sup> Counter-Memorial on Preliminary Objections, ¶ 60.

<sup>144</sup> Claimant’s Comments on NDP Submission, ¶¶ 6-8.

<sup>145</sup> Counter-Memorial on Preliminary Objections, ¶ 61.

complete the final PAMA project and began a campaign to disparage and inequitably treat DRP and the Claimant.<sup>146</sup>

137. The Claimant submits that the Interim Award in *Berkowitz v. Costa Rica*, upon which the Respondent exclusively relies, is inapposite, as in that case the claimant sought to apply processes mandated by DR-CAFTA for providing compensation to the claimant for expropriations which had taken place before the treaty entered into force.<sup>147</sup> The Claimant submits that, in *Berkowitz v. Costa Rica*, the tribunal distinguished between completed acts with lingering effects (not protected by the treaty) and continuing wrongful acts (which do receive protection), when it found that the compensation question was not “separable from the measures of direct expropriation” that had taken place prior to the treaty’s entry into force and therefore constituted the lingering effects of a completed act.<sup>148</sup>
138. In contrast, the Claimant contends that “all of the facts that form the basis of Renco’s FET and indirect expropriation claims occurred *after* the Treaty entered into effect on February 1, 2009”.<sup>149</sup> The Claimant also notes that Article 28 of the VCLT provides that the non-retroactivity principle relates to “any act or fact which took place *or any situation which ceased to exist* before the date of the entry into force of the treaty” and does not preclude application of the Treaty to such acts or facts that continue beyond its entry into force.<sup>150</sup> Consequently, the Claimant advances that, even were Renco to argue – which it does not – that Peru’s conduct prior to 10 March 2009 constituted part of the basis of its claims, such conduct would be part of a continuing breach over which the Tribunal has jurisdiction.<sup>151</sup>

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<sup>146</sup> Counter-Memorial on Preliminary Objections, ¶ 62.

<sup>147</sup> Counter-Memorial on Preliminary Objections, ¶ 64, referring to *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), 30 May 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶¶ 229-232 (**RLA-26**).

<sup>148</sup> Counter-Memorial on Preliminary Objections, ¶¶ 65-68, citing *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), 30 May 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶ 270 (**RLA-26**).

<sup>149</sup> Counter-Memorial on Preliminary Objections, ¶ 67 [emphasis in original].

<sup>150</sup> Counter-Memorial on Preliminary Objections, ¶¶ 69-71. See Vienna Convention on the Law of Treaties, Art. 28 (**RLA-3**) [emphasis added by Claimant]; *The International Law Commission 1949-1998*, vol. II, at 671, (Watts ed, Oxford 2000), (reproducing the commentary to Draft Article 24 which was incorporated verbatim as Article 28 in the final text of the Vienna Convention) (**CLA-2**); ILC Articles on State Responsibility, Art. 14(2) (**RLA-7**); James Crawford, *The International Law Commission Articles on State Responsibility* (2002), p. 138, reproducing paragraph 12 of the Commentary to Article 14 (**CLA-3**).

<sup>151</sup> Counter-Memorial on Preliminary Objections, ¶ 68.

c) *The Tribunal's analysis*

139. Article 10.1.3 of the Treaty reads as follows;

For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

140. The provision establishes an explicit rule of non-retroactivity. However, as pointed out by the US in its NDP Submission, the opening phrase “[f]or greater certainty” serves to clarify that the provision does not purport to be a *lex specialis*: it stipulates a rule that the contracting parties to the Treaty already understood to be applicable. That general rule of non-retroactivity of treaties is found in Article 28 of the VCLT, which provides in almost identical fashion:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

141. Article 28 of the VCLT must also be read in conjunction with Articles 13 and 14(1) of the ILC Articles on State Responsibility, which read as follows:

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

[...]

The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

142. The foregoing provisions reflect the general principle that the lawfulness of State conduct must be assessed contemporaneously with that conduct. Since a State is not bound by a conventional obligation it has assumed under a treaty until such treaty enters into force, that treaty obligation cannot be breached until the treaty giving rise to that obligation has come into force.

143. In this case, the Treaty entered into force on 1 February 2009. Therefore, the Treaty cannot be applied to acts or facts that took place before 1 February 2009.

144. This much is uncontroversial between the Parties. However, the Respondent, referring to the application of non-retroactivity to dismiss the claim in *Berkowitz*, appears to extrapolate a further subsidiary rule that, in order not to run afoul of the rule on non-retroactivity, acts or facts which are relied upon by the Claimant to establish a breach of the Treaty arising after the entry into force

of the Treaty also must not be “so deeply rooted in pre-entry into force conduct as not to be meaningfully separable from that conduct.”<sup>152</sup>

145. The Tribunal does not understand the tribunal in *Berkowitz* to purport to modify or supplement the applicable test for non-retroactivity of treaties, notwithstanding its frequent use of the apposite but imprecise phrase “deeply rooted”.<sup>153</sup> Rather, the *Berkowitz* tribunal<sup>154</sup>—just as almost every other pertinent decision cited by the Parties and the US<sup>155</sup>—affirms and relies on the authoritative restatement of the law made by the *Mondev* tribunal, which this Tribunal equally endorses and adopts:

The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle is stated both in the Vienna Convention on the Law of Treaties and in the ILC’s Articles on State Responsibility, and has been repeatedly affirmed by international tribunals. There is nothing in NAFTA to the contrary. Indeed Note 39 to NAFTA confirms the position in providing that “this Chapter covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter”. Thus, as the *Feldman* Tribunal held, conduct committed before 1 January 1994 cannot itself constitute a breach of NAFTA.

On the other hand, it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA’s entry into force. To the extent that the last sentence of the passage from the *Feldman* decision, quoted in para. 67 above, appears to say the contrary, it seems to the present Tribunal to be too categorical, as indeed the United States conceded in argument.

Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date

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<sup>152</sup> Hearing Transcript, 12 June 2020, 24:2-12, 26:19, 33:2-35:4, 45:14-25; Hearing Transcript, 13 June 2020, 157:21-158:5; Memorial on Preliminary Objections, ¶¶ 28-29, 58, 69, 73; Respondent’s Comments on NDP Submission, ¶¶ 17, 20, 26, 31-32, 36, 44, citing *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), 30 May 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶ 269 (**RLA-26**).

<sup>153</sup> *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), May 30, 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶¶ 246, 252, 269, 298 (**RLA-26**).

<sup>154</sup> *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), May 30, 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶¶ 210-212, 217, 222 (**RLA-26**).

<sup>155</sup> *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (James Anaya, John R. Crook, Fali S. Nariman (President)), ¶ 86 (**RLA-10**); *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2007-02, Interim Award, 1 December 2008 (Charles N. Brower, Albert Jan van den Berg, Karl-Heinz Böckstiegel (President)), ¶¶ 282-283 (**CLA-40**); *William Ralph Clayton et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Admissibility, 17 March 2015 (Donald McRae, Bryan Schwartz, Bruno Simma (President)), ¶ 282 (**RLA-21**).

which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist *Mondev*. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.<sup>156</sup>

146. Expressed in simpler terms, the principle is that, in order not to pass judgment on the lawfulness of conduct predating the entry into force of the Treaty, the allegedly wrongful conduct postdating the entry into force of the Treaty must “constitute an actionable breach in its own right” when evaluated in the light of all of the circumstances, including acts or facts that predate the entry into force of the Treaty.<sup>157</sup> On this essential reading of both *Mondev* and *Berkowitz*, the Parties and the US would seem to agree.<sup>158</sup>
147. The key question is thus whether the Claimant's FET and indirect expropriation claims necessarily depend on the alleged wrongfulness of Peru's conduct prior to 1 February 2009 or whether they are based on independently actionable breaches that arose after 1 February 2009.
148. The Tribunal notes, however, that it is not invited to decide at this juncture whether a treaty breach has in fact occurred, but merely to determine *prima facie* whether a treaty breach could have occurred if the Claimant is able to substantiate its claim on the merits in further proceedings.<sup>159</sup> The Tribunal must therefore defer to the factual characterizations put forward by the Claimant unless the Respondent is able already, at this stage, to conclusively disprove them.

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<sup>156</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award, 11 October 2002 (James Crawford, Stephen M. Schwebel, Ninian Stephen (President)), ¶¶ 68-70 (**RLA-8**) (footnotes omitted).

<sup>157</sup> *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), 30 May 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶¶ 210, 217, 222 (**RLA-26**).

<sup>158</sup> Memorial on Preliminary Objections, ¶¶ 27-29; Respondent's Comments on NDP Submission, ¶¶ 17, 19-21; Counter-Memorial on Preliminary Objections, ¶ 65; NDP Submission, ¶ 9; Hearing Transcript, 12 June 2020, 33:15-35:4, 107:8-108:3; Hearing Transcript, 13 June 2020, 157:21-158:5, 185:17-186:9.

<sup>159</sup> *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2007-02, Interim Award, 1 December 2008 (Charles N. Brower, Albert Jan van den Berg, Karl-Heinz Böckstiegel (President)), ¶¶ 103-112 (**CLA-40**).

149. In respect of the Claimant's FET claim, the Claimant contends that the Respondent breached the Treaty through MEM's illegal and unfair refusal on 10 March 2009 to grant an extension to DRP to complete the 16<sup>th</sup> and final PAMA project.<sup>160</sup> The Respondent answers that the denial of an extension was justified by and is inseparable from the Claimant's (non-)performance of its contractual obligations prior to the entry into force of the Treaty.<sup>161</sup> The Claimant's request was but a reiteration of prior requests in the same manner as rejected in the *Corona Materials* case.<sup>162</sup> The Claimant retorts that DRP's 5 March 2019 extension request was made on a fundamentally different basis as compared to prior requests and that MEM's subsequent formal and constructive denials were made in defiance of specific legislation enacted in September 2009 authorizing such an extension and were accompanied by a malicious "smear campaign".<sup>163</sup>
150. Similarly, the Claimant's indirect expropriation claim is based on MEM's assertion on 14 September 2010 of an allegedly improper credit of USD 163 million against DRP in the latter's bankruptcy proceedings and MEM's allegedly improper use of the creditor voting rights it thereby acquired to oppose to DRP's restructuring plans in 2012 and force it into liquidation.<sup>164</sup> The Respondent answers again that DRP's debt to MEM arises and is inseparable from the Claimant's (non-)performance of its contractual obligations prior to the entry into force of the Treaty.<sup>165</sup> The Claimant retorts that it was an "an absurd self-dealing credit" that was used to "freeze out the legitimate creditors, and make reorganization impossible."<sup>166</sup>
151. The Tribunal will need to scrutinize closely which of the foregoing accounts is correct when it turns to the merits of the Claimant's FET claims. In particular, the Tribunal will need to establish with precision the legal situation as it stood on 1 February 2009 and how it evolved thereafter. The Respondent may yet convince the Tribunal that MEM did nothing but uphold its prior

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<sup>160</sup> Notice of Arbitration and Statement of Claim, ¶¶ 45-46.

