

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

**THE RENCO GROUP, INC.**

**CLAIMANT**

**V.**

**THE REPUBLIC OF PERU**

**RESPONDENT**

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**Claimant's Counter-Memorial Concerning Peru's Waiver Objections**

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Claimant, the Renco Group, Inc. (“Claimant” or “Renco”), respectfully submits this Opposition to Peru’s Waiver Objection dated July 10, 2015, which the Republic of Peru (“Respondent” or “Peru”) filed pursuant to Procedural Order No. 4 dated July 6, 2015 (“Procedural Order No. 4”).

**I. PERU'S CLAIM THAT ITS INSTANT APPLICATION IS URGENT IS WITHOUT MERIT**

1. As the Tribunal is aware, the Parties agreed to a schedule for the briefing of Peru’s proposed objections under Article 10.20(4) of the Treaty, and the procedural schedule was attached as Annex A to Procedural Order No. 1. The agreement was that all competence objections were to be heard with the merits, unless the Tribunal determined that it was *required* under Article 10.20(4) of the US-Peru Trade Promotion Agreement (the “Treaty”) to hear competence objections as a preliminary question. In reliance on this agreement and Order, and at considerable effort and cost over the ensuing six months, Renco prepared and filed its Memorial on the Merits.

2. Thereafter, in briefing the 10.20(4) scope issue, Peru argued, *inter alia*, that Article 10.20(4) of the Treaty required the Tribunal to hear Peru’s waiver objection as a preliminary question under Article 10.20(4) of the Treaty. Peru first made this argument in its March 21, 2014 submission,<sup>1</sup> again in its April 23, 2014 submission,<sup>2</sup> and again in its final October 3, 2014 submission.<sup>3</sup> In its October 3, 2015 scope submission, Peru also argued, in the alternative, that the Tribunal should hear Peru’s waiver objection as a preliminary question on an expedited basis under UNCITRAL Rule Article 23(3), even if it were not required by Article 10.20(4) to do so. Peru’s alternative argument was sharp practice and in violation of the agreement between the parties and Procedural Order No. 1, because the parties agreed (and PO No. 1 reflects) that all competence objections will be heard with the merits unless the Tribunal is required to hear them under Article 10.20(4). There was no basis under the agreement or Procedural Order No. 1 for Peru to request preliminary consideration of competence objections as a discretionary measure.

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<sup>1</sup> Respondent’s Letter to the Tribunal, Mar. 21, 2014.

<sup>2</sup> Peru’s Submission on the Scope of Preliminary Objections, Apr. 23, 2014 (“Peru’s Preliminary Objections”).

<sup>3</sup> Peru’s Comments on the Non-Disputing Party Submission, Oct. 3, 2014.

3. In its Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20(4) dated December 18, 2014 (the "Scope Decision"),<sup>4</sup> the Tribunal, *denied* Peru's application.<sup>5</sup>

4. Specifically, the Tribunal held:

*[T]he Respondent's other preliminary objections, which related to competence, may be brought by the Respondent together with its Counter-Memorial on Liability in accordance with the timetable set out in Annex A to Procedural Order No. 1.*<sup>6</sup>

5. Unhappy with this result, Peru laid plans for an "end run" around the Scope Decision. Shortly after Renco submitted its Opposition to Peru's 10.20(4) Objection, Peru commenced a hyperbolic letter writing campaign alleging an urgent need for the Tribunal to take up Peru's waiver objection as soon as possible, based on new and allegedly important events in the local involuntary bankruptcy proceedings which have been ongoing since 2010 (the "Doe Run Peru Bankruptcy Proceedings"). Peru claimed in its letter dated April 29, 2015 that Renco "renewed its acts in flagrant disregard of the Treaty through ongoing violations of the waiver requirement in Article 10.01 the Treaty, at ongoing prejudice to Peru."<sup>7</sup> Appealing to a Tribunal that is mindful to preserve the integrity of its ultimate Award, Peru wrongfully stated that a recent filing in the involuntary bankruptcy proceedings was a "further aggravation of the dispute,"<sup>8</sup> that Renco was engaging in "interference with the authority of the Tribunal,"<sup>9</sup> and that "Renco has taken cover under the Tribunal's [Scope] Decision to engage in further violations of the waiver requirement under the Treaty."<sup>10</sup>

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<sup>4</sup> Decision as to the Scope of Respondent's Preliminary Objections under Article 10.20.4, Dec. 18, 2014 ("Scope Decision").

<sup>5</sup> *Id.*, ¶¶ 83-86, ¶ 256.

<sup>6</sup> *Id.*, ¶ 256 (emphasis added).

<sup>7</sup> Respondent's Letter to the Tribunal, Apr. 29, 2015 at 1.

<sup>8</sup> *Id.*, at 4.

<sup>9</sup> Respondent's E-mail to the Tribunal, May 7, 2015.

<sup>10</sup> Respondent's Letter to the Tribunal, May 18, 2015 at 4 (seeking expedited consideration of its waiver objection alleging, among other things, that "Renco has taken cover under the Tribunal's Decision to engage in further violations of the waiver requirement under the Treaty, including by demanding through its subsidiary a ruling in

6. The entire basis upon which Peru rests its alleged and new and urgent need for a preliminary ruling on waiver was a single page document that Doe Run Cayman, Ltd. (“Doe Run Cayman”) filed in the Doe Run Peru Bankruptcy Proceedings on March 26, 2015.<sup>11</sup> Peru did not advise the Tribunal, however, that these bankruptcy proceedings were commenced against Doe Run Peru more than five years ago, and that Doe Run Peru, as debtor-in-possession, has been embroiled in litigation within those bankruptcy proceedings with Peru’s Ministry of Energy & Mines (the “Ministry”) since November 12, 2010, when Doe Run Peru was compelled to defend against a US\$163 million credit claim that the Ministry asserted against the bankruptcy estate. In addition, the recent one page filing by Doe Run Cayman was as a “tercero coadyuvante” which is akin to an *amicus curiae* submission because Doe Run Cayman is not a party to Doe Run Peru’s 2010 challenge to the Ministry’s credit claim, has no claim of its own, and is solely dependent on Doe Run Peru’s claim. Peru further complained wrongly that by not addressing the newly urgent issue now, the Tribunal was allowing Renco “to have two bites at the apple,” that Renco was engaged in “opportunistic behavior,” and that Peru was suffering “ongoing prejudice from the ongoing bankruptcy proceedings.”<sup>12</sup>

7. After submission by the Parties on these and related issues, the Tribunal issued its Decision Regarding Respondent’s Requests for Relief on June 2, 2015 (the “June 2015 Decision”). In its June 2015 Decision, the Tribunal stated that one of the grounds for granting Peru’s request to hear its waiver objection as a preliminary question in accordance with Article 23(3) of the UNCITRAL Rules was “*the urgency with which it has been pressed by Peru...*”<sup>13</sup> There simply is no such urgency. The question of waiver is no more urgent now than it was at the time that the parties reached the agreement that resulted in Procedural Order No. 1;

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one of the improper local proceedings that it is pursuing before the Peruvian courts concerning measures at issue in this arbitration.”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; see also Respondent’s E-mail to the Tribunal, May 7, 2015 (alleging Renco’s “ongoing violation of the Treaty’s waiver requirement” and its “interference with the authority of the Tribunal”); White & Case letter to the Tribunal, May 18, 2015, p. 4 (seeking expedited consideration of its waiver objection alleging, among other things, that “Renco has taken cover under the Tribunal’s Decision to engage in further violations of the waiver requirement under the Treaty, including by demanding through its subsidiary a ruling in one of the improper local proceedings that it is pursuing before the Peruvian courts concerning measures at issue in this arbitration.”).

<sup>13</sup> Decision Regarding Respondent’s Request for Relief, June 2, 2015 ¶ 73 (“June 2015 Order”).

and when they briefed the scope issues; and when the Tribunal issued its Scope Decision. Nothing in the local bankruptcy proceedings has made this issue more, or less, urgent.

8. Nor did Peru advise the Tribunal that Peru has been aware for several years of the action that it now alleges are urgent and must be considered on an expedited basis. By letter dated March 18, 2012, Peru complained to Renco about Doe Run Peru's challenge to the Ministry's US\$163 million claim in the bankruptcy proceedings. Renco responded by letter dated March 20, 2012, stating that Doe Run Peru's challenge was a normal and natural part of the bankruptcy process.<sup>14</sup> Specifically, Renco stated:

We disagree with the manner in which your letter characterizes recent events. For example, your letter states that DRP secretly and unexpectedly filed a case on January 18, 2012 against the Ministry of Energy and Mines and INDECOPI, challenging the Ministry's claim as creditor in DRP's reorganization. But DRP's appellate filing on January 18, 2012 was a normal and natural part of the ongoing reorganization case. It is unrealistic for the Ministry or the Republic to expect DRP to abandon its legal and due process rights as this reorganization unfolds, especially when so many other issues remain unresolved."<sup>15</sup>

9. Peru's unfounded claim of new urgency was designed to, and succeeded in, circumventing the parties' agreement, Procedural Order No. 1, and the Tribunal's Scope Decision. Because Peru has misled the Tribunal into believing that recent events require Peru's waiver objection to be heard on an urgent basis, and because its waiver objection is no more urgent now than it has been for many years (and certainly since the parties reached the agreement reflected in Procedural Order No. 1 or when the Tribunal issued its Scope Decision), Renco should be awarded costs in connection with having to respond to Peru's waiver objection as a preliminary question. This request is consistent with the Tribunal's admonishment to Peru in the Tribunal's June 2015 Decision in which it stated: "[P]eru is invited to note that there will be cost consequences in the event Peru's application does not succeed."<sup>16</sup>

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<sup>14</sup> **Exhibit C-058**, Letter from E. Kehoe to J. Hamilton, Mar. 20, 2012.

<sup>15</sup> *Id.*

<sup>16</sup> June 2015 Order ¶ 75.

## **II. SUMMARY OVERVIEW**

10. As set forth in summary fashion immediately below, and more fully in the body of this submission, Peru's Waiver Objection fails for four main reasons. *First*, Renco asserts claims only on its own behalf under Treaty Article 10.16.1(a), and not on behalf of Doe Run Peru under Article 10.16.1(b). Because Renco was not required to submit a waiver for Doe Run Peru under the express language of the Treaty for Article 10.16.1(a) claims, the fact that it did not do so is irrelevant. *Second*, Renco's written waiver is not defective as Peru erroneously asserts; and even if it were the defect could be easily cured with no prejudice to Peru. *Third*, Doe Run Peru's challenge to the Ministry's US\$163 million claim in the Doe Run Peru Bankruptcy Proceedings is defensive in nature. Indeed, it is a required act under Peruvian bankruptcy law, for the benefit of all creditors of the bankruptcy estate. Doe Run Peru did not commence the involuntary Doe Run Peru Bankruptcy Proceedings, and Doe Run Peru has no power or authority to stop the proceedings. It is well-settled under international law that defensive measures can not constitute waiver of rights to arbitrate. *Fourth*, even if Doe Run Peru's defensive legal actions in the involuntary bankruptcy proceedings somehow run contrary Renco's waiver requirement, Renco's claims still stand because they either involve discrete measures that do not relate to the Ministry's credit, or are based on multiple measures beyond the legality of that credit.

***(i) Only Renco's Written Waiver is Required Because Renco, the Claimant, Asserts Claims Only on Its Own Behalf Pursuant to Article 10.16.1(a)***

11. Peru argues that Renco's waiver is deficient because it provided a written waiver only for itself, and not for Doe Run Peru. While Peru references "ordinary meaning" of Article 10.18 of the Treaty in its Waiver Objection, it ignores the plain language that conclusively undermines Peru's Waiver Objection.

12. Specifically, Article 10.20 defines a "claimant" as "an investor of a Party that is a party to an investment dispute with another Party." Renco, as the sole claimant in this arbitration, asserts only claims on its own behalf pursuant to Article 10.16.1(a). For claims submitted by a claimant on its own behalf pursuant to Article 10.16.1(a), such as those here, a



claimant's Notice of Arbitration must be accompanied by "*claimant's* written waiver."<sup>17</sup> Accordingly, based on the "plain language" and the "ordinary meaning" of the Treaty, Renco satisfied the requirement to provide the requisite written waiver when it provided a written waiver on its own behalf in the Notice of Arbitration and the Amended Notice of Arbitration.

13. Pursuant to Article 10.16.1(a) of the Treaty, an investor has standing to commence an arbitration on its own behalf if the Respondent State's Treaty breach has caused loss or damage *to the investor*. This is well-settled, and Peru knows it. For example, in *Teco v. Guatemala*, counsel for Peru represented the claimant/investor and the claimant asserted claims on its own behalf under Article 10.16.1(a) of CAFTA-DR (which is identical to the Treaty regarding the pertinent language). The claimant provided only its own written waiver (not a second written waiver on behalf of the local enterprise), and sought (and ultimately received) damages that the claimant investor suffered as a result of measures Guatemala took against the local operating enterprise.<sup>18</sup> So too, Renco has suffered and continues to suffer damage – both directly and indirectly – because of Peru's multiple Treaty breaches. Renco has been damaged in connection with two separate types of claims. First, Renco suffered, and continues to suffer, damage by Peru's refusal to assume liability for the claims in the St. Louis lawsuits, despite its duty to do so (the "St. Louis Litigation Claims"). Second, Renco has suffered, and continues to suffer damage due to, among other things, Peru's pattern of unfair treatment of Doe Run Peru – Renco's investment – which resulted in Renco's total loss of control over its mining investment in Peru (the "Taking Without Compensation Claims").

14. Because the written waiver requirement of Article 10.18 of the Treaty applies only to the claimant, and Renco is asserting claims solely on its own behalf as claimant pursuant to Article 10.16.1(a), not on behalf of its local enterprise pursuant to Article 10.16.1(b), Peru's Waiver Objection must fail.

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<sup>17</sup> **CLA-001**, Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, Article 10.18.

<sup>18</sup> **CLA-010**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, Dec. 19, 2013 ¶¶ 1-9 (William W. Park, Claus von Wobeser, Alexis Mourre (President)) ("*Teco* Award").

(ii) **Renco's Written Waiver is Not Defective**

15. In addition to its argument that Renco was required to submit a written waiver on behalf of Doe Run Peru (which it is not), Peru also asserts that Renco impermissibly added the following language to the end of its written waiver, which according to Peru causes Renco's written waiver to be void:

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>19</sup>

16. Peru's argument that Article 10.18 does not expressly *permit* its additional language is frivolous, because Article 10.18 does not *need* to expressly permit Renco to reserve this right. It is a fundamental tenet of due process that if the Tribunal dismisses Renco's St. Louis Litigation Claims or Taking Without Compensation Claims, or both, on jurisdictional or admissibility grounds, Renco's claims have not been heard on the merits. Thus, *res judicata* does not apply, and Renco would be free to try to pursue its claims wherever it thinks it can. The Tribunal in *Waste Management v. Mexico (Waste Management II)* held that *res judicata* does not apply where a tribunal dismisses a claim on jurisdictional or admissibility grounds, and does not preclude a separate tribunal, which did have jurisdiction, from adjudicating on the merits.<sup>20</sup> Peru has not provided any support to show otherwise. All of the decisions upon which Peru relies to attempt to avoid the merits of this case are inapposite. They all involve claimants who attempted to "carve out" some jurisdictional authority or competence from the Tribunal in favor of other, ongoing proceedings. But Renco does nothing of the sort here, which Peru does not (and can not) dispute. Here, Renco's writing stated something that it did not need to state, and which has no impact on this Tribunal or these proceedings. To the extent that the Tribunal may decline to hear any claims asserted in this arbitration on jurisdictional or admissibility grounds, Claimant

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<sup>19</sup> Claimant's Amended Notice of Arbitration and Statement of Claim, Aug. 9, 2011 ¶ 67 ("Claimant's Amended NOA").

<sup>20</sup> **RLA-103**, *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3), Decision of the Tribunal concerning Mexico's Preliminary Objection concerning the Previous Proceedings, June 26, 2002 ¶ 43 (Benjamin R. Civiletti, Eduardo Magallón Gómez, James Crawford (President)) ("*Waste Management II*") ("The point is simply that a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute *res judicata* as to those merits").

may, or may not, pursue such claims elsewhere (to the extent that such claims continue to exist at the time).

17. Moreover, the language at issue does not impact the purpose of the waiver requirement, namely, to prevent a claimant from pursuing double recovery by way of concurrent and overlapping proceedings that could lead to inconsistent results. The United States Government confirmed that the purpose of the waiver requirement is: “to avoid the need for a Respondent to litigate *concurrent and overlapping proceedings* in multiple forums, and to minimize not only the risk of double recovery, but also the risk of ‘conflicting outcomes’ (thus legal uncertainty)”<sup>21</sup> Peru itself admits that the purpose is to prevent “local litigation proceedings in parallel to the arbitration, in effect, giving them multiple bites at the same apple, to respondent’s prejudice.”<sup>22</sup> Renco’s written waiver does not involve either of the arguments put forward by Peru because the language at issue: (i) cannot result in any concurrent or overlapping proceedings; and (ii) cannot result in any type of double recovery. However, even if Renco’s language is considered to violate the waiver requirement, it would be merely a formal defect, easily cured by striking or disregarding the language. There has been no prejudice to Peru because this arbitration is ongoing and the language refers only to subsequent proceedings in the event of dismissal on jurisdictional or admissibility grounds.

18. Thus, the language of which Peru complains of has no impact on the validity of Renco’s waiver, in law, fact or common sense; and Peru’s effort to convert the language into something that it is not fails.

***(iii) The Waiver is Not Violated Because Doe Run Peru’s Actions Against the Ministry’s Credit in the Involuntary Bankruptcy Proceedings Are Defensive In Nature***

19. In its Waiver Objection, Peru complains of the following two acts by Doe Run Peru in the involuntary bankruptcy proceedings that were commenced against it in February

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<sup>21</sup> **CLA-095**, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of the United States of America, Feb. 14, 2014 ¶ 6 (“*Detroit Int’l v. Canada* U.S. Submission”) citing *International Thunderbird Gaming Corp. v. Mexico*, NAFTA/UNCITRAL, Award, January 26, 2006, ¶ 118 (“In construing Article 1121 of NAFTA, one must take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which would give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure”).

<sup>22</sup> Peru’s Memorial on Waiver, July 10, 2015 ¶ 2.

2010: (i) Doe Run Peru's 2010 *amparo* filing and (ii) a January 2012 "administrative action 368-2012." Peru mistakenly labels these "*First Proceeding*" and "*Second Proceeding*," respectively.<sup>23</sup> To the extent there was a "first" proceeding, it was the involuntary bankruptcy proceeding that a creditor commenced against Doe Run Peru in February 2010. From that day forward, Doe Run Peru, as debtor-in-possession, was acting to defend the bankruptcy estate, as Peruvian law requires it to do. Doe Run Peru did not initiate or continue the involuntary bankruptcy proceedings, and seeks no monetary damages whatsoever - anywhere.

20. In September 2010, approximately two months after Doe Run Peru was placed into involuntary bankruptcy, the Ministry entered the local proceedings and asserted a US\$163 million credit claim *against* the Doe Run Peru bankruptcy estate. Doe Run Peru challenged the recognition of the Ministry's credit claim before INDECOPI, Peru's bankruptcy agency, and also by way of constitutional *amparo*. After the creditors' committee removed existing management of Doe Run Peru, two subsequently appointed independent liquidators have, consistent with these same legal duties, continued these defensive measures to the present day. Doe Run Peru, as debtor-in-possession until May 2012, and now the liquidator appointed in May 2012, are under a fiduciary duty pursuant to Peruvian law to act to preserve the integrity of the bankruptcy estate for the benefit of all of its creditors. This obviously includes investigating and challenging the recognition of any credit that it considers inappropriate. Such duty is a fundamental principle of bankruptcy law in most developed countries.

21. As set forth below in Section IV.B below, it is well-settled that defensive actions taken by an investor to defend itself against claims asserted against it in local proceedings do not implicate a waiver requirement. Here, Claimant Renco has never been party to the local bankruptcy proceedings, and as set forth above, that is dispositive because only a claimant may breach the waiver requirement of the Treaty (either by not providing a written waiver or by violating its terms). But even if Doe Run Peru's acts of defending the bankruptcy estate could somehow be imputed to Renco (which they cannot), such defensive actions do not run afoul of waiver requirements.

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<sup>23</sup> *Id.*, ¶ 41.

22. Thus, because Doe Run Peru was acting defensively to claims asserted by Peru against it, and because Peruvian bankruptcy law required it, the waiver requirement of Article 10.18 is not implicated.

(iv) ***Renco's Claims Stand Because They Are Grounded Either On Measures Unrelated To The Ministry's Credit Claim Or Upon A Series Of Measures Beyond The Ministry's Credit Claim***

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23. Renco claims that Peru has breached the Treaty with respect to two main aspects of Renco's investment. First, the St. Louis Litigation Claims concern Peru's Treaty breaches through its failure and refusal to assume liability and responsibility for the claims in the St. Louis lawsuits (*breach of an investment agreement and breach of fair and equitable treatment under customary international law*). Second, Peru's Taking Without Compensation Claims are based upon, among other acts, Peru's patterns of unjust treatment of Doe Run Peru in connection with its final PAMA<sup>24</sup> project, culminating in Renco's total loss of its investment (*fair and equitable treatment, breach of investment agreement, discrimination and expropriation*).

24. In the unlikely event the Tribunal determines that (i) Doe Run Peru's actions in the Peruvian bankruptcy proceedings are attributable to Renco, *and* (ii) waiver is implicated even though Doe Run Peru is acting defensively, this still should not result in dismissal of any of Renco's claims.

25. The measures that make up the St. Louis Litigation Claims are independent and distinct from the Ministry's credit claim in the Doe Run Peru Bankruptcy Proceedings and therefore do not implicate any purported waiver violation. Accordingly, the St. Louis Litigation claims would stand even if the Tribunal were to find somehow that Doe Run Peru waived Renco's right to bring the Taking Without Compensation Claims in this Arbitration.