<sup>161</sup> Memorial on Preliminary Objections, ¶ 66; Respondent's Comments on NDP Submission, ¶¶ 26-33; Hearing Transcript, 12 June 2020, 28:17-29:1, 39:15-42:17.

<sup>162</sup> Hearing Transcript, 12 June 2020, 42:14-43:9; Hearing Transcript, 13 June 2020, 160:2-12, *citing Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)) (**RLA-23**)

<sup>163</sup> Counter-Memorial on Preliminary Objections, ¶¶ 28-38; Hearing Transcript, 12 June 2020, 109:6-111:13; Hearing Transcript, 13 June 2020, 186:10-188:20.

<sup>164</sup> Notice of Arbitration and Statement of Claim, ¶¶ 51-54.

<sup>165</sup> Memorial on Preliminary Objections, ¶ 73; Respondent's Comments on NDP Submission, ¶¶ 37-44; Hearing Transcript, 12 June 2020, 43:20-46:3.

<sup>166</sup> Hearing Transcript, 12 June 2020, 111:14-112:13; Counter-Memorial on Preliminary Objections, ¶¶ 39-41.



decisions and hold DRP to its existing contractual and environmental obligations. However, its assertions are insufficient at this stage to deprive the Tribunal of jurisdiction to examine these claims altogether.

## 2. The Respondent's objections arising under Article 10.18.1 of the Treaty

### a) Respondent's position

152. The Respondent's second objection to the Claimant's claims arises under Article 10.18.1, which precludes the Claimant from raising claims with respect to breaches which occurred or about which the Claimant acquired knowledge more than three years prior to submitting the claim to arbitration.<sup>167</sup>
153. **First**, the Respondent submits that the limitation period begins to run upon the "first appreciation that loss or damage will be (or has been) incurred"<sup>168</sup> and does not require high particularity or specificity as to the loss or damage.<sup>169</sup> The Respondent agrees with the US that the acquisition of knowledge starts the prescription period "even if the amount or extent of that loss or damage cannot be precisely quantified until some future date".<sup>170</sup>
154. Relying on *Grand River v. United States*,<sup>171</sup> the Respondent submits that the prescription period applies not only on the basis of "[a]ctual knowledge", but also "[c]onstructive knowledge" that a claimant should or would have acquired had it exercised "reasonable care or diligence".<sup>172</sup>

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<sup>167</sup> Memorial on Preliminary Objections, ¶ 30. *See also* Respondent's Comments on NDP Submission, ¶ 52.

<sup>168</sup> *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶ 213 (**RLA-36**).

<sup>169</sup> Memorial on Preliminary Objections, ¶ 32, *relying on, inter alia, Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶¶ 194, 217 (**RLA23**).

<sup>170</sup> Respondent's Comments on NDP Submission, ¶¶ 49-50; Hearing Transcript, 12 June 2020, 36:1-23.

<sup>171</sup> *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (James Anaya, John R. Crook, Fali S. Nariman (President)), ¶ 59 (**RLA-10**).

<sup>172</sup> Memorial on Preliminary Objections, ¶ 31.

155. The Respondent additionally advances that “a continuing course of alleged measures does not renew the prescription period”.<sup>173</sup> Relying on *Berkowitz v. Costa Rica*,<sup>174</sup> the Respondent submits that the Claimant cannot overcome the time limitation by claiming that the breach is a continuing course of conduct beyond the expiry of the prescription period, as that would deprive the limitation provision of meaning.<sup>175</sup>
156. **Secondly**, according to the Respondent, the relevant cut-off date for the purposes of Article 10.18.1, i.e. the date prior to which any alleged breaches of the Treaty are time-barred in this case, is 13 November 2013. The Respondent notes that while the Notice of Arbitration was filed on 23 October 2018 and the three-year prescription period would, therefore, normally lead to 23 October 2015 being the cut-off date, the Parties agreed to suspend the prescription period during their consultations in 2016-2018, which lasted for 709 days. Therefore, the Respondent asserts that the cut-off date is 13 November 2013, being 709 days prior to 23 October 2015.<sup>176</sup>
157. **Thirdly**, the Respondent submits that the prescription period was not (further) suspended because of the Claimant’s mere initiation of arbitral proceedings in *Renco I*.<sup>177</sup>
158. The Respondent claims that the US’s interpretation of Article 10.18.1 aligns with the Respondent’s proffered interpretation of the three-year limitation period as a “clear and rigid” requirement that is not subject to any “suspension”, “prolongation” or “other qualification”.<sup>178</sup>
159. Moreover, according to the Respondent, the express text of Articles 10.16.2, 10.16.3, 10.16.4, 10.18.1 and 10.18.2 makes clear that a mere notice of arbitration, without more, does not suspend the running of the prescription period; instead, unless the notice of arbitration meets all of the requirements stipulated in the foregoing provisions of the Treaty, including a valid waiver, the

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<sup>173</sup> Memorial on Preliminary Objections, ¶ 33.

<sup>174</sup> *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶ 208 (**RLA-36**).

<sup>175</sup> Memorial on Preliminary Objections, ¶ 33. *See also*, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, Submission of the United States of America ¶ 6 (**R-13**).

<sup>176</sup> Memorial on Preliminary Objections, ¶¶ 34-36. *See also* Hearing Transcript, 12 June 2020, 25:1-3, 46:14-47:7.

<sup>177</sup> Respondent’s Comments on NDP Submission, ¶ 55.

<sup>178</sup> Respondent’s Comments on NDP Submission, ¶¶ 45-46, 49. *See also* Hearing Transcript, 12 June 2020, 24:21-23.

prescription period continues to run.<sup>179</sup> The Respondent asserts that this position is supported by the decisions in *Renco I, Corona Materials v. Dominican Republic*, and *Waste Management v. Mexico* as well as by the positions taken by the US and Peru in *Gramercy v. Peru* and by the US in *Feldman v. Mexico*.<sup>180</sup> The Respondent submits that the necessary consequence of the Claimant's failure to comply with the Treaty's waiver requirement in *Renco I*, therefore, is that the claim was never submitted to arbitration.<sup>181</sup>

160. In addition, the Respondent submits that its position is supported by the object and purpose of the Treaty (in particular that of "ensur[ing] a predictable legal [...] framework") and of Article 10.18.1 (protecting respondent States from late or recurring claims).<sup>182</sup>
161. Also, the Respondent argues, relying in particular on *Feldman v. Mexico*, that the general principles of international or domestic law invoked by the Claimant cannot supersede the *lex specialis* terms of the Treaty.<sup>183</sup> The Respondent adds that the Claimant mischaracterizes *Feldman v. Mexico* by pulling an isolated quote out of context to suggest that acknowledgement of an arbitration claim could interrupt the limitation period, while the "acknowledgement" referred to in that case had nothing to do with the arbitration and the tribunal anyway rejected the

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<sup>179</sup> Respondent's Comments on NDP Submission, ¶¶ 56-57; Hearing Transcript, 12 June 2020, 59:11-14.

<sup>180</sup> Respondent's Comments on NDP Submission, ¶58, referring to *Renco I*, Partial Award, ¶ 158; *Corona Materials v. Dominican Republic* (ICSID Case No. ARB/AF/14/3), Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶ 174 (**RLA-23**); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002 (Benjamin R. Civiletti, Eduardo Magallón Gómez, James Crawford (President)), ¶¶ 32-33 (**RLA-78**); *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Statement of Rejoinder of the Republic of Peru, 13 September 2019, ¶ 84 (**RLA-64**); *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the US, 21 June 2019, ¶ 11 (**R-13**). *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Submission of the United States of America on Preliminary Issues, 6 October 2000 (**CLA-1**).

<sup>181</sup> Respondent's Comments on NDP Submission, ¶ 59. See also Hearing Transcript, 12 June 2020, 58:20-59:20.

<sup>182</sup> Respondent's Comments on NDP Submission, ¶¶ 62-67.

<sup>183</sup> Respondent's Comments on NDP Submission, ¶¶ 68-72, referring to *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶ 63 (**CLA-25**); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶ 45 (**RLA-6**).

claimant's argument.<sup>184</sup> Moreover, the Respondent notes that the Parties having agreed to a suspension of the prescription period during their consultations after the conclusion of *Renco I* does not support the Claimant's position because a respondent State is always free to waive its jurisdictional objections.<sup>185</sup>

162. Furthermore, the Respondent contends that the factual differences invoked by the Claimant between the present case and the cases cited in the US Submission do not overcome or alter the clear legal standard set forth in the Treaty.<sup>186</sup>

163. **Fourthly**, the Respondent contends that the Claimant first actually or constructively acquired knowledge of the alleged breaches and consequent losses or damages prior to the cut-off date of 13 November 2013, such that "Peru has not consented to arbitrate the claims and the Tribunal must dismiss the claims for lack of competence".<sup>187</sup>

164. In this regard, the Respondent highlights the following relevant facts as presented in the Claimant's Statement of Claim, which arose between the Treaty's entry into force on 1 February 2009 and 13 November 2013:<sup>188</sup>

- February 2009: DRP's loss of its US\$ 75 million revolving line of credit.<sup>189</sup>
- March, May, and June 2009: DRP's request for an extension in March; MEM's rejection of the request in May; and DRP's resulting suspension of operations at the facility in June.<sup>190</sup>
- September 2009: the promulgation of a law by the Congress of Peru permitting an extension for DRP, but subsequent imposition of additional regulations undermining the benefits of the new law.<sup>191</sup>

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<sup>184</sup> Respondent's Comments on NDP Submission, ¶ 61.

<sup>185</sup> Hearing Transcript, 13 June 2020, 166:9-167:3.

<sup>186</sup> Respondent's Comments on NDP Submission, ¶ 54.

<sup>187</sup> Memorial on Preliminary Objections, ¶ 37. *See also* Hearing Transcript, 12 June 2020, 13:25-14:2.

<sup>188</sup> Memorial on Preliminary Objections, ¶¶ 52-54.

<sup>189</sup> Statement of Claim, ¶ 44.

<sup>190</sup> Statement of Claim, ¶¶ 45-46.

<sup>191</sup> Statement of Claim, ¶¶ 48-49.

- February 2010: the decision of MEM to reject restructuring and to involuntarily place DRP into bankruptcy and Peru's alleged "patently improper claim for US\$ 163 million."<sup>192</sup>
- November 2011: efforts by Peru to prevent DRP's restructuring and to force its liquidation, specifically, the INDECOPI Tribunal's resolution reversing INDECOPI Bankruptcy Commission's allegedly proper rejection of MEM's credit offering.<sup>193</sup>

165. The Respondent contends that each of these events occurred earlier than the cut-off date of 13 November 2013, and as such they are time-barred from arbitration in the present proceedings.<sup>194</sup>

The Respondent posits that the fact that the Claimant's submissions in the present arbitration are substantially identical to those which were alleged in *Renco I*, with only minimal edits and deletions, provides further support to the Respondent's argument that the Claimant's claims are now time-barred, years following the initiation of the *Renco I* proceedings.<sup>195</sup>

166. Specifically, with respect to the Claimant's FET claim, the Respondent notes that the most recent conduct of the Respondent on which the Claimant relies took place in 2009, i.e. years before the cut-off date.<sup>196</sup>

167. As regards the Claimant's indirect expropriation claim, the Respondent submits that all relevant events likewise occurred far in advance of the cut-off date and the Claimant had or should have had knowledge of any alleged breach of the Treaty.<sup>197</sup> The Respondent emphasizes that the Claimant's indirect expropriation claim rests on (1) MEM's refusal to reasonably provide DRP with extensions necessary to prevent the termination of operations of the facility; (2) the alleged disparaging comments by Peruvian government officials aimed at undermining DRP;<sup>198</sup> and (3)

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<sup>192</sup> Statement of Claim, ¶¶ 50-51.