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<sup>24</sup> PAMA (Programa de Adecuación y Manejo Ambiental) refers to:

Environmental Remediation and Management Program; program consisting of projects intended to reduce pollutants and to bring a facility into compliance with the LMPs and ECAs issued by the Government of Peru; required under Peru's 1993 Regulations for Environmental Protection in Mining and Metallurgy.

26. Moreover, because Renco's Taking Without Compensation claims are based on many discrete acts that go well beyond the single act of the Ministry's filing of a US\$163 million credit in the Doe Run Peru Bankruptcy Proceedings, those claims would not be excluded *even if* the Tribunal were to find that Doe Run Peru's defensive challenge to the Ministry's credit claim somehow violated Renco's waiver obligations.

27. The Taking Without Compensation Claims claims are comprised of a series of discrete acts by Peru which, even without any allegations related to the Ministry's US\$163 million credit claim, combine to form multiple Treaty breaches, which forced Doe Run Peru to permanently suspend operations, destroyed the value of Renco's indirect shareholding in the company and ultimately caused Renco to lose total control over its investment.

28. Some of these discrete acts include, but are not limited to, Peru's:

- Failing to grant Doe Run Peru an effective extension to finish one of the three sub-projects comprising the ninth and final PAMA project;
- Reneging on an agreed upon Memorandum of Understanding, which included a PAMA extension;
- Issuing an "emergency decree" that targeted Renco by restricting participation of related creditors in bankruptcy proceedings;
- Giving preferential treatment to Centromin with respect to its request for the extension of its PAMA deadlines;
- Issuing a punitive supreme decree that imposed a trust account requirement that ensured that Doe Run Peru could not take advantage of the 30-month PAMA extension that Congress had granted;
- Obligating Doe Run Peru to perform numerous additional environmental obligations, some of which addressed Centromin's own PAMA obligation;
- Imposing more stringent requirements on Doe Run Peru than the national standards imposed on other companies, including regulations that did not exist under Peruvian law; and
- Pursuing baseless criminal actions against Renco officers Ira Rennert and Bruce Neil, accusing them of crimes related to the INDECOPI bankruptcy proceeding and Doe Run Cayman's issuance of an intercompany note.

29. In *Railroad Development Corp. v. Guatemala* (“RDC”), the Tribunal concluded that it would be inappropriate to exclude claims based on measures that went beyond those at issue in the local arbitrations.<sup>25</sup>

### **III. RENCO COMPLIED WITH ITS WRITTEN WAIVER OBLIGATIONS**

30. This Tribunal can resolve all of Peru’s waiver objections by answering two questions:

- A) Is Renco asserting claims on behalf of Doe Run Peru in this Treaty Arbitration (which would require a waiver from Doe Run Peru)?
- B) In its Amended Notice of Arbitration, Renco noted that if this Tribunal declines to hear any of Renco’s claims on jurisdictional or admissibility grounds, Renco would not be precluded from attempting to pursue such claims elsewhere if it chose to do so. Does that written observation invalidate Renco’s waiver?

If the answer to both questions is “no,” Peru’s waiver objection fails, and the Tribunal need not consider any other arguments by the parties on the topic of waiver. The answer to both questions is “no.”

31. As to the first question, claims under Article 10.16.1(a) of the Treaty require the claimant’s written waiver. Claims on behalf of an enterprise under Article 10.16.1(b) require a written waiver from both the claimant and the enterprise. In this arbitration, Renco is asserting its own claims under Article 10.16.1(a). Renco is not asserting claims on behalf of Doe Run Peru under Article 10.16.1(b). Renco has provided a written waiver, and Renco has not initiated or continued any proceedings regarding the measures it alleges constitute breaches of the Treaty. Thus, Renco has complied with all of its waiver obligations.

32. Peru does not argue that claims under Article 10.16.1(a) require an enterprise’s waiver, and Peru does not argue that Renco has initiated or continued any proceeding in violation

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<sup>25</sup> **CLA-096**, *Railroad Development Corp. v. Guatemala*, ICSID Case No. ARB/07/23, Decision on Clarification Request of the Decision on Jurisdiction, Jan. 13, 2009, ¶ 13 (Stuart E. Eizenstat, James Crawford, Andrés Rigo Sureda (President)) (“RDC Clarification Decision”); see also **RLA-100**, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, April 2, 2015, ¶ 304 (Michael Chertoff, Vaughn Lowe, Yves Derains (President)) (“Detroit Award on Jurisdiction”) (“[A] measure is a discrete act. The fact that multiple discriminatory acts may be part of a common plan does not make them one measure.”).

of the waiver. Instead, Peru advances the novel argument that Renco is asserting “de facto enterprise claims.”<sup>26</sup> Peru does not cite a single legal authority in support of its position, because there is none. Peru’s invented “de facto enterprise claims” theory fails because it conflicts directly with:

- The text of the Treaty;
- Basic principles of International Investment Law;
- Numerous awards from investment treaty tribunals;
- Arguments that White & Case has successfully asserted in another investment arbitration;
- An article that Peru cites in its Memorial on Waiver for other legal propositions;
- Arguments that Peru asserts in its Preliminary Objections Under Article 10.20.4; and
- Principles of corporate separateness under Peruvian law.

Put simply, Article 10.16.1(a) provides that “claimant, on its own behalf, may submit...a claim that the respondent has breached [a treaty obligation, investment authorization, or investment agreement] and that the claimant has incurred a loss or damage by reason of, or arising out of, that breach....”<sup>27</sup> Investment tribunals consistently have interpreted provisions akin to Article 10.16.1(a) as allowing a claimant to assert claims on its own behalf for damages *it* has incurred due to injuries a State inflicts on the claimant’s *subsidiary*.

33. As to the second question, Peru argues that the waiver bars an investor from reserving its right to pursue claims in another forum when an investment tribunal declines to hear those claims on jurisdictional or admissibility grounds. Peru’s argument conflicts with the object and purpose of the waiver provision and the Treaty’s dispute-resolution mechanism, and it leads to a manifestly absurd and unreasonable result. The *Waste Management II* Tribunal rejected a similar argument, and no authority supports it.

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<sup>26</sup> Peru’s Memorial on Waiver ¶¶ 31-33.

<sup>27</sup> CLA-001, Treaty, Article 10.16.1



34. Peru and Renco agree that the legal person acting in the Peruvian proceedings is Doe Run Peru and not Renco. Because Doe Run Peru’s waiver is not required, it does not matter whether Doe Run Peru “initiated or continued” the local involuntary bankruptcy proceedings

**A. CLAIMS UNDER ARTICLE 10.16.1(a) (I.E., AN INVESTOR’S CLAIMS) ONLY REQUIRE A WAIVER FROM THE CLAIMANT**

35. The rules of treaty interpretation codified in Articles 31-33 of the Vienna Convention on the Law of Treaties (“Vienna Convention”) reflect the rules of treaty interpretation under customary international law.<sup>28</sup> Those rules require that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>29</sup> Under Article 31(4) of the Vienna Convention, “[a] special meaning shall be given to a term if it is established that the parties so intended.”<sup>30</sup> Defined terms in a treaty thus should be interpreted in accordance with their definition.

36. Article 10.18(2)(b) of the Treaty provides that a claimant’s Notice of Arbitration be accompanied with:

(i) for claims submitted in arbitration under *Article 10.16.1(a)*, by the *claimant’s written waiver*, and

(ii) for claims submitted to arbitration under *Article 10.16.1(b)*, by the *claimant’s and the enterprise’s written waivers*

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.

37. The Treaty deliberately provides precise definitions for the terms “claimant” and “enterprise.” A “claimant” is “an investor of a Party that is a party to an investment dispute with another Party,” and an “enterprise” as “any entity constituted or organized under applicable law,

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<sup>28</sup> See, e.g., **CLA-082**, *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶ 43 (citing *Case concerning Kasikili/Sedudu Island* (Botswana/Namibia), 1999 ICJ Reports 1045, at pp. 1059-1060 (¶¶ 18-20)) (Stephen Schwebel, James Crawford, Ninian Stephen (President)) (“*Mondev Award*”).

<sup>29</sup> **CLA-083**, Vienna Convention on the Law of Treaties, Article 31(1).

<sup>30</sup> *Id.* at Article 31(4).

whether or not for profit, and whether privately-owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association.”<sup>31</sup>

38. Claims under Article 10.16.1(a) concern claims that a claimant (*i.e.*, investor that is a party to an investment dispute) asserts directly *on its own behalf*: “[T]he claimant, *on its own behalf*, may submit to arbitration under this Section a claim....”<sup>32</sup> Claims under Article 10.16.1(b) concern claims that an investor asserts *on behalf of an enterprise* of the respondent that the claimant owns or controls: “[T]he claimant, *on behalf of an enterprise* of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim....”<sup>33</sup> Thus, claims submitted solely under Article 10.16.1(a) do not require a claimant to provide a written waiver by its enterprise.

39. The structure of Chapter 10 confirms this straightforward textual analysis. There are two categories of claims. Those an investor asserts directly, and those that an investor asserts on behalf of its enterprise investment. In the first category, the investor will need to prove damages that it has suffered, and a tribunal will award any damages to the investor.<sup>34</sup> In the second category, the investor need not prove that it suffered any harm at all. Instead, it must prove that the investment suffered harm, and a tribunal will award those damages, *to the investment*.<sup>35</sup> Limiting waiver obligations to an investor when the investor only asserts claims on its own behalf (and not claims on behalf of an enterprise) protects the interests of other parties who may have an interest in the enterprise, such as minority shareholders and creditors. This distinction also can be important (as in the present case) when the investor has lost control over its enterprise investment due to actions by the State, and the investor does not wish an arbitration award to be paid to the investment, because the investor will not benefit from any such award and ultimate payment.

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<sup>31</sup> **CLA-001**, Treaty, Article 1.3, 10.28.

<sup>32</sup> **CLA-001**, Treaty, Article 10.16.1(a).

<sup>33</sup> **CLA-001**, Treaty, Article 10.16.1(b).

<sup>34</sup> **CLA-097**, Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 57 (2d ed. 2012).

<sup>35</sup> *Id.*

40. Because Renco is asserting claims only on its own behalf under Article 10.16.1(a), and not claims on Doe Run Peru's behalf under Article 10.16.1(b), Renco must provide a written waiver only on its own behalf, and that is exactly what Renco has done.

41. Peru acknowledges that Renco is not asserting enterprise claims under Article 10.16.1(b).<sup>36</sup> Peru also acknowledges that Renco specifically discontinued its Article 10.16.1(b) claims in its Amended Notice of Arbitration and also withdrew Doe Run Peru's waiver.<sup>37</sup> But Peru argues that even though Renco is asserting claims under Article 10.16.1(a) (which would not require an enterprise waiver), Renco is asserting "de facto enterprise claims" because: a) the allegations in the Original and Amended Notice of Arbitration are the same, b) several of those allegations concern measures that Peru inflicted on Doe Run Peru, and c) Renco is not claiming for a proportionate share of injuries that Doe Run Peru suffered because it owns 100% of Doe Run Peru's shares.<sup>38</sup> Under Peru's novel "de facto enterprise claims" argument, Renco must provide a written waiver on behalf of Doe Run Peru, and because Renco has failed to do so, its arbitration must be dismissed.<sup>39</sup>

42. Peru's invented "de facto enterprise claims" theory conflicts with the Treaty's text and basic principles of international investment law. The same State measures can give rise to claims under Article 10.16.1(a) on behalf of claimants and, at the same time, claims under Article 10.16.1(b) on behalf of enterprises. The compensation to which a claimant will be entitled regarding claims for damage it has suffered under Article 10.16.1(a) will not necessarily be the same as the compensation to which an enterprise will be entitled concerning claims that the enterprise has suffered under Article 10.16.1(b). To be clear, Renco is not seeking compensation in this arbitration for damages owed to Doe Run Peru; Renco is seeking an arbitral award, and payment thereunder to Renco itself, for damages that Renco itself has suffered as investor and Claimant.