<sup>193</sup> Statement of Claim, ¶¶ 52-54. The Respondent also highlights that the Supreme Court of the Republic of Perú's decision on the matter was issued on 6 July 2015. Memorial, n. 72.

<sup>194</sup> Memorial on Preliminary Objections, ¶ 52.

<sup>195</sup> Memorial on Preliminary Objections, ¶¶ 59, 67. *See also* Memorial on Preliminary Objections, "Figure C", p. 18.

<sup>196</sup> Memorial on Preliminary Objections, ¶67.

<sup>197</sup> Memorial on Preliminary Objections, ¶ 74.

<sup>198</sup> For further discussion of these claims, *see supra* ¶¶ 125-128.

“DRP[’s] bankruptcy in 2009, the recognition of a MEM credit, and the decision by a committee of creditors to reject restructuring and place DRP in liquidation” in 2012.<sup>199</sup>

168. Also, the Respondent highlights that in *Renco I* the Claimant’s notice of arbitration and statement of claim dated 9 August 2011 already stated that the Respondent’s treatment of DRP “has the potential to culminate in an expropriation”, describing the Respondent’s assertion of a credit in the DRP bankruptcy as “patently bogus”. According to the Respondent, this shows that the Claimant had knowledge of the alleged breach in August 2011, since only a first appreciation that loss or damage will be incurred is needed to trigger the limitation period.<sup>200</sup>
169. Regarding the Claimant’s denial of justice claim, which relates to local proceedings initiated by the Claimant in an attempt to challenge the MEM credit, the Respondent asserts that the only alleged fact that post-dates the cut-off date is the Peruvian Supreme Court’s rejection of DRP’s appeal on 3 November 2015.<sup>201</sup> However, the Respondent argues that the Claimant cannot rely on this decision to circumvent the limitation periods<sup>202</sup> because of prior rulings in these local proceedings (culminating in the Supreme Court ruling) whose dates show that the claim materialized prior to the cut-off date.<sup>203</sup>
170. According to the Respondent, if recognition of the MEM credit was patently absurd, as contended by the Claimant, a respective breach would have materialized already on 22 November 2010 when the Claimant opposed the recognition of this credit before INDECOPI or, at the very latest, when the first-instance administrative court rendered its decision on the Claimant’s challenge on 18 October 2012.<sup>204</sup>
171. The Respondent argues that this position is supported in particular by the rulings in *ATA v. Jordan* and *Mondev v. United States*, where the tribunals held that the relevant point in time to the prescription analysis for a denial of justice claim is when the dispute arose, not when remedies

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<sup>199</sup> Memorial on Preliminary Objections, ¶¶ 56, 70-75.

<sup>200</sup> Memorial on Preliminary Objections, ¶ 74.

<sup>201</sup> Memorial on Preliminary Objections, ¶ 55.

<sup>202</sup> Memorial on Preliminary Objections, ¶ 76.

<sup>203</sup> Memorial on Preliminary Objections, ¶ 56(iii). *See also* Memorial on Preliminary Objections, n. 74, where the Respondent states that in *Renco I* the Claimant had indicated dates for those prior rulings, namely 18 October 2012 for a decision of the Fourth Administrative Court and 25 July 2014 for a decision of the Superior Court of Lima.

<sup>204</sup> Memorial on Preliminary Objections, ¶¶ 79-80.

were exhausted.<sup>205</sup> Also, the Respondent argues that following the decision in *Corona Materials v. Dominican Republic*, the Tribunal should not accept the Claimant's treating the alleged denial of justice as distinct from its claim that the credit should not have been recognized by INDECOPI in the first place.<sup>206</sup>

172. The Respondent notes that while the US stated that the limitation does not begin to run until all domestic remedies have been exhausted, it also stated that "a continuing course of conduct cannot renew the limitations period under Article 10.18.1" and that "the exhaustion of local remedies will not give rise to a legally distinct injury, unless the institutions to whom appeal has been made commit some new breach of the applicable standard." For this reason, the Respondent submits that, as the Claimant has not raised any new breach with respect to the decision of the Supreme Court of Peru, the denial of justice claim is therefore time-barred.<sup>207</sup>
173. **Finally**, the Respondent submits that the Claimant's "abuse of rights" argument is meritless, neither mentioned in the US's submission, nor anywhere in the Treaty.<sup>208</sup>
174. The Respondent asserts that the Claimant has failed to establish that its abuse theory has achieved such widespread recognition and consensus as to constitute a general principle of international law, and notes that the Claimant failed to identify a single case where such a theory has been used against a respondent State.<sup>209</sup> The Respondent adds that even the authorities relied on by the Claimant caution against a broad application of general abuse principles.<sup>210</sup>

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<sup>205</sup> Memorial on Preliminary Objections, ¶ 80, referring to *ATA Construction v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (W. Michael Reisman, Ahmed Sadek El-Kosheri, L. Yves Fortier, C.C., Q.C. (President)), ¶107 (**RLA-17**); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002 (James Crawford, Stephen M. Schwebel, Ninian Stephen (President)), ¶70 (**RLA-8**).

<sup>206</sup> Memorial on Preliminary Objections, ¶ 81, referring to *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶206 (**RLA-23**).

<sup>207</sup> Respondent's Comments on NDP Submission, ¶¶ 90-98. Respondent cites *Mondev v. United States*, *ATA v. Jordan*, *Corona Materials v. Dominican Republic* to make its point, and contests Claimant's position on *Corona Materials*, not the US's position in context of Article 10.18.1. See also Hearing Transcript, 12 June 2020, 49:10-18, 51:17-20, 55:16-25.

<sup>208</sup> Respondent's Comments on NDP Submission, ¶¶ 73-75.

<sup>209</sup> Respondent's Comments on NDP Submission, ¶¶ 74, 76.

<sup>210</sup> Respondent's Comments on NDP Submission, ¶ 74. The Respondent submits that the application of the abuse of right principle is subject to a very high threshold [...] very, very rarely applied", and accordingly should not be applied in the present case. Hearing Transcript, 12 June 2020, 62:17-25.

175. The Respondent further contends that the *Renco I* Interim Award never ruled that a limitations defence would be abusive. The Respondent points out that, on the contrary, the tribunal ruled that Respondent's raising of the waiver defence was not an abuse of rights.<sup>211</sup> The Respondent acknowledges that *dicta* in the *Renco I* Interim Award suggested that justice would be served if Respondent accepted that prescription was tolled as of 9 August 2011 (the date on which the Claimant files its amended notice of arbitration in *Renco I*). However, the Respondent argues that those were incidental comments on issues that were not arbitrated and have no binding or preclusive effect in the present proceeding, and notes that the tribunal in *Renco I* expressly stated that it "cannot prevent Peru from exercising in the future what it then considers to be its legal rights".<sup>212</sup>
176. Additionally, the Respondent denies the Claimant's assertion that Respondent "ran the clock" by delaying the first arbitration, arguing that it exercised its Treaty rights reasonably.<sup>213</sup> According to the Respondent, it was the Claimant who attempted to protract the *Renco I* proceedings by refusing to amend its non-compliant waiver and opposing Peru's request that the tribunal hear its preliminary objections on an expedited basis.<sup>214</sup> The Respondent rejects the Claimant's insinuation that the Respondent acted abusively in the *Renco I* proceedings by not raising its objection to the non-compliant waiver in its Statement of Claim, noting that, pursuant to Article 23(2) of the UNCITRAL Arbitration Rules, Peru had no obligation to raise such an objection until its Counter-Memorial on Liability, and in fact raised its claims much earlier.<sup>215</sup>
177. The Respondent argues that the Claimant seeks to rely on its own non-compliance with Treaty requirements during *Renco I* to circumvent the Treaty's temporal requirements barring its claims in the present proceedings.<sup>216</sup> The Respondent insists that a claimant must meet all of the Treaty's preconditions in order to submit a claim to arbitration, meaning that the Claimant cannot comply

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<sup>211</sup> Hearing Transcript, 12 June 2020, 66:3-5.

<sup>212</sup> Memorial on Preliminary Objections, ¶¶ 86f. *See also* Respondent's Comments on NDP Submission, ¶¶ 77-80. The quote is from *Renco I*, Partial Award, ¶188.

<sup>213</sup> Respondent's Comments on NDP Submission, ¶¶ 99-105. Respondent outlines its arguments based on the specific facts of the case to demonstrate it was not "running-out-the-clock", with particular reference to *Renco I*.

<sup>214</sup> Memorial on Preliminary Objections, ¶ 89; Hearing Transcript, 12 June 2020, 19:24-20:3, 20:18-20.

<sup>215</sup> Memorial on Preliminary Objections, ¶¶ 88-89. *See also* UNCITRAL Arbitration Rules, Art. 23(2) ("A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence.").

<sup>216</sup> Memorial on Preliminary Objections, ¶ 83.



partially with the Treaty's requirements in *Renco I*, do the same in the present proceeding, and then somehow argue that the cumulative effect of the two deficient proceedings is that it has properly submitted claims to arbitration.<sup>217</sup>

178. For these reasons, the Respondent concludes that the Claimant has failed to submit any claims complying with Article 10.18.1, and its claims consequently should be dismissed for lack of jurisdiction because the Respondent has not consented to arbitrate them.<sup>218</sup>

**b) Claimant's position**

179. The Claimant argues that its claims are not time-barred by the prescription period under Article 10.18.1.
180. **First**, the Claimant notes that its FET and indirect expropriation claims in the present arbitration arise out of acts and facts occurring within three years of submitting these claims to arbitration in *Renco I*. The Claimant claims that, on 10 March 2009, Peru first breached the Treaty's Article 10.5 FET requirements when MEM denied DRP's request for an extension to complete the final (sixteenth) PAMA project on the basis of the economic *force majeure* provision contained in the Stock Transfer Agreement, in contravention of legislation passed by the Congress of Peru permitting a 30-month extension.<sup>219</sup> The Claimant submits that this was the first of a series of failures to permit an extension and was followed by a "smear campaign" against the Claimant and DRP.
181. The Claimant further claims that, on 14 September 2010, the Respondent committed the first act in contravention of the Treaty's Article 10.7 protections against indirect expropriation, when MEM asserted a credit against DRP that endowed Peru with nearly one third of all voting rights on the creditors' committee of DRP's bankruptcy. According to the Claimant, this preceded further actions by Peru to force DRP's liquidation in July 2012 and deny the Claimant the control over and enjoyment of its investment in Peru.<sup>220</sup>

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<sup>217</sup> Memorial on Preliminary Objections, ¶ 67.

<sup>218</sup> Memorial on Preliminary Objections, ¶ 82.

<sup>219</sup> Counter-Memorial on Preliminary Objections, ¶ 79.

<sup>220</sup> Counter-Memorial on Preliminary Objections, ¶ 80.

182. The Claimant notes that Renco initiated the *Renco I* proceedings on 9 August 2011, within the three-years of the aforementioned dates of breach, the earliest of which was 10 March 2009.<sup>221</sup>
183. **Secondly**, the Claimant argues that the initiation of the *Renco I* proceedings suspended the Treaty’s Article 10.18.1 prescription period with respect to its FET and indirect expropriation claims.
184. The Claimant notes that Article 10.18.1 of the Treaty is silent as to whether a timely submission of claims to arbitration, which must later be resubmitted due to a dismissal on jurisdictional grounds without prejudice, will suspend the three-year limitation period.<sup>222</sup> The Claimant submits that the Respondent’s argument of the Treaty containing a *lex specialis* on the issue of a suspension of the prescription period is meritless and finds no support in the NDP Submission of the US.<sup>223</sup> In particular, the Claimant notes that Articles 10.16 and 10.18 relied on by the Respondent in this regard each deal with different things, the latter pertaining to conditions and limitations on consent, rather than to the timing of when a claim is submitted.<sup>224</sup> Moreover, the Claimant argues that if the respective Treaty provision were a *lex specialis* so as to exclude any suspension, it would not have been possible for the Parties to repeatedly agree to a suspension after the conclusion of *Renco I*, as they did.<sup>225</sup>
185. To fill this lacuna in the Treaty, the Claimant submits that Article 31(1) of the VCLT requires that the Tribunal examine the “object and purpose” of the Treaty provision and relevant rules of international law.<sup>226</sup>
186. Relying on jurisprudence related to analogous provisions in other US treaties and upon the treatise of Bin Cheng, the Claimant asserts that a time-bar as introduced by Article 10.18.1 of the Treaty seeks to prevent claimants from unreasonably delaying the submission of their claims to arbitration, and to ensure that respondents have access to sufficient and reliable evidence to defend

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<sup>221</sup> Counter-Memorial on Preliminary Objections, ¶ 81.

<sup>222</sup> Counter-Memorial on Preliminary Objections, ¶ 110. Hearing Transcript, 12 June 2020, 74:13-78:5. The Claimant further argues that the Treaty cannot be *lex specialis* on this matter, for the Parties have already paused the prescription period in entering into the Framework Agreement. Hearing Transcript, 12 June 2020, 78:5-79:19.

<sup>223</sup> Hearing Transcript, 12 June 2020, 76:22-76:24.

<sup>224</sup> Hearing Transcript, 12 June 2020, 76:2-76:6 and 80:14-81:8.

<sup>225</sup> Hearing Transcript, 12 June 2020, 78:5-79:19

<sup>226</sup> Counter-Memorial on Preliminary Objections, ¶¶ 108, 112.

themselves. According to the Claimant, this object and purpose was satisfied by the Claimant timely submitting its FET and indirect expropriation claims in *Renco I*, without any negligent delay, thus putting the Respondent on notice of the need to secure sufficient and reliable evidence to defend itself, which it did.<sup>227</sup>

187. Additionally, the Claimant advances that it is “a general principle of law recognized by civilized nations”, which the Tribunal must take into consideration when interpreting Article 10.18.1 pursuant to the VCLT, that limitation periods are suspended when a claimant puts a government on notice of a claim.<sup>228</sup> Thus, the Claimant contends that, in accordance with the “relevant rules of international law”, when *Renco* timely submitted its claims in *Renco I* to the competent authority and put Peru on notice of the Claimant’s claims, the prescription period was suspended.<sup>229</sup>
188. The Claimant argues that the Respondent’s contention that the three-year limitation period under Article 10.18.1 is “not subject to any suspension, tolling, prolongation or other qualification” is incongruous with the object and purpose of the provision and relevant rules of international law, and relies improperly on the non-disputing party submission filed by the US in *Gramercy v. Peru* with respect to the North American Free Trade Agreement.<sup>230</sup> The Claimant notes that in the cases cited by the US’ non-disputing party submission in that case, as well as in the NDP Submission

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<sup>227</sup> Counter-Memorial on Preliminary Objections, ¶¶ 113-116, referring to *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, 11 March 2016, ¶ 5 (RLA-22); *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, 17 April 2015, ¶ 7 (CLA-5); *Vannessa Ventures v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, 22 August 2008 (Charles Brower, Brigitte Stern, Robert Briner (President), ¶ 3.5.4 (CLA-7); citing Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987), pp. 378-379 (CLA-8).

<sup>228</sup> Counter-Memorial, ¶¶ 83, 117-123; Hearing Transcript, 12 June 2020, 75:15-20, 86:25-88:12. In support of this claim, the Claimant refers to the holdings in various international arbitral awards as well provisions in multiple civil codes and common law doctrines that similarly provide that limitations periods toll when notification to a respondent of a complaint or dispute occurs. See, e.g. *Gentini Case*, Reports of International Arbitral Awards, Vol. X, pp. 551-561, at 561 (CLA-10); *Case of John H. Williams v. Venezuela*, Reports of International Arbitral Awards, Vol. XXIX, pp. 279-293, at 291 (CLA-20); *Giacopini Case*, Reports of International Arbitral Awards, Vol. X, pp. 594-596, at 595 (CLA-21); *Tagliaferro Case*, Reports of International Arbitral Awards, Vol. X, pp. 592-594, at 593 (CLA-22); Civil Code of Peru, Art. 1996 (CLA-11); Civil Code of Argentina, Art. 2546 (CLA-12); Civil Code of France, Art. 2241 (CLA-13); Civil Code of Germany, Art. 204(1) (CLA-14); Civil Code of Spain, Art. 1973 (CLA-16); Civil Code of Portugal, Art. 323(1) (CLA-17); *Henderson v. United States*, 517 U.S. 654 (1996), 657 n. 2 (CLA-19).

<sup>229</sup> Counter-Memorial on Preliminary Objections, ¶ 125.

<sup>230</sup> Counter-Memorial on Preliminary Objections, ¶ 126, citing Memorial on Preliminary Objections, ¶ 23, referring to *Gramercy Funds Management LLC et al. v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, ¶ 6 (R-13).

of the US in the present case, the claimants failed to initiate any arbitration proceedings in the three-year window, inapposite to the present case.<sup>231</sup> The Claimant emphasizes that in the instant case, “Peru has been aware of Claimant’s claims since 2011 and is suffering no limitations prejudice as a result of Claimant’s resubmission of its claims in this arbitration”.<sup>232</sup>

189. The Claimant further notes that in *Feldman v. Mexico*, as relied upon by the Respondent, the tribunal conceded that “an acknowledgment of the claim under dispute by the organ competent to that effect and in the form prescribed by law would probably interrupt the running of the period of limitation”. The Claimant argues that the Respondent acknowledged the Claimant’s claims in *Renco I* by participating in that arbitration without ever questioning that it was aware of the dispute and of its obligation to retain documents and defend itself, and by subsequently negotiating with the Claimant to settle the dispute.<sup>233</sup>
190. For the above reasons, the Claimant submits that the limitation period was suspended from 9 August 2011 (submission of the amended notice of arbitration in *Renco I*) to 9 November 2016 (final award in *Renco I*).<sup>234</sup>
191. **Thirdly**, the Claimant notes that as of 10 November 2016, i.e. the day after the final award in *Renco I* was issued, the Parties entered into several agreements under which they agreed on consultations pertaining to the Notice of Intent. These agreements, which were in force until 20 October 2018, provided that the time during which they were in effect would not count towards the limitation period of Article 10.18.1.<sup>235</sup>
192. The Claimant concludes that the only added time to be counted towards the limitation period after the Claimant’s submission of its claims in *Renco I* is three days, from 20 October 2018 until its submission of the Notice of Arbitration on 23 October 2018. The Claimant contends that, as a result, its claims were filed in compliance with the three-year limitation period.<sup>236</sup>

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<sup>231</sup> Counter-Memorial on Preliminary Objections, ¶ 127; Claimant’s Comments on NDP Submission, ¶¶ 11-14.

<sup>232</sup> Counter-Memorial on Preliminary Objections, ¶ 130.

<sup>233</sup> Counter-Memorial on Preliminary Objections, ¶¶ 129-130.

<sup>234</sup> Counter-Memorial on Preliminary Objections, ¶ 105.

<sup>235</sup> Counter-Memorial, ¶¶ 102-103.

<sup>236</sup> Counter-Memorial, ¶¶ 104-105, 131.

193. **Fourthly**, the Claimant argues that the Respondent’s objections to Claimant’s FET and indirect expropriation claims on the basis of Article 10.18.1 constitute an abuse of rights.
194. The Claimant notes that, on 4 April 2011, it submitted a notice of arbitration in *Renco I* with a waiver including reservation of rights language. The Claimant further notes that despite “countless opportunities to raise its objection relating to Claimant’s waiver”, including the expedited review mechanism under Article 10.20.5, it was not until three and one half years later, on 3 October 2014, that Peru objected for the first time to the additional reservation of rights language in the waiver – after having previously made ambiguous statements on its waiver objection in multiple submissions. The Claimant adds that had the Respondent raised its objection to the additional reservation of rights language in a timely fashion, the Claimant could have removed it from its waiver within three years of the breaches alleged as a basis for the FET and indirect expropriation claims. In fact, the Claimant asserts that it repeatedly offered during *Renco I* to strike the contentious reservation of rights language in its waiver, provided that the Respondent gave assurance that it would not then object to the claims being prescribed, but the Respondent failed to accept this.<sup>237</sup> According to the Claimant, one may reasonable conclude that the Respondent purposefully delayed raising its waiver objection in a bad faith effort to allow the limitations period to expire, and if it prevailed on its belated waiver objection, to raise a limitations objection in a refiled arbitration.<sup>238</sup>
195. The Claimant submits that, while the *Renco I* tribunal dismissed the case because of this technical error with Renco’s written waiver, the tribunal noted and “unanimously condemned” that the Respondent waited three and a half years to raise its waiver objections.<sup>239</sup> The Claimant contends that the Respondent now seeks to prejudice the Claimant by asserting that the time elapsed during those arbitration proceedings, due to the Respondent’s own delay tactics, should count against the prescription period set by Article 10.18.1.<sup>240</sup>
196. The Claimant further notes that the tribunal in *Renco I* held that “an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco’s claims were now time-barred until Article 10.18(1)” as the Respondent does now, and unanimously found that “justice

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<sup>237</sup> Counter-Memorial on Preliminary Objections, ¶¶ 47, 138, 159; Hearing Transcript, 13 June 2020, 175:19-177:24.

<sup>238</sup> Counter-Memorial on Preliminary Objections, ¶¶ 82, 84-90, 98, 132, 136-150.