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<sup>36</sup> Peru's Memorial on Waiver, ¶¶ 29-30.

<sup>37</sup> *Id.*

<sup>38</sup> Peru's Memorial on Waiver, ¶¶ 31-33.

<sup>39</sup> *Id.*, ¶ 37.

43. Peru’s own arguments illustrate the distinction between claims on behalf of a claimant and claims on behalf of that claimant’s enterprise. Peru argues that Renco’s claims are “de facto enterprise claims” on behalf of Doe Run Peru because Renco is not claiming a “proportionate share” because it owns 100% of Doe Run Peru.<sup>40</sup> But when an investor claims for only a proportionate share of damages commensurate with its percentage of ownership in the investment company, it does so precisely because the damages suffered by an investor and its enterprise are distinct even vis-à-vis the same measure.

44. That distinction is why Peru’s argument based on the similarity between the allegations in the Original and Amended Notices of Arbitration is irrelevant to this analysis. In the Original Notice of Arbitration, Renco asserted claims on its own behalf and claims on behalf of its enterprise investment Doe Run Peru regarding the same measures. In its Amended Notice of Arbitration (which Renco filed after it became clear that Renco would have no control over its investment), Renco is only asserting claims on its own behalf, but Renco still is asserting claims regarding the same measures as those alleged in the Original Notice of Arbitration. The fact that the underlying wrongful measures of respondent Peru remain the same does not somehow convert Article 10.16.1(a) claims into Article 10.16.1(b) claims based on a “de facto” theory – or any other theory of existing law.

45. Claims by an investor seeking compensation for its own injuries that result from measures inflicted on the investor’s investment are common under modern investment treaties. The text and structure of these treaties have been designed in the wake of *Barcelona Traction* to allow such claims.<sup>41</sup> Several treaties on investment law explain this basic and uncontroversial concept. In the treatise *DAMAGES IN INTERNATIONAL INVESTMENT LAW*, Sergey Ripinsky and Kevin Williams describe these types of claims and explain how they create “flow through” damages.<sup>42</sup> In the treatise *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, Rudolf Dolzer and Christoph Schreuer explain that modern investment treaties include shareholding or participation in a company in their definitions of “investment” in order to provide standing to shareholders to

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<sup>40</sup> Peru’s Memorial on Waiver ¶ 33.

<sup>41</sup> See, e.g., **CLA-097**, Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 56-57 (2d ed. 2012).

<sup>42</sup> **CLA-098**, Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law*, 155–57 (2008).

assert claims regarding injures that they suffer from measures taken against the companies they own. “The shareholder may then pursue claims for adverse action by the host state against the company that affects its value and profitability. *Arbitral practice illustrating this point is extensive.*”<sup>43</sup>

46. Several NAFTA Tribunals have rejected the argument that Peru makes here. In *Pope & Talbot*, the tribunal stated that “where the investor is the sole owner of the enterprise (which is a corporation, and thus an investment within the definitions contained in Articles 1139 and 201), it is plain that *a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116*” of NAFTA,<sup>44</sup> the analogous provision to Article 10.16(a) of the Treaty. In *UPS v. Canada*, Canada argued that the Tribunal lacked jurisdiction because UPS had brought its claims on its own behalf under Article 1116 (analogous to Article 10.16.1(a) of the Treaty) rather than on behalf of its wholly-owned investment, under NAFTA Article 1117 (analogous to Article 10.16.1(b) of the Treaty). Canada argued that “any harm flowing from the conduct complained of primarily affects the enterprise (UPS Canada) rather than the investor UPS.”<sup>45</sup> The tribunal rejected Canada’s jurisdictional objection and held that UPS had brought the claims properly on its own behalf under Article 1116.<sup>46</sup>

47. Arbitral caselaw interpreting CAFTA-DR, which has identical treaty text regarding these issues, further confirms this analysis. In *Teco v. Guatemala*, the claimant, Teco, was an American corporation that indirectly owned shares in a Guatemalan company.<sup>47</sup> White & Case acted as counsel for claimant Teco. In that arbitration, Teco asserted its claims under Article 10.16.1(a) on its own behalf.<sup>48</sup> Teco did not assert claims under Article 10.16.1(b) on

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<sup>43</sup> **CLA-097**, Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 57 (2d ed. 2012), (citing seventeen (17) awards) (emphasis added).

<sup>44</sup> **CLA-086**, *Pope & Talbot Inc. v. Government of Canada*, Award in Respect of Damages, May 31, 2002, ¶ 80 (emphasis added) (Benjamin Greenberg, Murray Belman, Lord Dervaird (President)).

<sup>45</sup> **CLA-087**, *United Parcel Service of America Inv. v. Government of Canada*, Award on the Merits, May 24, 2007, ¶ 32 (L. Yves Fortier, Dean Ronald A. Cass, Kenneth Keith (President)).

<sup>46</sup> *Id.*, ¶ 35. See also, **CLA-082**, *Mondev Award*, ¶ 82-83 (holding that Mondev had standing to bring its claim under Article 1116 of the NAFTA concerning the U.S. courts’ decisions that impact its investment).

<sup>47</sup> **CLA-010**, *Teco Award*, ¶¶ 1-9.

<sup>48</sup> **CLA-099**, *Teco Guatemala Holdings, LLC., v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Notice of Arbitration, Oct. 20, 2012, ¶¶ 23-27 (“*Teco NOA*”).

behalf of the Guatemalan company that operated the investment. Teco provided a written waiver on behalf of itself.<sup>49</sup> Teco did *not* provide a written waiver on behalf of Teco’s Guatemalan investment.<sup>50</sup> Teco sought damages that it suffered as claimant as a result of measures that Guatemala took against Teco’s Guatemalan investment.<sup>51</sup> And Teco accounted for “flow through” issues in its request for damages by seeking “lost cash flow that its investment would have earned had [the Guatemalan operating enterprise] been able to collect [certain tariffs] [and] the difference between the actual market value of Teco’s [shares in the Guatemalan enterprise and] the amount that its shares would have been worth had Guatemala not breached its treaty obligations.”<sup>52</sup> The Tribunal admitted Teco’s claim under Article 10.16.1(a), ruled in Teco’s favor on the merits, and awarded damages to claimant Teco for harm that Teco suffered as a result of measures that Guatemala took against the Guatemalan company that operated the Teco investment.<sup>53</sup> And the Tribunal in *Teco* also accounted for “flow through” issues in its award of damages.<sup>54</sup> Similarly, in the present case, Renco, like Teco, is asserting claims on its own behalf under Article 10.16.1(a) for injuries that Renco has suffered as a result of measures that Peru took against Renco’s enterprise investment, Doe Run Peru.

48. Peru’s novel “de facto enterprise claims” theory also is inconsistent with authorities that Peru cited in its Memorial on Waiver. In that submission, Peru cites to an article by Jennifer Thornton—currently a Senior Policy Advisor and Counsel at the Office of the United States Trade Representative—for the uncontroversial points that a) academics refer to these waiver clauses as “no U-turn” provisions, and b) the waiver clause concerns measures at issue in multiple proceedings.<sup>55</sup> However, Peru does not cite the portions of this same article where Ms. Thornton noted the distinction that Renco notes here. Ms. Thornton explains that under CAFTA-DR, a claimant may assert claims on its own behalf regarding injuries to the enterprise, *without* needing to provide an enterprise waiver:

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<sup>49</sup> **CLA-099**, *Teco* NOA, ¶ 22.

<sup>50</sup> **CLA-010**, *Teco* Award, ¶ 16, **CLA-099**, *Teco* NOA, ¶ 22.

<sup>51</sup> **CLA-010**, *Teco* Award, ¶ 333, 716.

<sup>52</sup> *Id.*, ¶ 333.

<sup>53</sup> *Id.*, ¶¶ 742, 780.

<sup>54</sup> *Id.*

<sup>55</sup> Peru’s Memorial on Waiver, ¶¶ 12 n.24, 43 n.103.

*The waiver provision in NAFTA Article 1121(1)(b) muddied this distinction to a certain extent, by requiring investors bringing claims under NAFTA Article 1116 to submit waivers on behalf of their locally incorporated enterprises, even though such claims are limited to claims for direct injury to the investor....The waiver provision in CAFTA-DR Article 10.18.2 reaffirms this distinction between claims by investors for direct injury and claims by investors for injury to their investments. It requires a Claimant to submit only its own written waiver when bringing a claim for direct injury to its interests (CAFTA-DR Article 10.18.2(b)(i)), while requiring a Claimant to submit its own written waiver, as well as the written waiver of the enterprise that it owns or controls, when bringing a claim for injury to its locally incorporated enterprise (CAFTA-DR Article 10.18.2(b)(ii)).*<sup>56</sup>

49. Peru argues that allowing Renco to assert claims in this arbitration concerning injuries that Peru caused to Doe Run Peru, without requiring Doe Run Peru's waiver, would constitute an "end-run" around the waiver obligation, rendering it meaningless.<sup>57</sup> Peru is incorrect. If a claimant asserts a claim on behalf of an enterprise, Article 10.18 requires the claimant to provide a written waiver barring that enterprise from asserting claims elsewhere regarding the same measures. But nothing in the Treaty prevents a claimant from asserting its own claims under Article 10.16.1(a) in an investment arbitration while, at the same time, an enterprise asserts claims regarding the same measures in another forum.<sup>58</sup> To the contrary, as Ms. Thornton explains, the parties drafted CAFTA-DR expressly to provide for that possibility.<sup>59</sup>

50. Peru's "end run" argument treats Renco and Doe Run Peru as if they were the same juridical person. That runs afoul not only of the defined terms and text of "claimant" and

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<sup>56</sup> **CLA-100**, J. Thornton, "The Modified Waiver Provision in CAFTA-DR Article 10.18.2" in C. Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (2012) at 501-501 n.63.

<sup>57</sup> Peru's Memorial on Waiver, ¶ 34. As support for its argument that not requiring Doe Run Peru's waiver would render the waiver provision meaningless, Peru cites the *Corfu Channels Case* and this Tribunal's Scope Decision for uncontroversial *effet utile* principle of treaty interpretation (*i.e.*, treaty provisions should be interpreted so as to give them effect). *Id.* Yet it is Peru who seeks to render Treaty text without effect. The Treaty is very clear that Article 10.16.1(a) claims require a waiver from the investor, but not the investor's enterprise.