<sup>239</sup> Counter-Memorial on Preliminary Objections, ¶ 100.

<sup>240</sup> Counter-Memorial, ¶¶ 84-99.

would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011”.<sup>241</sup> The Claimant also points out that the tribunal in *Renco I* acknowledged that “Renco would suffer material prejudice if Peru were to claim in any subsequent arbitration that Renco’s claims were now time-barred under Article 10.18(1)”.<sup>242</sup>

197. The Claimant proffers that “[i]t is well-settled that a right may be refused recognition on the ground that it is being abused”, when exercising the right is purposed toward prejudicing the interests of the other party.<sup>243</sup> The Claimant notes that it is unnecessary to prove bad faith for a Tribunal to find abuse of rights and proscribe the Respondent’s exercise of any rights arising under Article 10.18.1.<sup>244</sup> The Claimant further notes that the tribunal in the 1903 *Stevenson Case* specifically found that a State could not invoke a defence of prescription when it was responsible for causing the delay.<sup>245</sup>
198. The Claimant notes that the US did not contradict its contention that a party may be prevented from exercising rights wherein the exercise thereof would constitute an abuse of rights.<sup>246</sup>
199. In sum, the Claimant submits that, given the Respondent’s own conduct in *Renco I*, Respondent’s objections under Article 10.18.1 constitute an abuse of rights and should therefore be dismissed by the Tribunal.<sup>247</sup>
200. **Fifthly**, the Claimant claims that the Respondent breached Article 10.5 of the Treaty when, on 3 November 2015, the Supreme Court of Peru failed to nullify a “patently improper credit by the Peruvian Ministry of Energy and Mines” and rejected DRP’s appeal on the issue.<sup>248</sup> The Claimant

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<sup>241</sup> Counter-Memorial on Preliminary Objections, ¶ 101, *citing Renco I*, Partial Award, ¶¶ 187-188.

<sup>242</sup> Counter-Memorial on Preliminary Objections, ¶ 134, *citing Renco I*, Partial Award, ¶¶ 187.

<sup>243</sup> Counter-Memorial on Preliminary Objections, ¶ 135. *See also* Counter-Memorial, ¶¶ 152-156.

<sup>244</sup> Counter-Memorial, ¶¶ 135, 151, 157.

<sup>245</sup> Counter-Memorial on Preliminary Objections, ¶ 158, *referring to Stevenson Case*, Reports of International Arbitral Awards, Vol. IX, pp. 385-387, at 385 (CLA-35).

<sup>246</sup> Claimant’s Comments on NDP Submission, ¶ 15.

<sup>247</sup> Counter-Memorial on Preliminary Objections, ¶ 160.

<sup>248</sup> Counter-Memorial on Preliminary Objections, ¶ 161.

argues that, having initiated the present arbitration on 23 October 2018, within three years of the Supreme Court decision, this claim satisfies the Article 10.18.1 temporal requirement.<sup>249</sup>

201. According to the Claimant, the Parties agree as to the facts of DRP's submission of a claim to trial and subsequent appeal before the Peruvian judiciary regarding MEM's improper assertion of a claim for US\$ 163 million against DRP when it entered bankruptcy in February 2010.<sup>250</sup> However, the Claimant notes that the Parties differ in that the Respondent argues that the denial of justice claim is time-barred because it arose out of the 2010 bankruptcy proceedings and, at the latest, in 2012, when "Renco's affiliate(s) initiated and pursued the contentious administrative challenge".<sup>251</sup>
202. The Claimant submits that "[i]t is axiomatic that when a court decision is not final and binding, and can be corrected by internal appellate mechanisms, a denial of justice cannot have arisen".<sup>252</sup> Relying on *Chevron v. Ecuador*, the Claimant advances that the "finality" requirement mandates that all local remedies be exhausted before a denial of justice claim may be asserted.<sup>253</sup>
203. The Claimant highlights the NDP Submission, wherein the US states that "non-final judicial acts have not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless further recourse is obviously futile or manifestly ineffective. In the context of a claim of denial of justice, therefore, the three-year limitations period set out in Article 10.18.1 will not begin to run [...] when all available domestic remedies have been exhausted, unless obviously futile or manifestly ineffective."<sup>254</sup>

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<sup>249</sup> Counter-Memorial on Preliminary Objections, ¶ 161.

<sup>250</sup> Counter-Memorial on Preliminary Objections, ¶ 162.

<sup>251</sup> Counter-Memorial on Preliminary Objections, ¶ 164, *citing* Memorial on Preliminary Objections, ¶ 80.

<sup>252</sup> Counter-Memorial on Preliminary Objections, ¶ 166.

<sup>253</sup> Counter-Memorial on Preliminary Objections, ¶ 166, *referring to* *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018 (Horacio A. Grigera Naón, Vaughan Lowe, V.V. Veeder (President)), ¶ 7.117 (CLA-39). The Claimant asserts that this "finality" requirement is echoed in the holdings of various tribunals. *See, e.g. Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (Michael Mustill, Abner J. Mikva, Anthony Mason (President)), ¶ 143 (CLA-45). *See also* Counter-Memorial, nn. 185; Hearing Transcript, 12 June 2020, 105:7-13.

<sup>254</sup> Claimant's Comments on NDP Submission, ¶ 17.

204. According to the Claimant, the Respondent misapplies *Mondev v. United States*<sup>255</sup> and *ATA v. Jordan*<sup>256</sup> when it argues that “the moment in time that is relevant to the prescription analysis for a denial of justice claim is when the dispute arose, not when remedies were exhausted”.<sup>257</sup> The Claimant submits that these holdings do not apply to the issue of prescription, but rather to instances in which the alleged breach occurred prior to the entry into force of the investment treaty.<sup>258</sup> Thus, the Claimant contends that these holdings do not apply to the present arbitration.<sup>259</sup>
205. Furthermore, the Claimant asserts that Article 10.18.1 establishes a time limitation from the point that a claimant acquires knowledge, or ought to have acquired knowledge that a respondent breached the treaty, not the moment that the dispute arose.<sup>260</sup> The Claimant asserts that it was not until the Supreme Court of Peru rejected DRP’s appeal against the Lima Superior Court’s decision upholding MEM’s alleged bankruptcy credit that Peru breached Article 10.5 of the Treaty.<sup>261</sup> The Claimant submits that it necessarily follows that it was only on this date, 3 November 2015, that the Claimant could have acquired knowledge of Respondent’s breach, and thus, the Claimant’s denial of justice claim is not time-barred as under Article 10.18.1.<sup>262</sup>

*c) The Tribunal’s analysis*

206. The Tribunal notes that the earliest breach asserted by the Claimant in this case is MEM’s refusal on 10 March 2009 to grant an extension for the completion of the Claimant’s sixteenth (and last) PAMA obligation. Accordingly, as the Claimant accepts that it acquired knowledge of the breach

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<sup>255</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award, 11 October 2002 (James Crawford, Stephen M. Schwebel, Ninian Stephen (President)) (**RLA-8**).

<sup>256</sup> *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (W. Michael Reisman, Ahmed Sadek El-Kosheri, L. Yves Fortier (President)) (**RLA-17**).

<sup>257</sup> Counter-Memorial on Preliminary Objections, ¶ 171, *citing* Memorial on Preliminary Objections, ¶ 80. The Claimant also argues that the Respondent inappropriately relies on *Corona Materials v. Dominican Republic* which has irreconcilably differing facts from the present case. Counter-Memorial, ¶¶ 175-178; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶ 43 (**CLA-23**).

<sup>258</sup> Counter-Memorial on Preliminary Objections, ¶ 172.

<sup>259</sup> Counter-Memorial on Preliminary Objections, ¶ 173.

<sup>260</sup> Counter-Memorial on Preliminary Objections, ¶ 174.

<sup>261</sup> Counter-Memorial on Preliminary Objections, ¶ 169.

<sup>262</sup> Counter-Memorial on Preliminary Objections, ¶ 170.



on that day,<sup>263</sup> the three-year prescription period pursuant to Article 10.18.1 began to run on 10 March 2009 insofar as the Claimant's claim rests on this asserted breach. The Tribunal finds it useful to focus its analysis of the prescription issue on this portion of the claim because, logically, if the first breach alleged by the Claimant is not time-barred under Article 10.18.1, the same holds true for all other breaches asserted in this arbitration.

207. When the Claimant filed its original and amended notices of arbitration in *Renco I* on 4 April 2011 and 9 August 2011, respectively, less than three years had elapsed since the alleged breach on 10 March 2009. Accordingly, and having already determined above that this alleged breach is actionable independently from earlier conduct of the Respondent,<sup>264</sup> the Tribunal concludes that the Claimant's FET and indirect expropriation claims brought in the instant proceeding were not yet time-barred when the Claimant submitted its notices of arbitration in *Renco I*.
208. In addition, it is undisputed between the Parties that between the conclusion of *Renco I* and the filing of the Notice of Arbitration in the present case, only three days elapsed in respect of which the Parties had not agreed on a suspension of the prescription period. These three days do not make any material difference because the notices of arbitration in *Renco I* were filed several months before the three-year period elapsed. Therefore, unless Peru is precluded from invoking Article 10.18.1 due to an abuse of rights, the decisive question is whether the prescription period was suspended in relation to the Claimant's FET and indirect expropriation claims during the pendency of *Renco I*. If it was not, the claim resting on MEM's refusal to grant an extension would have become prescribed on 11 March 2012. The same holds true for all other claims resting on breaches alleged to have occurred before 13 November 2013 (i.e. the cut-off date calculated by the Respondent).
209. As a matter of course, the arbitral proceedings in *Renco I* could only have suspended the prescription period in relation to the Claimant's FET and indirect expropriation claims if these same claims were already submitted in *Renco I*. The Tribunal notes that the Parties agree this is the case,<sup>265</sup> and does not see any reason to find otherwise. In particular, while certain facts invoked

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<sup>263</sup> Counter-Memorial on Preliminary Objections, ¶ 106.

<sup>264</sup> See *supra* section VII.B.1(c).

<sup>265</sup> Memorial on Preliminary Objections, ¶ 59 ("Renco's articulation of [the FET claim] is practically identical to a claim submitted by Renco in its Notice of Arbitration and Statement of Claim [in *Renco I*]), ¶ 70 ("Renco purports to support its [expropriation] argument [in relation to extensions, new environmental obligations and public comments] based on the same factual allegations as for Renco's unfair treatment claim").

in relation to the indirect expropriation claim post-date the notices of arbitration in *Renco I* (notably MEM's vote in support of DRP's liquidation, which occurred in July 2012), the Respondent accepts, as does this Tribunal, that these developments were already anticipated by the Claimant in its amended notice of arbitration in *Renco I*.<sup>266</sup> In addition, the Tribunal notes that the Claimant introduced these additional facts in its Memorial on Liability in *Renco I* and expanded the scope of its FET and indirect expropriation claims accordingly.<sup>267</sup> Therefore, the Tribunal concludes that if *Renco I* resulted in a suspension of the limitations period for all claims subject to that arbitration, the Claimant's FET and indirect expropriation claims would benefit in their entirety from such suspension.