<sup>58</sup> Peru's Memorial on Waiver, ¶ 36.

<sup>59</sup> **CLA-100**, J. Thornton, "The Modified Waiver Provision in CAFTA-DR Article 10.18.2" in C. Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (2012) at 501-501 n.63.

“enterprise” in the Treaty, but also of well-grounded principles regarding corporate separateness that are fundamental to Peruvian Civil and Corporate Law.<sup>60</sup>

51. Peru’s “de facto enterprise claims” theory also runs head-on with its objections under Article 10.20(4). In its Waiver Objection, Peru argues that Renco is making “de facto” enterprise claims under 10.16.1(b). But in its 10.20(4) submission, Peru argues repeatedly that Renco asserts only Article 10.16.1(a)(i)(C) “investor” claims and that “having withdrawn its claims under 10.16.1(b)(i)(C), Renco has only asserted – and, indeed can only assert – claims under Article 10.16.1(a)(i)(C) for breach of an investment agreement to which *Renco itself*, as alleged covered investor, is a party.”<sup>61</sup> If Renco’s claims are “de facto enterprise claims” under Article 10.16.1(b)(i)(C)—as Peru incorrectly asserts in its Waiver Objection—Peru’s 10.20(4) jurisdictional objections fail because Renco would be making claims on Doe Run Peru’s behalf. To be clear, Renco has explained in its Counter-Memorial on Preliminary Objections why Renco, *qua* Renco, may assert claims under the Treaty for breach of its “investment agreement,” and Renco is not asserting enterprise claims in this arbitration. But Peru may not, as it is doing now, characterize Renco’s claims as “de facto” enterprise claims under Article 10.16.1(b), for purposes of its Waiver Objection, while simultaneously arguing that Renco is making only “investor claims” under Article 10.16.1(a) for purposes of its Article 10.20(4) submission.

52. A claimant is entitled to decide what claims to assert in an arbitration. In this arbitration, Renco is asserting its own claims under 10.16.1(a), and, in doing so, Renco is seeking compensation for damages that it has suffered as a result of (i) Peru’s refusal to assume liability for the claims in the St. Louis lawsuits, and (ii) measures that Peru has inflicted on Doe Run Peru which deprived Renco of its mining investment. Article 10.16.1(a) allows Renco to

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<sup>60</sup> **Exhibit C-159**, Peruvian Civil Code, Article. 78, (“A legal entity has an existence distinct from its members’...”). Under Peruvian law, decision issued by the Supreme Court *en Banc* (with the full bench), in Spanish *Pleno Casatorio*, is binding upon all other courts and, thus, sets jurisprudence. Under article 400 of the Peruvian Code of Civil Procedure, “decisions made by absolute majority during a full bench sitting (*pleno casatorio*) constitute judicial precedent and are binding upon all jurisdictional organs of the Republic of Peru, until they are amended by a subsequent precedent.” See, **Exhibit C-205**, Supreme Court’s Fifth Civil *Pleno Casatorio* in Case No. 3189-2012-LIMANORTE, ¶¶ 46-51; see also, **CLA-101**, Enrique Elías, *Derecho Societario Peruano: La Ley General de Sociedades del Perú. Tomo I* at 30 (Editorial Normas Legales 1999).

<sup>61</sup> See, e.g., Peru’s Preliminary Objection Under Article 10.20(4), Feb. 20, 2015, ¶ 35 (emphasis added).



assert such claims and Renco has provided the written waiver that allows it to pursue such claims in this arbitration.

**B. RENCO HAS PROVIDED A VALID WRITTEN WAIVER**

53. Peru argues that Renco impermissibly “qualified” its waiver because, after using the language set forth in Article 10.18, Renco stated that it reserved the right to submit before another forum any claim dismissed by this tribunal on jurisdictional or admissibility grounds. In its Request for Arbitration and Amended Request for Arbitration, Renco wrote the following:

[A]s required by Article 10.81.2 of the Treaty, Renco waives its right to initiate or continue before any 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 injunctive 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>62</sup>

54. According to Peru, this statement is inconsistent with the waiver requirement because once an investor submits a claim to arbitration, it cannot pursue claims regarding measures that it alleges to constitute a breach of the Treaty in another forum, even if a tribunal dismisses those claims on jurisdictional or admissibility grounds and never decides the merits.

55. Peru’s argument is without merit, and no authority supports it. Under the rules of treaty interpretation codified in the Vienna Convention, a tribunal should interpret a treaty provision in “light of its object and purpose” and avoid interpretations that are “manifestly absurd or unreasonable.”<sup>63</sup> Peru’s interpretation conflicts with the Treaty’s object and purpose and is manifestly absurd and unreasonable. The language that Renco added is superfluous and simply states the obvious. Renco did not limit or carve out any aspect of the waiver required under Article 10.18 as Peru wrongly states. Nor did Renco attempt to waive fewer rights than the Treaty requires. Had Renco not included this statement in its Notice of Arbitration, nothing

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<sup>62</sup> Claimant’s Amended NOA, ¶ 67 (emphasis added).

<sup>63</sup> CLA-083, Vienna Convention on the Law of Treaties, Articles 31-32.

would change. With or without that statement, if this Tribunal dismisses Renco's claims on jurisdictional or admissibility grounds, Renco is free to attempt to bring such claims before a different tribunal that may have jurisdiction to hear such claims.

56. As Peru itself argues, the object and purpose of the waiver requirement is to prevent parallel proceedings, inconsistent results, and double recovery.<sup>64</sup> If an investment tribunal dismisses claims for lack of jurisdiction, it does not rule on the merits of the investor's claim. If that investor thereafter pursues other remedies, there will be no parallel proceedings because the investment arbitration will be concluded, at least as to dismissed claims. And there will be no risk of inconsistent results or double recovery because the investment tribunal will not have ruled on the merits of the claims. Thus, permitting an investor in that circumstance to pursue other remedies does not conflict with the waiver provision's object and purpose.

57. At the same time, Peru's interpretation of the waiver requirement conflicts with the object and purpose of the Treaty's dispute resolution mechanism. The Treaty is designed to provide investors with an effective means of resolving disputes. Yet, under Peru's interpretation, if an investment tribunal dismisses claims for lack of jurisdiction or as being inadmissible, that investor will never be able to have its claims heard on the merits in any forum. That would not be an effective system of dispute resolution. An important fact here is that Renco has *not* pursued or continued any dispute settlement procedures with respect to any measure alleged to constitute a breach of the Treaty, and it will not do so if the Tribunal retains jurisdiction.

58. The *res judicata* effect of a decision dismissing a claim on jurisdictional grounds is limited to the holding that there is no jurisdiction. Yet, under Peru's interpretation, the *res judicata* effect would extend to the merits even though the investor has not had its investment

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<sup>64</sup> Peru's Memorial on Waiver, ¶¶ 2, 13. *see, also*, CLA-095, *Detroit Int'l v. Canada* U.S. Submission, ¶ 6 citing *International Thunderbird Gaming Corp. v. Mexico*, NAFTA/UNCITRAL, Award, January 26, 2006, ¶ 118 ("In construing Article 1121 of NAFTA, one must take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which would give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure").

claim heard on the merits. Peru repeatedly complains that Renco should not be allowed “two bites at the apple” yet, under Peru’s interpretation, Renco would not even be allowed one.<sup>65</sup>

59. The Tribunal’s analysis in *Waste Management II* reasoned that a waiver provision should not be interpreted in a manner that bars an investor from ever having its claims heard on the merits in any forum.

[T]he underlying purpose of the arbitration provisions in Chapter 11 [of NAFTA is] 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>66</sup>

The *Waste Management II* Tribunal also observed that there is no rule under international law that precludes a Claimant from asserting a claim in a new forum if it is dismissed for lack of jurisdiction. “[T]here is no equivalent rule under general international law. In international litigation the withdrawal of a claim does not, unless otherwise agreed, amount to a waiver of any underlying rights of the withdrawing party. Neither does a claim which fails for want of jurisdiction prejudice underlying rights....”<sup>67</sup> After rejecting other arguments regarding *res judicata*, the *Waste Management II* Tribunal concluded, “there is no doubt that, in general, the dismissal of a claim by an international tribunal on grounds of lack of jurisdiction does not

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<sup>65</sup> Peru’s Memorial on Waiver, ¶¶ 2, 36.

<sup>66</sup> **RLA-103**, *Waste Management II* ¶ 35 (emphasis added). Although the context was different, this analysis also accords with the Tribunal’s reasoning in *Murphy v. Ecuador*. “While the Tribunal acknowledges that Article VI(3)(a) of the BIT—as well as Article VI(2)—does not explicitly refer to a decision on the merits, it nevertheless finds that an interpretation of both provisions in accordance with the *effet utile* principle mandates that such a result be obtained.” **CLA-102**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL Case, Partial Award on Jurisdiction, Nov. 13, 2013, ¶ 183 (Kaj Hobér, Georges Abi-Saab, Bernard Hanotiau (President)). The Tribunal further reasoned that an object and purpose of the treaty is to achieve meaningful settlement of investment disputes, which means obtaining decisions on the merits. *Id.* ¶¶ 188-192.

<sup>67</sup> **RLA-103**, *Waste Management II* ¶ 36.

constitute a decision on the merits and does not preclude a later claim before a tribunal which has jurisdiction.”<sup>68</sup>

60. Peru asserts that investment tribunals have “consistently” held that “carve outs” invalidate a waiver, and cites to *Waste Management I* and *Detroit International Bridge* for the proposition.<sup>69</sup> Those two authorities are inapposite on the facts and the law. Most importantly, there is no “carve out” here.

61. With respect to the facts, the claimants in those two cases carved out existing, ongoing legal proceedings regarding measures that went to the core of their treaty claims, which the claimant’s continued to actively pursue in parallel with the arbitrations. In *Waste Management I*, Claimant Waste Management refused—on behalf of both itself and its enterprise—to waive the right to continue the ongoing proceedings in Mexican courts regarding the exact same measures that it alleged violated NAFTA.<sup>70</sup> Waste Management literally waived nothing. And Waste Management continued actual proceedings before courts in Mexico. In its holding, the *Waste Management I* Tribunal found that this conduct of actively pursuing the other proceeding was the dispositive factor.<sup>71</sup> Similarly, in *Detroit International Bridge Company*, the claimant carved out its lawsuit pending in the United States District Court of the District of Columbia which it continued after filing the arbitration. The ongoing litigation in the District of Columbia concerned claims related to decisions to a) locate a parkway where it would divert traffic towards a new bridge instead of Detroit International’s existing bridge, b) delay improvements that would benefit Detroit International’s existing bridge, and c) take other measures that would divert traffic to a new bridge instead of Detroit International’s existing bridge.<sup>72</sup> The Tribunal found that the measures that were the basis for the NAFTA claims were the exact same measures that were the basis for the claims being pursued in the District of

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<sup>68</sup> RLA-103, *Waste Management II* ¶ 43.

<sup>69</sup> Peru’s Memorial on Waiver, ¶¶ 20-26.

<sup>70</sup> RLA-102, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 Award, June 2, 2000 ¶¶ 4, 31 (Keith Hight, Eduardo Siqueiros, Bernardo M. Cremades (President)) (“*Waste Management I*”).

<sup>71</sup> *Id.*, ¶ 31.

<sup>72</sup> RLA-100, *Detroit Award on Jurisdiction*, ¶¶ 305-312.

Columbia, and the Tribunal based its holding dismissing the claims both on the existence of the litigation and on the express carve out of those claims in the written waiver.<sup>73</sup>

62. In the instant dispute, Renco’s written waiver does not carve out the right to initiate or continue *any* proceedings with respect to measures over which this Tribunal asserts jurisdiction, and Renco has not commenced any such proceedings.

63. With respect to the law, neither of the tribunals in *Waste Management I* nor *Detroit International Bridge Company* held that the written waiver requirement prevents an investor from attempting to enforce its rights elsewhere *after* an Treaty tribunal dismisses a claim without ruling on its merits. None of the authorities that Peru cites in its Memorial endorse that proposition and, to Renco’s knowledge, none exist.

64. Peru argues that to “reserve” certain rights, by its nature, entails waiving fewer rights than the Treaty requires and that “the very fact that Renco qualified its waiver shows that Renco also understood that in the absence of such qualification the waiver required by Article 10.18.2(b) would prohibit it from initiating new proceedings in another forum in the event its claims were dismissed for lack of jurisdiction or admissibility.”<sup>74</sup> This conclusory leap-of-logic conflicts with reality, and with Peru’s own conduct in this arbitration. It is common in legal documents for parties to “reserve” rights that they do not need to reserve. It is a “belt and braces” approach that, rightly or wrongly, has become part of the legal process on occasion. For example, in its Memorial on Waiver, Peru “reserved” the right to contest the merits of Renco’s case, stating: “Peru, *as always*, reserves all of its rights, including in respect to Renco’s claims in this arbitration, which are factually and legally meritless.”<sup>75</sup> Under Peru’s logic, this statement shows that Peru understood that if it did *not* include this qualification, it would have *waived* its right to dispute the factual or legal merits of Renco’s case. That, of course, is not the case. If Peru had not included this reservation, Peru still would have retained the right to contest the merits of Renco’s case at the merits phase of this arbitration. Peru’s “reservation of its

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<sup>73</sup> *Id.*

<sup>74</sup> Peru’s Memorial on Waiver, ¶ 20, 26.

<sup>75</sup> Peru’s Memorial on Waiver, ¶ 7 n.12 (emphasis added).

rights” to do so in its Waiver on Memorial neither adds nor detracts from anything. It is a superfluous statement of the obvious.

65. In the unlikely event the Tribunal finds that the referenced language constitutes a violation, it would merely be a mere “formal” defect, and easily cured. As Peru notes in its Memorial on Waiver, tribunals distinguish between “formal” compliance (*i.e.*, providing a written waiver that complies with the Treaty’s requirements) and “material” compliance (*i.e.*, refraining from conduct inconsistent with one’s waiver obligations).<sup>76</sup> At most, Renco’s superfluous reservation would constitute a formal defect (and not a material breach), because it relates to a future right that, by its very nature, Renco has not exercised.<sup>77</sup>

66. Investment tribunals allow parties to cure “formal” waiver errors (as opposed to “material” waiver errors). In *Ethly v. Canada* and *Thunderbird v. Mexico*, the claimants did not provide *any* written waiver with their notices of arbitration. Instead, they provided the written waiver notices in the arbitration process, and neither claimant had commenced other dispute settlement procedures.<sup>78</sup> Both Tribunals held that these errors could be remedied during the course of the arbitration because the respondents in each case had not suffered any prejudice. The Tribunals reasoned that the waiver obligations should not be read in an overly formalistic or excessively technical manner, and that allowing a claimant to correct a written waiver error when the claimant had not taken any action in contravention of the waiver requirement is consistent with the waiver’s purpose. These holdings are consistent with numerous holdings of the Permanent Court of International Justice and the International Court of Justice, which routinely allow “formal” jurisdictional defects to be cured during a proceeding.<sup>79</sup> All of the investment

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<sup>76</sup> Peru’s Memorial on Waiver, ¶ 15 citing *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. El Salvador* (ICSID Case No. ARB/09/) Award dated 14 mar. 2011 ¶ 84.

<sup>77</sup> Peru’s Memorial on Waiver ¶ 15.

<sup>78</sup> **CLA-103**, *Ethly Corporation v. Government of Canada*, NAFTA/UNCTRAL Case, Award on Jurisdiction, June 24, 1998, ¶¶ 89, 91 (Charles N. Brower, Marc Lalonde, Karl-Heinz Böckstiegel (President)); **CLA-019**, *International Thunderbird Gaming Corp. v. United Mexican States*, Ad hoc – UNCTRAL, Award, Jan. 26, 2006, ¶ 116-17 (Thomas W. Wälde, Agustín Portal Ariosa, Albert Jan van den Berg (President)).

<sup>79</sup> *See, e.g.*, **CLA-104**, *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment, Aug. 25, 1925, P.C.I.J., Series A, No. 6, at 14 (“[T]he Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned.”); **CLA-105**, *Case of the Mavrommatis Palestine Concessions*, Judgment, Aug. 30, 1924 P.C.I.J. Ser. A, No. 2, at 34 (“Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant’s suit. The Court, whose jurisdiction is international, is

tribunals that dismissed arbitrations for waiver violations—including, *Waste Management I*, *Detroit Bridge*, *RDC*, and *Commerce Group*—concerned material breaches of the waiver (*i.e.*, the claimants actively were pursuing other proceedings). No tribunal has dismissed an arbitration due to a mere formal defect. The same principle applies even if the Tribunal determines Renco is bringing “de facto” 10.16.1(b) claims on behalf of Doe Run Peru such that a written waiver from Doe Run Peru is needed. The lack of a written waiver by Doe Run Peru would be merely a formal defect which could be cured by Doe Run Peru providing a written waiver.

67. For the foregoing reasons, Renco’s written waiver is valid. In any event, the language of which Peru complains constitutes, at most, a formal defect easily capable of being cured if necessary.

#### **IV. DOE RUN PERU’S DEFENSE AGAINST THE MINISTRY’S CREDIT CLAIM DOES NOT VIOLATE THE WAIVER OBLIGATION**

68. As demonstrated above, the waiver requirement applies only to Renco as Claimant, and not to Doe Run Peru. Because Renco is asserting its own claims (and not claims on behalf of its enterprise investment), Peru’s arguments regarding Doe Run Peru’s conduct in the Peruvian bankruptcy proceedings are of no moment. Peru’s waiver objections fail for an additional reason. Even if the waiver requirement were to apply to Doe Run Peru, waiver does not apply to defensive measures that a claimant takes in response to proceedings that it did not initiate or continue. A consistent line of arbitral jurisprudence, as well as the fundamental notion of due process, confirms that analysis. Moreover, if the Treaty’s waiver provision were interpreted to preclude the investment enterprise from defending the bankruptcy estate against

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not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications”); **CLA-106**, *Case Concerning The Northern Cameroons*, Preliminary Objections, Judgment, Dec. 2, 1963, I.C.J. Reports 1963 at 28; **CLA-107**, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Judgment, Nov. 26, 1984, I.C.J. Reports 1984 at 427-429 (“It would make no sense to require Nicaragua now to institute fresh proceedings based on a Treaty, which it would be fully entitled to do.”); **CLA-108**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, July 11, 1996, I.C.J. Reports 1996 at 595, 604, 613-14 (¶ 26) (“[The Court] should not penalize a defect in a procedural act which the applicant could easily remedy.”); **CLA-109**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, Nov. 18, 2008, I.C.J. Reports 2008, ¶ 89.

what the estate believes to be improper credit claims, it would force the debtor-in-possession to violate its legal duties and obligations to the bankruptcy estate and all creditors under Peruvian law. Such an outcome is untenable. It would constitute the rankest form of due process violation, would wreak havoc on the Peruvian bankruptcy system, and should not be countenanced by this Tribunal.

69. Peru complains about two matters—“administrative action 368-2012” (the “administrative appeal”) and an *amparo*. Both matters exist within the involuntary Doe Run Peru Bankruptcy Proceedings. Doe Run Peru, as debtor-in-possession, did not initiate or continue its involuntary bankruptcy proceeding. One of Doe Run Peru’s creditors forced it into involuntary bankruptcy, and Doe Run Peru defended the estate, as any debtor should, by taking defensive measures regarding, among other things, the US\$163 million credit claim that the Ministry asserted against the bankruptcy estate. The managers of Doe Run Peru were—and the subsequently appointed liquidators are still—obligated under Peruvian bankruptcy laws and under the General Corporations Law (*Ley General de Sociedades*) to protect the integrity of the bankruptcy estate for the benefit of all legitimate creditors. This includes an obligation to investigate and challenge credit claims that the debtor-in-possession or liquidator (trustee) believes to be improper. The duties of debtor-in-possession and liquidator under Peruvian law are commonplace in many jurisdictions worldwide.<sup>80</sup> There are serious consequences under Peruvian law for failing to comply with these duties.<sup>81</sup>

70. Neither Doe Run Peru, as debtor-in-possession, nor the liquidator has ever sought monetary recovery, and there is no possibility of double recovery by Renco in the Doe Run Peru

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<sup>80</sup> Under United States bankruptcy law, for example, a debtor in possession (or when appointed, a trustee in bankruptcy) has a fiduciary duty to represent the interests of the debtor’s bankruptcy estate. **CLA-110**, *In re Coin Phones, Inc.*, 148 B.R. 391, 394 (Bankr. S.D.N.Y. 1992). See generally, **CLA-111**, 11 U.S.C.A. §§ 704, 1106, 1107. This fiduciary duty includes the obligation on the debtor/trustee to examine the claims filed against the bankruptcy estate and, if necessary, object to them so that a fair and equitable allocation of the bankruptcy estate is made amongst the creditors and equity holders of the debtor. **CLA-111**, 11 U.S.C.A. §704(a)(5); 11 U.S.C.A. § 1106(a)(1); **CLA-112**, *SPV OSUS Ltd. v. UBS AG*, No. 15-CV-619 JSR, 2015 WL 4079079, at \*4 (S.D.N.Y. July 1, 2015) (“The Trustee of the estate is under a duty to examine proofs of claims and object to those that are improper.”).

<sup>81</sup> Prior to appointment of the liquidator, Doe Run Peru was managed by officers appointed by its shareholder assembly who are subject to Article 288 of the General Corporations Law which states, “Managers are liable before the company for the damages and losses caused by fraud, abuse of authority and gross negligence.” Failing to defend the estate against a US\$163 million credit, when one believes it to be improper, would rise to the level of gross negligence, **Exhibit C-217**, Peruvian General Law of Companies, Article 288.



Bankruptcy Proceedings and this arbitration. Doe Run Peru’s defensive challenges to the MEM credit seek to preserve the *status quo ante* in order for the bankruptcy estate not to be burdened by a US\$163 million credit claim to the extent that Peruvian bankruptcy law does not recognize such a claim.

71. After Doe Run Peru was forced into involuntary bankruptcy, the creditors rejected its plan of reorganization, voted to liquidate the company, and appointed a liquidator to manage the company through the liquidation process. As a result, a liquidator, and *not* Renco, has controlled Doe Run Peru since May 2012.