210. In view of the Parties' arguments on the suspension issue, the Tribunal finds it useful to divide its analysis into two questions as follows:

(a) First, is there a general principle of law recognized under international law pursuant to which prescription periods are suspended during the pendency of an arbitration?

(b) Secondly, what is the Treaty's position on the question of whether the prescription period in Article 10.18.1 is suspended pending arbitral proceedings?

211. The Tribunal will analyse both questions in turn.

(1) Does arbitration suspend prescription periods under general principles of law recognized under international law?

212. In the first prong of its argument that the *Renco I* proceedings suspended the prescription period, the Claimant submits that it is a "general principle of law recognized by civilized nations" under Article 38(1)(c) of the ICJ Statute that prescription periods are suspended for the duration of relevant judicial or arbitral proceedings. The Tribunal concurs.

213. While international law generally holds individual States' internal law to be irrelevant to a State's obligations under international law,<sup>268</sup> it nevertheless acknowledges that issues may arise in respect of which there is no clearly applicable treaty or customary international law obligation, but also no clear inference to be derived from the silence thereof. In this domain, and especially where the international rule to be applied finds its origin in analogous national law, the "rules

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<sup>266</sup> Memorial on Preliminary Objections, ¶ 74.

<sup>267</sup> *Renco I*, Memorial on Liability, in particular ¶¶ 196-208, 340-344, 381, 388 (R-12).

<sup>268</sup> See ILC Articles on State Responsibility, Art. 32; VCLT, Art. 27.

generally accepted by municipal legal systems” may be invoked in order that the ultimate result not “lose touch with reality”.<sup>269</sup> Accordingly, the “general principles of law recognized by civilized nations” may be resorted to in a gap-filling capacity as one of the sources of international law authoritatively enumerated in Article 38(1) of the ICJ Statute.

214. The existence of such principles is not lightly presumed. In order for a principle to rise to the level of a “general principle of law” under Article 38(1)(c) of the ICJ Statute, it must be “generally accepted” across national legal systems. The exact degree of acceptance required remains a subject of debate. However, no such difficulty arises in this case. The Claimant has pointed to the laws of Peru, Argentina, France, Germany, Portugal, Spain, the United Kingdom, and the United States.<sup>270</sup> The Claimant also cites early arbitral decisions from which the rules of prescription in international law originated as a general principle adopted by analogy from national legal systems and Roman law, including most notably the *Gentini Case*, which held that “the presentation of a claim to competent authority within proper time will interrupt the running of prescription.”<sup>271</sup>
215. To this list, the Tribunal can add further international and transnational instruments. For instance, Article 13 of the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods provides as follows:

The limitation period shall cease to run when the creditor performs any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

216. This provision was later endorsed and adopted as the basis for Article 10.5 of the UNIDROIT Principles on International Commercial Contracts, which provides that “[t]he running of the

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<sup>269</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ, Judgment, 5 February 1970, [1970] ICJ 1, ¶ 50 cited in *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy’s Request for Immediate Termination and Italy’s Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to intra-EU Disputes, 7 May 2019 (Guido S. Tawil, Brigitte Stern, Jean E. Kalicki (President)), ¶ 119 (CLA-9).

<sup>270</sup> Counter-Memorial, ¶¶ 117-121; Civil Code of Peru, Art. 1996 (CLA-11); Civil Code of Argentina, Art. 2546 (CLA-12); Civil Code of France, Art. 2241 (CLA-13); Civil Code of Germany, Art. 204(1) (CLA-14); Civil Code of Portugal, Art. 323(1) (CLA-17); Civil Code of Spain, Art. 1973 (CLA-16); *Henderson v. United States*, 517 U.S. 654 (1996), 657 n. 2 (CLA-19).

<sup>271</sup> *Gentini Case*, Reports of International Arbitral Awards, Vol. X, pp. 551-561, at 561 (CLA-10). See also *Case of John H. Williams v. Venezuela*, Reports of International Arbitral Awards, Vol. XXIX, pp. 279-293, at 291 (CLA-20); *Giacopini Case*, Reports of International Arbitral Awards, Vol. X, pp. 594-596, at 595 (CLA-21); *Tagliaferro Case*, Reports of International Arbitral Awards, Vol. X, pp. 592-594, at 593 (CLA-22). See also Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987), pp. 378-379 (CLA-8).

limitation period is suspended [...] when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognized by the law of the court as asserting the obligee's right against the obligor."<sup>272</sup> The official commentary to this latter provision reads as follows:

In all legal systems judicial proceedings affect the running of a limitation period in either of two manners. Judicial proceedings can cause an interruption of the limitation period, so that a new limitation period begins when the judicial proceedings end. Alternatively, judicial proceedings can cause only a suspension, so that a period that has already lapsed before the judicial proceedings began will be deducted from the applicable period, the remaining period starting at the end of the judicial procedure.<sup>273</sup>

217. The existence of such a general principle is not seriously disputed by the Respondent, who has not referred the Tribunal to a single jurisdiction in which prescription periods are not suspended during the pendency of legal proceedings. Instead, the Respondent submits that the Treaty's three-year prescription period establishes a *lex specialis* that wholly excludes the application of general principles.<sup>274</sup> It is to this argument that the Tribunal turns next.

(2) What is the Treaty's position regarding a suspension of the Article 10.18.1 deadline pending arbitral proceedings?

218. While the Parties diverge as to whether the Treaty is silent or conversely contains a *lex specialis* on the question of whether the three-year prescription period is suspended during arbitral proceedings, the Tribunal understands that there is no dispute between the Parties about the fact that neither Article 10.18.1 nor any other provision of the Treaty expressly addresses this question. Indeed, the Tribunal has no difficulty in finding that the Treaty does not expressly deal at all with the issue of a suspension of the prescription period – neither whether such a suspension may occur

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<sup>272</sup> International Institute for the Unification of Private Law (UNIDROIT), *UNIDROIT Principles on International Commercial Contracts 2016* (integral version), p. 361. Per their Preamble, the UNIDROIT Principles intend to reflect general principles of transnational law.

<sup>273</sup> International Institute for the Unification of Private Law (UNIDROIT), *UNIDROIT Principles on International Commercial Contracts 2016* (integral version), p. 362.

<sup>274</sup> Respondent's Comments on NDP Submission, ¶ 72 ("Renco's references to local jurisdictions that allow for suspension of the limitations period where a claim is procedurally defective cannot change the fundamental fact that the Treaty prohibits it."). Hearing Transcript, 12 June 2020, 59:11-14 ("one cannot suspend the prescription period as Renco has asked [this Tribunal] to do because that is [...] contrary to the express terms of the Treaty"), 61:7-15 ("none of that jurisprudence is applicable here at all because domestic law just simply doesn't apply [...] the Treaty is clear that what applies here, what the Tribunal must apply is the Agreement itself and only applicable rules of international law, not international law that overrides the express terms of the Agreement, and certainly not municipal law.").

at all nor, if so, whether submitting a claim to arbitration is a circumstance that could trigger such suspension.

219. Consequently, it is for the Tribunal to interpret the Treaty so as to ascertain whether one can infer from it an implicit position on the possibility of suspending the prescription period provided for in Article 10.18.1 for the pendency of arbitral proceedings, in particular in the presence of a defective waiver.

220. The articles of the Treaty invoked by the Respondent in support of its position that the Treaty contains a *lex specialis* regarding a suspension of the prescription period read, in relevant part, as follows:

10.16.2 At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration [...]

10.16.3 Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim [to arbitration].

10.16.4 A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration [...] referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in [then] Article 18 [now Article 20] of the UNCITRAL Arbitration Rules, are received by the respondent.

10.18.1 No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant [...] has incurred loss or damage.

10.18.2 No claim may be submitted to arbitration under this Section unless [...] (b) the notice of arbitration is accompanied [...] by the claimant's written waiver of any right to initiate or 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.

221. The Respondent submits that a combined reading of the above Articles makes clear that a notice of arbitration accompanied by a defective waiver as to local proceedings does not suspend the running of the prescription period. Rather, the Respondent argues that the relevant event suspending the Treaty's prescription period is the "submission of a claim to arbitration", which in the Respondent's view requires, amongst other things, a waiver conforming with Article 10.18.2. Therefore, according to the Respondent, the prescription period continues

running if a notice of arbitration is filed with an invalid waiver because, in such case, the claim was “never submitted to arbitration”.<sup>275</sup>

222. The Tribunal agrees with the Respondent that the prescription period is suspended once the claim is “submitted to arbitration”. The Tribunal further agrees with the Respondent that the term “submitted to arbitration” should be taken to have the same meaning in Article 10.18.1 as it has in the other provisions quoted in paragraph 220 above. Indeed, these provisions provide context to Article 10.18.1 within the meaning of Article 31(1) and (2) of the VCLT.
223. However, the Tribunal is unable to accept the Respondent’s contention that the text of the Articles invoked indicate that no claim was ever “submitted to arbitration” if the notice of arbitration did not include a waiver conforming with Article 10.18.2 (as was found to have been the case in *Renco I*). In fact, the plain language of Article 10.16.4, referred to by the Respondent itself, suggests the opposite: If a notice of arbitration and statement of claim is filed in accordance with Articles 3 and 20 of the UNCITRAL Rules, this is the point in time at which the claim “shall be deemed to be submitted to arbitration”. In other words, once a notice of arbitration and statement of claim conforming with the formal filing requirements of the UNCITRAL Rules is submitted, Article 10.16.4 requires the Tribunal to treat the claim as having been “submitted to arbitration”, with the necessary consequence that the prescription period under Article 10.18.1 ceases to run as of this point in time (this consequence being acknowledged by the Respondent itself in the event that a claim is “submitted to arbitration”<sup>276</sup>).
224. The texts of the other Articles of the Treaty invoked by the Respondent either do not add anything to this textual analysis (Article 10.16.2) or merely stipulate, just like Article 10.18.1 itself, under which circumstances a claim “may” be submitted to arbitration (Articles 10.16.3 and 10.18.2). However, the fact that a notice and statement of claim filed in accordance with the UNCITRAL Rules “may [not] be submitted to arbitration” in a given case (and therefore stands to be dismissed, at least if corresponding objections are raised) because the requirements of Articles 10.16 or 10.18 are not met, does not call into question that such a claim is in fact (deemed to be) “submitted to arbitration” based on Article 10.16.4 and, therefore, stops the prescription period from running. This is further confirmed by the final paragraph of Article 10.16.4, which again refers to the date

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<sup>275</sup> Respondent’s Comments on NDP Submission, ¶¶ 57, 59, 68.