72. Article 10.18.2 provides that a claimant (or enterprise under Article 10.16.1(b)) may not “initiate or continue” any proceeding regarding measures alleged to breach the treaty. The Article 10.18 waiver does *not* require a claimant to waive any right to defend its interests in connection with a proceeding that it did not initiate or continue. The concept of a waiver implies a choice and a voluntary decision to act. Section IV.A.1 below sets forth the factual chronology of the ongoing bankruptcy proceedings, demonstrating that Due Run Peru did not initiate or continue to involuntary bankruptcy proceedings that were commenced against it.<sup>82</sup> As set forth in Section IV.A.2 below, international law is clear and uniform that the waiver provision does not apply when the claimant in the arbitration is acting defensively in local court proceedings.

**A. DOE RUN PERU, THE DEBTOR, TOOK DEFENSIVE ACTION AGAINST THE MINISTRY’S CREDIT CLAIM IN THE DOE RUN PERU BANKRUPTCY PROCEEDING AND WAS LEGALLY REQUIRED TO DO SO TO PROTECT BOTH THE BANKRUPTCY ESTATE AND ALL OF THE CREDITORS**

73. As set forth below, a fulsome description of the Doe Run Peru Bankruptcy Proceedings, and accompanying Peruvian legal principles, demonstrates that Doe Run Peru acted as debtor-in-possession to defend against a credit claim asserted against it in order to protect the bankruptcy estate and interests of all legitimate creditors.<sup>83</sup>

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<sup>82</sup> The chronology also shows that Peru’s claim of new urgency with respect to the involuntary bankruptcy proceedings is inaccurate and was alleged for purposes of an end-run around the parties agreement, Procedural Order No. 1 and the Tribunal’s Scope Decision.

<sup>83</sup> Insolvency matters in Peru are governed by the General Law of Bankruptcy Proceedings (“Ley General del Sistema Concursal”). Other bodies of law, such as the General Law of Companies (“Ley General de Sociedades”), complement the General Law of Bankruptcy Proceedings (the “Bankruptcy Law”), and have

## 1. **One of Doe Run Peru's Creditors Forced it into Bankruptcy**

74. On **February 18, 2010**, Consorcio Minero, S.A. (“Cormin”), one of Doe Run Peru’s creditors, filed for the bankruptcy of Doe Run Peru before INDECOPI<sup>84</sup> invoking an unpaid debt of US\$ 24,222,361.50.<sup>85</sup> On **July 14, 2010** INDECOPI issued Resolution 4985-2012 pursuant to which Doe Run Peru was declared to be in involuntary bankruptcy.<sup>86</sup>

75. On **August 16, 2010**, the notice of the Doe Run Peru bankruptcy process was published in “El Peruano,” which officially commenced the Doe Run Peru INDECOPI bankruptcy proceeding.<sup>87</sup>

## 2. **MEM and Activos Mineros Asserted Credits Against Doe Run Peru**

76. In order to participate in the Creditors Committee, putative creditors must file for recognition of their credits within thirty (30) business days of publication of the INDECOPI Bankruptcy Commission’s resolution declaring the debtor’s insolvency.<sup>88</sup> After the thirty (30)

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subsidiary application. All insolvency matters fall within the administrative jurisdiction of the Bankruptcy Commission (“Comisión de Procedimientos Concursales”), which is one of seven specialized commissions of The National Institute for Defense of Competition and Protection of Intellectual Property (“Instituto Nacional de Defensa de Competencia y de la Protección de la Propiedad Intelectual”) (hereinafter “INDECOPI”).

<sup>84</sup> INDECOPI is a large agency of the Peruvian government with jurisdiction over several areas of the economy (including Antitrust, Consumer Protection, Copyright and Intellectual Property, Bankruptcy, Unfair Competition, Antidumping and Subsidies, and Technical Regulations and Standards). Each one of these areas has a Commission or Office, which deals with the substantive area under its jurisdiction, and the decisions of each Commission or Office are subject to review by INDECOPI’S Administrative Tribunal.

<sup>85</sup> **Exhibit C-119**, Application to Initiate Bankruptcy Proceedings filed by Consorcio Minero, S.A. against Doe Run Peru, S.R.L., Comisión de Procedimientos Concursales del INDECOPI, Feb. 18, 2010.

<sup>86</sup> **Exhibit C-206**, Resolution No. 4985-2010/CCO-INDECOPI, Comisión de Procedimientos Concursales del INDECOPI, July 14, 2010. Insolvency proceedings may be voluntary or involuntary. Generally, an involuntary insolvency proceeding commences when one or more creditors file a petition with the INDECOPI Bankruptcy Commission, asking it to declare the insolvency of a debtor. In order for an involuntary insolvency petition to be admitted, the creditor or creditors must show (i) that the debtor has obligations with them that are at least thirty (30) calendar days past due, and (ii) that such obligations amount in the aggregate to more than fifty (50) Tax Units or UITs.

<sup>87</sup> **Exhibit C-207**, Notice of the Doe Run Peru Bankruptcy Process, EL PERUANO, Aug. 16, 2010.

<sup>88</sup> Pursuant to Article 34 of the Peruvian General Bankruptcy Law, a putative creditor has (30) days in which to request that the INDECOPI Commission recognize its credit as legitimate. **Exhibit C-208**, Peruvian General Law of Bankruptcy System No. 27809. *Id.*, at Article 38.1, Proceeding for recognition of credits provides that once the stage of personal appearance by the creditors has culminated, the Technical Secretary shall notify the debtor so that, within a term of ten (10) days, it may express its position on the requests for the presented credits to be recognized.

day period to request the recognition of the credit expires, the INDECOPI Bankruptcy Commission must officially notify the debtor with respect to each proposed credit requiring that, within a period of ten (10) business days, the debtor must to respond to the various putative creditors' requests for recognition of credits.

77. **On September 14, 2010** MEM filed its application with INDECOPI to be recognized as creditor of Doe Run Peru asserting a credit claim for US\$ 163,046,495.<sup>89</sup> MEM's petition stated that it requested that INDECOPI recognize a credit in MEM's favor alleging that Doe Run Peru breached its obligation to complete one of the nine environmental projects pursuant the PAMA within the timeframe required by MEM.<sup>90</sup> MEM asserted that the amount of money estimated as needed to complete the outstanding PAMA project constituted a "debt" of Doe Run Peru to MEM and was accordingly a credit in MEM's favor in the INDECOPI proceeding.<sup>91</sup>

78. **On September 27, 2010**, Activos Mineros S.A. ("Activos Mineros) (successor to Centromin) filed an application to be recognized as creditor of Doe Run Peru with claim for US\$10.5 million.<sup>92</sup> Activos Mineros sought recognition of this credit in an amount it alleged was based upon the estimated percentage of Doe Run Peru's responsibility for remediation and revegetation of areas affected by emissions from the Complex.<sup>93</sup>

### **3. Peruvian Law Obligated Doe Run Peru to Challenge both MEM's Credit and Activos Mineros's Credit**

79. A debtor is required to submit any challenge to the recognition of a credit it considers improper within ten (10) business days of being notified by the Technical Secretary of INDECOPI that a putative creditor requested that a credit in its favor be recognized.<sup>94</sup> Under

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<sup>89</sup> **Exhibit C-025**, Application filed by Ministry of Energy & Mines ("MEM") for Recognition of Claim, Comisión de Procedimientos Concursales del INDECOPI, Sept. 14, 2010.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> **Exhibit C-072**, Application filed by Activos Mineros, S.A.C., for Recognition of Claim, Comisión de Procedimientos Concursales del INDECOPI, Sept. 27, 2010.

<sup>93</sup> *Id.*

<sup>94</sup> *See Exhibit C-208*, Peruvian General Law of Bankruptcy System No. 27809, Article 38.

Peruvian law, debtor's management has the fiduciary duty to act in the best interest of the both the bankruptcy estate and all legitimate creditors.<sup>95</sup> If a debtor fails to challenge a creditor's application for recognition of a credit that the debtor believes is improper, then the credit is deemed valid and admitted unless INDECOPI, on its own accord, deems the credit invalid or another creditor challenges the credit; notwithstanding it is the debtor that has access to the information related to the alleged credit and is therefore the party who should be challenging improper credit claims. Thus, failure by a debtor to challenge a credit that appears improper may have significant consequence for both the bankruptcy estate and the other creditors whose credits are eventually recognized.

80. Accordingly, on **November 12, 2010** and **November 17, 2010**, Doe Run Peru, as debtor, submitted its opposition to the Ministry's application seeking recognition of its US\$ 163 million credit claim against the estate.<sup>96</sup> Among other things, Doe Run Peru argued that failure to complete the final PAMA project did not constitute a credit as defined by the General Law of Bankruptcy Proceedings. While the Ministry can sanction a mining company for not finishing the PAMA, or may ultimately shut down the operations for failure to finish the PAMA, the Ministry cannot force the company to finish the PAMA, nor can the Ministry finish the PAMA with the company's resources.

81. Ten days later, on **November 22, 2010**, because the proposed MEM credit had not yet been recognized, and in conjunction with its challenge of the proposed credit before INDECOPI, Doe Run Peru filed a defensive constitutional *amparo* action requesting that the

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<sup>95</sup> Article V of the Preliminary Title of the Peruvian General Law of Bankruptcy provides: "[...] Bankruptcy proceedings seek the participation and benefit of all creditors involved in the debtor's crisis. The collective interest of the body of creditors supersedes the individual interest in collection of each creditor." Similarly, VIII of the Preliminary Title of that same law provides: "The subjects of the proceedings, their representatives, attorneys and, in general, all participants of the bankruptcy proceedings must conform their conduct to the obligations of accuracy, probity, faithfulness and good faith. Recklessness, bad faith or any other willful misconduct shall be sanctioned, according to law." Thus, a debtor, prior to the appointment of an administrator or liquidator, has a good faith fiduciary duty to act in the best interest of the bankruptcy estate itself and also with respect to the rights of legitimate creditors. **Exhibit C-208**, Peruvian General Law of Bankruptcy System No. 27809.

<sup>96</sup> **Exhibit C-209**, Brief in Opposition filed by Doe Run Peru to the Application filed by Ministry of Energy & Mines ("MEM") for Recognition of Claim, Comisión de Procedimientos Concursales del INDECOPI, Nov. 12, 2010; **Exhibit C-210**, Brief in Opposition filed by Doe Run Peru to the Application filed by Ministry of Energy & Mines ("MEM") for Recognition of Claim, Comisión de Procedimientos Concursales del INDECOPI, Nov. 17, 2010.

Ministry be prevented from having its US\$ 163 million credit claim recognized before INDECOPI.<sup>97</sup> This was part and parcel of Doe Run Peru’s defensive strategy to protect the bankruptcy estate itself and to benefit all creditors. Filing an *amparo* action against a credit that the debtor believes is without legal merit is a legitimate ancillary action to a challenge to recognition of an improper credit before INDECOPI, particularly when such action constitutes a breach of a constitutional right (in Peru, companies are deemed to possess constitutional rights such as the rights of property and due process of law).