<sup>276</sup> Respondent’s Comments on NDP Submission, ¶¶ 57, 68.

of receipt under the applicable arbitration rules for the determination of the effective date on which a claim asserted subsequently to the notice of arbitration has been submitted.<sup>277</sup>

225. Nor does any other context (none is invoked by the Parties) or the object and purpose of the Treaty, give the terms “shall be deemed”, “may”, and “submitted to arbitration” an ordinary meaning to the effect that the prescription period continues running if a notice of arbitration is filed in accordance with Article 10.16.4 but fails to include a valid waiver.
226. The Parties seem to agree, as does this Tribunal, that one of the objectives of the Treaty is to provide a predictable legal framework, and that Article 10.18.1 in particular aims at providing legal predictability by protecting State respondents against late<sup>278</sup> claims, not least to ensure that claims will be resolved when evidence is reasonably available and fresh.<sup>279</sup>
227. The Tribunal finds that this object and purpose does not support reading into the term “submitted to arbitration”, as used in Article 10.18.1, a requirement of a valid waiver so as to avoid the otherwise applicable suspension of the prescription period. Contrary to the Respondent’s argument, the object and purpose of both the Treaty and the prescription period in its Article 10.18.1 are not inconsistent at all with the prescription period being suspended during arbitral proceedings, irrespective of whether there is a defective waiver. The existence and length of such suspension can be easily and clearly established by reference to the dates of the notice of arbitration and the final award (or termination order), thus not calling into question legal predictability. Furthermore, if an arbitration is filed within the prescription period, this will prompt a diligent respondent State to find and secure evidence, such that sufficient evidence will

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<sup>277</sup> Treaty, Art. 10.16.4 (“A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.”).

<sup>278</sup> While the Respondent suggests that the objective of prescription periods is also to protect respondent States from “recurring” claims (Respondent’s Comments on NDP Submission, ¶ 65), the Respondent has not offered any support for this suggestion and the Tribunal does not agree with it. By their very nature, prescription periods are only concerned with claims that are made after a certain point in time. They do not protect a respondent against recurrent claims for as long as they are filed within the prescription period.

<sup>279</sup> Counter-Memorial on Preliminary Objections, ¶¶ 133-134; Respondent’s Comments on NDP Submission, ¶¶ 63-65; *referring to Vanessa Ventures v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, 22 August 2008 (Charles Brower, Brigitte Stern, Robert Briner (President), ¶ 3.5.4 (CLA-7); *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), 30 May 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶ 208 (RLA-26); *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, 11 March 2016, ¶ 5 (RLA-22); *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, 17 April 2015, ¶ 7 (CLA-5).

be available to it even if a second arbitration is filed after the conclusion of the first one. This applies with special force if, as in the present case, the respondent State must reasonably expect, upon or shortly after the conclusion of the first arbitration, that the same claim will be re-filed.<sup>280</sup> In such a case, the respondent State is aware of the need to preserve its evidence beyond the duration of the first arbitration. In addition, the Tribunal notes that in most, if not all, legal systems, prescription periods pursue the same objectives as Article 10.18.1, but are nonetheless subject to possible suspensions,<sup>281</sup> thus confirming that suspensions are generally compatible with the objectives underlying prescription periods.

228. Moreover, despite the US and, subsequently, Peru submitting that the limitation period is “clear and rigid”, not to be modified by any “suspension, prolongation or other qualification”, the Tribunal considers that this does not give the terms of the Treaty an ordinary meaning to the effect that a suspension of the prescription period of Article 10.18.1 requires, in addition to a claim being “submitted to arbitration” pursuant to Article 10.16.4, the presence of a waiver complying with Article 10.18.2(b).<sup>282</sup>
229. As “clear and rigid” as this general statement of the Contracting Parties purports to be, the Tribunal notes that both Contracting Parties do qualify it in their submissions in the instant proceedings.
230. The US, for its part, refers in its NDP Submission to *Feldman v. Mexico*<sup>283</sup> as the source for its general statement that the prescription period is “clear and rigid” and not subject to any “suspension, prolongation or other qualification”.<sup>284</sup> However, that very tribunal expressly found it possible, in the same paragraph of its award referred to by the US, that the prescription period

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<sup>280</sup> The Claimant filed its notice of intent in the present arbitration almost three months before the final award in *Renco I* was even rendered, see ¶¶ 60-61 *supra*.

<sup>281</sup> See the examples in Counter-Memorial on Preliminary Objections, ¶¶ 118-123.

<sup>282</sup> NDP Submission, ¶ 4; Respondent’s Comments on NDP Submission, in particular ¶¶ 3, 45, 49.

<sup>283</sup> For the sake of completeness, the non-disputing party submission of the US in that case does not help the Respondent, contrary to what is asserted in Respondent’s Comments on NDP Submission, ¶ 58. The US merely stated that the NAFTA prescription period is not satisfied by a mere notice of intent to submit a claim to arbitration, but rather requires a notice of arbitration. See *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Submission of the United States of America on Preliminary Issues, 6 October 2000, ¶ 14 (CLA-1).

<sup>284</sup> NDP Submission, n. 4. The other award cited by the US merely reproduces the general statement made in *Feldman v. Mexico* to justify bifurcation of the issue of prescription. See *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (James Anaya, John R. Crook, Fali S. Nariman (President)), ¶ 29 (RLA-10).



provided for in Articles 1116(2) and 1117(2) of NAFTA (which is analogous to Article 10.18.1) is “interrupted”, i.e. suspended, under certain circumstances.<sup>285</sup> In addition, the Tribunal notes that in its non-disputing party submissions in *Gramercy* and *Corona Materials*, the US specifically stated that a claim was not “submitted to arbitration” within the meaning of Article 10.18.1 (or the analogous provision in Article 10.18.1 of DR-CAFTA) unless it was accompanied by a valid waiver of local proceedings.<sup>286</sup> Such statement is notably absent from the NDP Submission in the present case.

231. The Respondent, in turn, expressly confirmed in its pleadings that a notice of arbitration that conforms with all requirements of the Treaty “suspend[s] the prescription period”.<sup>287</sup> Indeed, it could hardly be any different because, otherwise, a claim could become time-barred during a pending arbitration.
232. Moreover, the Respondent itself accepts that the prescription period was in fact suspended for almost the entire period between the conclusion of *Renco I* and the filing of the Notice of Arbitration in the present case, based on the Parties having so agreed. In this regard, the Tribunal has carefully considered the Respondent’s argument that this agreed suspension merely confirms the general principle that the respondent State can waive its jurisdictional objections, but that this is irrelevant to the question of whether the Claimant or the Tribunal can suspend the prescription period. The Tribunal finds that this argument ignores a decisive difference. It is one thing for a respondent State simply to choose not to raise a prescription objection in the arbitration (which it undoubtedly can, even if the Treaty did not allow for any suspension of the prescription period). It is quite another thing, however, for a respondent State to agree, outside of an arbitration, to a suspension of the prescription period, which is effectively the same as it agreeing not to raise a prescription objection in a subsequent arbitration in relation to that period of time. This latter course of action presupposes that the Tribunal could enforce this agreement, be it on the basis of an estoppel argument or otherwise, in case the Respondent ultimately raises a prescription

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<sup>285</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶ 63 (CLA-25) (“Of course, an acknowledgment of the claim under dispute by the organ competent to that effect and in the form prescribed by law would probably interrupt the running of the period of limitation. But any other state behavior short of such formal and authorized recognition would only under exceptional circumstances be able to either bring about interruption of the running of limitation [...]”).

<sup>286</sup> *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the US, 21 June 2019, ¶ 11 (R-13); *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Submission of the US, 11 March 2006, ¶ 9 (RLA-22).

<sup>287</sup> Respondent’s Comments on NDP Submission, ¶ 68.

objection in the arbitration in contravention of the agreement (on the basis of the time for which it previously agreed the prescription period would be suspended). The Respondent's position seems to be that the Tribunal could in fact do so and reject the respondent State's prescription objection despite more than three years having alleged since the alleged breach. Thus, the Respondent implicitly acknowledges that the prescription period of Article 10.18.1 is in fact subject to a suspension in such a scenario, despite no such (or other) suspension being expressly provided for in the Treaty.

233. In addition, the Tribunal has no reason to doubt that the Contracting Parties would agree that, if an arbitral award rendered under the Treaty is annulled for reasons of improper composition of the tribunal or a violation of due process, the claimant would not be prevented from re-filing the same claim again even though that (re-)“submission to arbitration” will hardly ever take place within three years of the alleged breach. Therefore, despite their general statement that the prescription period is “clear and rigid” and not subject to any “suspension”, the States parties must be taken to accept that Article 10.18.1 does allow for the prescription period to be suspended for the pendency of an arbitration, despite its wording not expressly saying anything to this effect. To hold otherwise would not only create perverse incentives for a respondent State to elicit grounds for setting aside, it would frustrate a claimant's due process rights: a successful vindication of those rights would be rewarded with a prescribed claim.<sup>288</sup> Such a manifestly unreasonable result—which flies in the face of the object and purpose of the Treaty under Article 31(1) of the VCLT—also confirms the Tribunal's interpretation under Article 32(b) of the VCLT.
234. In any case, even if the Tribunal were to regard the coincident use of the phrase “clear and rigid” by the Respondent and the US in their respective submissions as constituting or establishing an agreement on the interpretation or application of the Treaty in the sense of Article 31(3)(a) or (b) of the VCLT—a point on which the Tribunal need not pronounce itself—the VCLT merely requires the Tribunal to take such agreement “into account, together with the context”. In other words, such agreement on questions of interpretation is not binding on the Tribunal.<sup>289</sup> Instead, it

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<sup>288</sup> In very similar circumstances, the *Waste Management II* tribunal stated that such an interpretation “should be avoided if possible”. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002 (Benjamin R. Civiletti, Eduardo Magallón Gómez, James Crawford (President)), ¶ 33 (RLA-78).

<sup>289</sup> *Renco I*, Partial Award, ¶ 156 (“Although the Tribunal must ‘take into account’ any subsequent agreement between the State Parties pursuant to Article 31(3)(a) of the VCLT, the proper interpretation of Article 10.18 and how it should be applied to the facts of this case are tasks which reside exclusively with this Tribunal.”). This is all the more poignant under a Treaty that expressly allows the Contracting Parties to the Treaty to adopt, through the Free Trade Commission, interpretations that are expressly binding upon

is merely one (albeit an important) factor in the interpretative process, together with all others mentioned in Article 31 of the VCLT.

235. One other such factor is recourse to “any relevant rules of international law applicable in the relations between the parties”, pursuant to Article 31(3)(c) of the VCLT. As shown above, international law—and, more specifically “the general principles of law” recognized under international law—does provide for a suspension of the prescription period during the pendency of an arbitration. This, and the necessity of avoiding a claim from becoming prescribed during a pending arbitration, in particular to allow for resubmission after annulment of a first arbitral award, squarely confirms what is already suggested by the term “submitted to arbitration” in Article 10.18.1.
236. The Contracting Parties could have drafted Article 10.18.1 in a way that requires more than a claim being “submitted to arbitration” (which term necessarily refers back to Article 10.16.4) for the prescription period to be suspended, thereby expressly departing from general principles of law in this regard. However, they chose not to do so. The Tribunal is not prepared to conclude that a claim “submitted to arbitration” within the meaning of Article 10.16.4 does not suspend the prescription period merely because the Contracting Parties made coinciding submissions to the effect that Article 10.18.1 is a “clear and rigid” requirement that is not subject to any “suspension, prolongation or other qualification”, in circumstances where (i) the Contracting Parties themselves qualify this general statement; (ii) the plain language of the Treaty does not address the issue of suspension at all and suggests that the prescription period is satisfied by a claim that meets the requirements set out in the UNCITRAL Rules; (iii) if at all, the context and object and purpose of the treaty militate in favor of such a suspension of the prescription period, in particular to avoid manifestly unreasonable results in case an arbitral award is annulled; and (iv) general principles of law, which are to be read into the Treaty pursuant to Article 31(3)(c) of the VCLT,<sup>290</sup> provide for such a suspension.

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the Tribunal. *See* Treaty, Article 10.22(3). *See also* International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, (2008) II (Part Two) Yearbook of the ILC, ¶ 52.

<sup>290</sup> *Georges Pinson Case (France v. Mexico)*, Award, 19 October 1928, V UNRIAA 327, p. 422 (“Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way”; in the original French: “Toute convention internationale doit être réputée s’en référer tacitement au droit international commun, pour toutes les questions qu’elle ne résout pas elle-même en termes exprès et d’une façon différente.”); *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (UK, Czechoslovakia, Denmark, Germany & Sweden v. Poland), Judgment of 10 September 1929, PCIJ Series

237. Finally, the Tribunal rejects the Respondent's contention that the Tribunals in *Renco I*, *Corona Materials* and *Waste Management* confirmed the Respondent's position that the prescription period stops running only if the notice of arbitration meets all jurisdictional and admissibility requirements.<sup>291</sup>
238. In the paragraph from the *Renco I* Partial Award referred to by the Respondent in this regard, the Respondent highlights the term "timing issue"; however, a reading of that entire paragraph shows that this "timing issue" had nothing to do with prescription, but rather with the view of the majority of the *Renco I* tribunal that the Claimant could not retroactively confer it with jurisdiction by removing the contentious reservation of rights language from its waiver.<sup>292</sup>
239. As regards *Corona Materials*, while the Respondent purports to rely on a finding of that Tribunal,<sup>293</sup> the paragraph of the award to which it refers merely contains a summary of the non-disputing party submission filed by the US in those proceedings.<sup>294</sup> Instead, the Tribunal in that case found the relevant cut-off date for prescription purposes to be three years prior to the filing of the notice of arbitration, noting expressly that it did not need to deal with the issue as to whether a defective waiver may have changed this finding, given that this point was not advanced by the respondent State.<sup>295</sup>
240. With respect to *Waste Management*, it is true, as contended by the Respondent, that the Tribunal in that case found that a notice of arbitration containing a defective waiver did not amount to a "submission of a claim" within the meaning of Article 1121 of NAFTA. However, this finding does not support the Respondent's case for at least three reasons as follows.

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A, No. 23, 3, p. 26 ("reference is properly had to the principles underlying the matter to which the text refers"); Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention* (2005) 54(2) ICLQ 279, p. 311.

<sup>291</sup> Respondent's Comments on NDP Submission, ¶ 58 with n. 91 and 92.

<sup>292</sup> *Renco I*, Partial Award, ¶ 158.

<sup>293</sup> Respondent's Comments on NDP Submission, n. 91.

<sup>294</sup> *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶ 174 (**RLA-23**).

<sup>295</sup> *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶ 199 with n. 186 (**RLA-23**).

241. **First**, Article 1121 of NAFTA has nothing to do with prescription. In fact, the decision in *Waste Management* did not concern prescription at all, but rather whether a claim could be submitted to arbitration for a second time after it was dismissed in a first arbitration for lack of jurisdiction due to a defective waiver.
242. **Secondly**, Article 1121 of NAFTA uses a terminology (“submit a claim”) that is different from that in Articles 1116(2) and 1117(2) of NAFTA (“make a claim”), which are the provisions dealing with prescription. Hence, contrary to Articles 10.16 and 10.18 of the Treaty in the present case, which use identical terminology (“submit to arbitration”), it is not at all clear whether the meaning of those terms in NAFTA must be the same when it comes to the presence of a defective waiver.
243. **Thirdly**, none of the three reasons that the tribunal in *Waste Management* gave for its interpretation of Article 1121 of NAFTA support the Respondent’s position that filing a claim with a defective waiver does not suspend the prescription period of Article 10.18.1.
244. The first reason given by that Tribunal was very specific language in Article 1121 of NAFTA, viz. the terms “condition precedent” and “only if”,<sup>296</sup> none of which is present in Article 10.18.1 of the Treaty.
245. The second reason was

the underlying purpose of the arbitration provisions in Chapter 11, which was to ‘create effective procedures... for the resolution of disputes’. An investor in the position of the Claimant, who had eventually waived any possibility of a local remedy in respect of the measure in question but found that there was no jurisdiction to consider its claim at the international level either, might be forgiven for doubting the effectiveness of the international procedures. The Claimant has not had its NAFTA claim heard on the merits before any tribunal, national or international; and if the Respondent is right, that situation is now irrevocable. Such a situation should be avoided if possible.<sup>297</sup> (footnote omitted)

246. While, contrary to NAFTA, the Treaty does not explicitly mention as one of its objections the creation of effective dispute resolution procedures, there can be no doubt that the Contracting Parties, acting in good faith, must have intended for the Treaty’s dispute resolution mechanism to

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<sup>296</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002 (Benjamin R. Civiletti, Eduardo Magallón Gómez, James Crawford (President)), ¶ 33 (RLA-78).

<sup>297</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002 (Benjamin R. Civiletti, Eduardo Magallón Gómez, James Crawford (President)), ¶ 35 (RLA-78).

be effective. Applying the above reasoning of the Tribunal in *Waste Management*, it would seem to run counter to the effectiveness of the system if the Claimant in the present case, after having eventually submitted a valid waiver (without any relevant time having passed for prescription purposes after the conclusion of *Renco I*), is still denied in its request to have its Treaty claim heard on the merits. In the words of the Tribunal in that case, such a situation should be avoided if possible.

247. The third reason given by the Tribunal in *Waste Management* for its interpretation of Article 1121 of NAFTA was that general international law, which forms part of the governing law under Article 1131(1) of NAFTA, did not contain any rule in support of the respondent State's position that the claim could not be re-filed.<sup>298</sup> In the present case, Respondent's position does not only lack support in general international law, it even stands in contrast to it.<sup>299</sup>
248. In summary, therefore, the Respondent's position on the suspension of the prescription period is not supported by the case-law it relied upon in that context. In fact, the precise issue before this Tribunal has not arisen in any prior case.<sup>300</sup>
249. On the basis of the foregoing, the Tribunal finds that the Claimant's notice of arbitration and statement of claim in *Renco I* suspended the prescription period of Article 10.18.1 –

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<sup>298</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002 (Benjamin R. Civiletti, Eduardo Magallón Gómez, James Crawford (President)), ¶¶ 36-37 (**RLA-78**) (the "third" reason in the line of argument employed by that Tribunal).

<sup>299</sup> See section VII.B.2(c)(1) *supra*.

<sup>300</sup> In the *Waste Management* saga, Mexico did not raise a prescription objection in the resubmitted arbitration, even though it arguably could have done so in respect of the majority of the measures invoked by the claimant. The key measures invoked, however, still fell within three years of the date of the resubmission. Similarly, in *Methanex*, the US did not raise a prescription objection following an agreement that the claimant did not claim any violation of NAFTA on the basis of the only measure that potentially ran afoul of the prescription period. While *Apotex* did purport to hold that "there is support in previous NAFTA decisions for the proposition that the limitation period applicable to a discrete government or administrative measure (such as the FDA decision of 11 April 2006) is not tolled by litigation, or court decisions relating to the measure", the decisions referred to do not support that conclusion. Both *Mondev* and *Grand River* dealt only with the question of the date on which the investor acquired knowledge of the alleged breaches and loss or damage arising therefrom, i.e. the starting date for the prescription period in respect of the measures alleged—a denial of justice in *Mondev* and a series of related statutory measures subject to litigation in *Grand River*—not any potential suspension of the prescription period. In any event, it is manifest that a submission to a national court does not constitute a "submission to arbitration" under Articles 10.16.4 and 10.18.1 of the Treaty or "making a claim" or "submitting a claim" under NAFTA for the purposes of Articles 1116(2), 1117(2), and 1121 thereof. *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (Clifford M. Davidson, Fern M. Smith, Toby Landau (President)), ¶ 328 (**CLA-26**).

notwithstanding the fact that the Claimant was found, almost five years later, to have submitted a defective waiver. In this vein, what matters is that the notice of arbitration and statement of claim in *Renco I* met the requirements of Articles 3 and 20 of the UNCITRAL Rules<sup>301</sup> and, therefore, amounted to a submission to arbitration within the (identical) meaning of both Articles 10.16.4 and Article 10.18.1.

250. The Tribunal does not need to decide whether the suspension was triggered on 4 April 2011 (when the original notice of arbitration and statement of claim was filed) or 9 August 2011 (when the amended notice of arbitration and statement of claim was filed), because even the latter date was several months before three years elapsed from the alleged first breach on 10 March 2009.
251. Consequently, the Tribunal finds that the Claimant's claims are not time-barred pursuant to Article 10.18.1. As a result, the Tribunal does not need to pronounce itself on whether, based on the Respondent's behaviour in *Renco I*, the Respondent would have been precluded from objecting to the Claimant's claims being prescribed.

### **C. Costs of the Preliminary Phase**

252. As a final matter, the Tribunal turns to consider the issue of costs of this preliminary phase of the proceedings.
253. Both Parties have requested the Tribunal to order the other Party to bear the full costs of this preliminary phase.<sup>302</sup>
254. The Tribunal has discretion to award costs under Article 10.20.6 of the Treaty, which provides:
- When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.
255. Notwithstanding its discretion to award costs at this juncture, the Tribunal considers it more appropriate to defer any decision on costs to a later phase of these proceedings.

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<sup>301</sup> The Tribunal notes that this is not disputed between the parties.

<sup>302</sup> Memorial on Preliminary Objections, ¶ 107; Counter-Memorial on Preliminary Objections, ¶ 180.

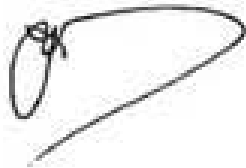
**VIII. THE TRIBUNAL'S DECISION**

256. For the reasons set out above, the Tribunal:

- (a) **dismisses** the Respondent's preliminary objections under Articles 10.1.3 and 10.18.1 of the Treaty; and
- (b) **reserves** its decision on costs for a future decision.

**Place of arbitration (legal seat):** Paris, France

**Date:** 30 June 2020



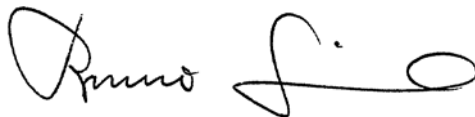
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Professor Horacio A. Grigera Naón  
Arbitrator



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Mr. J. Christopher Thomas QC  
Arbitrator  
(Subject to Dissenting Opinion)



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Judge Bruno Simma  
Presiding Arbitrator