82. On **December 2, 2010**, just as it had with respect to the Ministry’s application to be recognized as a creditor, Doe Run Peru challenged Activos Mineros’ credit in the amount of US\$ 10.5 million.<sup>98</sup> Doe Run Peru argued that the remediation obligation underlying Activos Mineros’s application was its own responsibility under the STA. Doe Run Peru also argued that it had not breached the PAMA, and that, even if it had, that would not result in a debt to Activos Mineros that would translate into a credit in the INDECOPI proceeding.<sup>99</sup>

#### **4. The First Instance Court Dismissed the Amparo on Procedural Grounds (Improcedente)**

83. On **January 11, 2011**, the First Instance Constitutional Court dismissed Doe Run Peru’s constitutional *amparo* against the Ministry’s credit.<sup>100</sup> The court held the *amparo* was procedurally inadmissible (*improcedente*) because violating a PAMA could not create a credit. According to the First Instance Constitutional Court, INDECOPI would never recognize the Ministry’s credit claim, and thus the alleged “threat” to Doe Run Peru was “imaginary.”<sup>101</sup>

FOUR: “(...) one does not observe in this case that any of the assumptions referred to in the above mentioned Decisions occur, insofar as **the threat argued by the appellant is not based on actual, effective, tangible, concrete or ineludible facts**, to the extent that it does not set out the reasons for which it considers that

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<sup>97</sup> **Exhibit R-19**, DRP Constitutional *Amparo* Action Complaint, Nov. 22, 2010.

<sup>98</sup> **Exhibit C-124**, Response filed by Doe Run Peru Opposing Recognition Claim by Activos Mineros, S.A.C., Comisión de Procedimientos Concursales del INDECOPI, Dec. 2, 2010.

<sup>99</sup> *Id.*

<sup>100</sup> **Exhibit C-211**, First Court Specialized on Constitutional Matters of Lima, Resolution No. 1, Jan. 11, 2011.

<sup>101</sup> *Id.*

the *Comisión de Procedimientos Concursales* shall recognize the credit requested by the Ministry of Energy and Mines, which is essentially what it considers as constituting the threat of a breach of the constitutional rights invoked in the claim, especially if, as indicated, **the Bankruptcy Law itself does not consider the PAMA as a credit, therefore, this is the argument to assume that the PAMA obligation would be recognized as a credit by the *Comisión de Procedimientos Concursales*; furthermore, [the appellant] has not indicated either whether in any bankruptcy proceedings the cited Commission has recognized the PAMA as a credit, in such a way that one can presume that [said recognition] would constitute a reiterative action of such entity and, consequently one could decide in the same manner in this case; therefore [the appellant is] alluding to an imaginary injury that escapes an objective abstraction, an assumption that does constitute a certain or imminent threat of a breach of the referred to rights.**<sup>102</sup>

**5. *The INDECOPI Commission Dismissed Activos Mineros' Credit and the Ministry's Credit***

84. On **February 2, 2011**, INDECOPI *rejected* Activos Mineros' US\$10.5 million credit claim and issued Resolution 507-2011/CCO-INDECOPI.<sup>103</sup> The INDECOPI Commission found that Activos Mineros failed to demonstrate that Doe Run Peru had undertaken the obligation to remediate the soil of La Oroya under the STA.<sup>104</sup> The INDECOPI Commission concluded, among other things that:

Accordingly, it has not been demonstrated that, on the basis of the Share Transfer Contract, the bankrupt party was obligated to assume the obligations prescribed in that contract or the consequences of a breach thereof vis-à-vis Activos Mineros, nor has it been demonstrated that it was obligated to bear 35% of the total investment for soil remediation and that Doe Run is responsible to Activos Mineros for such investment, in conformity

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<sup>102</sup> **Exhibit C-211**, First Court Specialized on Constitutional Matters of Lima, Resolution No. 1, Jan. 11, 2011. On **March 2, 2011**, Doe Run Peru appealed the First Instance Constitutional Court's ruling. On **August 18, 2011**, the Superior Court of Justice of Lima, First Civil Chamber, affirmed the First Instance Constitutional Court's ruling dismissing Doe Run Peru's *amparo*. The Superior Court's decision was appealed to the Supreme Constitutional Court on **September 15, 2011** and the Supreme Court has not taken up the matter since that time – nearly four years ago.

<sup>103</sup> **Exhibit C-128**, Resolution No. 0507-2011/CC-INDECOPI, Comisión de Procedimientos Concursales del INDECOPI Feb. 2, 2011.

<sup>104</sup> *Id.*

with the provisions of Article 1 of the General Law of Bankruptcy System. .<sup>105</sup>

85. On **February 23, 2011**, the INDECOPI Commission *rejected* the Ministry's US\$163 million credit claim and issued Resolution 1105-2011/CCO-INDECOPI concluding that Ministry's claim that the obligation to complete the PAMA did not constitute a "debt" of Doe Run Peru and was therefore not a valid credit claim capable of recognition by INDECOPI.<sup>106</sup>

86. The INDECOPI Commission stated:

The goal of a PAMA is for the mine/metallurgical operator to reduce or eliminate emissions and/or dumping derived from mining/metallurgical operations to be able to comply with the maximum permissible levels established by the Relevant authority, so that investments must be made to incorporate cutting edge technology and/or alternate methods..<sup>107</sup>

Unfulfillment of the goals of a PAMA could lead the mining/metallurgical operator to incur civil liability against third parties[footnote omitted] or against the State, in their capacity as the person responsible for the protection of the Right to Health and Human Life [footnote omitted].<sup>108</sup>

The applicable legislation does not establish that if the PAMA projects are not completed, or if their goals are not met, an obligation arises, in favor of the MEM, made up of the value of the incomplete Project. It also does not establish that the MEM should execute the last phase of the PAMA (The Project).<sup>109</sup>

87. Losing parties may appeal INDECOPI Commission Decisions to INDECOPI's Free Competition Tribunal ("*Tribunal de Defensa de la Competencia y de la Propiedad Intelectual*") (the "INDECOPI Tribunal"). INDECOPI is an administrative agency. The decisions issued by INDECOPI's Tribunal exhaust administrative jurisdiction and are subject to review by the Peruvian Courts (the Judiciary) at three different instances, first by the First

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<sup>105</sup> *Id.* at 11.

<sup>106</sup> **Exhibit C-130**, Resolution No. 1105-2011/CC-INDECOPI, Comisión de Procedimientos Concursales del INDECOPI, Feb. 23, 2011.

<sup>107</sup> *Id.* at 12.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Instance Court in Lima specializing in administrative matters, second by the Superior Court of Lima specializing in matters related to INDECOPI (intermediate appellate level) and then by the Supreme Court, whose decisions are final. Decisions of INDECOPI's Tribunal that are not appealed to the Courts for judicial review become final (*cosa juzgada*) 90 days after they are issued.

**6. MEM and Activos Mineros Appealed to the INDECOPI Tribunal.**

88. On **February 18, 2011**, Activos Mineros appealed the rejection of its credit to the INDECOPI Tribunal. On **March 7, 2011**, the Ministry also appealed the rejection of its credit.<sup>110</sup> By successfully challenging these credits, Doe Run Peru had complied with its good faith obligation to preserve the integrity of the bankruptcy estate and act in the best interests of all potential legitimate creditors.

89. On **April 4, 2011**, Renco commenced this international arbitration.<sup>111</sup> A few weeks later, on **May 20, 2011**, Doe Run Peru submitted its opposition to the Ministry's appeal in the bankruptcy proceedings.<sup>112</sup> Peru argues that Doe Run Peru can drop its challenges to the Ministry's credit.<sup>113</sup> Peru ignores that Doe Run Peru was, and the liquidator currently is and continues to be, subject to special duties and obligations under Peruvian bankruptcy law and required to defend against improper credits. If Doe Run Peru had not done so, it clearly would have violated its legal obligations to act in the best interest of the bankruptcy estate and in the interest of the creditors. That is especially so given that the INDECOPI Commission had already rejected both the Ministry's credit and Activos Mineros' credit prior to the arbitration being commenced. Failure to act defensively would have likely resulted in creditors filing civil and criminal lawsuits against Doe Run Peru management for failing to act in a prudent manner *vis a vis* the creditors. Thus, having prevailed before the INDECOPI Commission, Doe Run Peru, as

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<sup>110</sup> **Exhibit C-121**, Motion to Appeal INDECOPI Resolution No. 0507-2011/CC-INDECOPI filed by Activos Mineros, S.A.C., Comisión de Procedimientos Concursales del INDECOPI, Feb. 18, 2011; **Exhibit C-212**, Motion to Appeal INDECOPI Resolution No. 1105-2011/CC-INDECOPI filed by Ministry of Energy & Mines, Comisión de Procedimientos Concursales del INDECOPI, Mar. 7, 2011.

<sup>111</sup> Claimant's Notice of Arbitration and Statement of Claim, Apr. 4, 2011.

<sup>112</sup> **Exhibit C-213**, Brief in Opposition filed by Doe Run Peru to Appeal by Ministry of Energy and Mines, Comisión de Procedimientos Concursales del INDECOPI, May 20, 2011.

<sup>113</sup> Peru's Memorial on Waiver, ¶¶ 50 n.116, 52.



debtor-in-possession, was obligated to continue challenging the Ministry's credit claim on appeal. It is simply not feasible for a debtor-in-possession, in these circumstances, to withdraw its challenge to a credit.

**7. The INDECOPI Tribunal Confirmed the Rejection of the Activos Mineros Credit, but Reversed the Rejection of the Ministry's Credit**

90. On **September 7, 2011**, the INDECOPI Tribunal rejected Activos Mineros' appeal and issued Resolution 1483-2011/SC1 confirming the INDECOPI Commission's dismissal of Activos Mineros' credit.<sup>114</sup> The INDECOPI Tribunal concluded, among other things:

The claims invoked in this proceeding arise from compensation obligations – that is, environmental remediation obligations -, and therefore, their classification requires the verification of: (i) the existence of environmental damage; (ii) the fact that such damage was exclusively attributable to Doe Run under clause 5 of the share transfer agreement; and (iii) the fact that the environmental damage was indeed assumed and remediated by Activos Mineros.<sup>115</sup>

\* \* \*

However, it does not clearly follow from the revision of the documentation submitted by the requesting party that the expenses incurred were actually made as a result of soil remediation activities, or that they were specifically made to remediate the environmental damage attributable to Doe Run or Activos Mineros (formerly Centromin). Thus, since neither the existence nor the right to the claims invoked was proved, the appealing party's argument in this regard must be dismissed.<sup>116</sup>

91. Activos Mineros did not seek review of the INDECOPI Tribunal's Dismissal to by the Contentious Administrative (Judicial) Court, and the Activos Mineros credit was permanently dismissed. If Doe Run Peru had not opposed the appeal by Activos Mineros, then the INDECOPI Tribunal would have recognized Activos Mineros' improper credit thus

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<sup>114</sup> **Exhibit C-129**, Resolution No. 1483-2011/SCI-INDECOPI, Comisión de Procedimientos Concursales del INDECOPI, Sept. 7, 2011.

<sup>115</sup> *Id.*, ¶ 33 (emphasis in original).

<sup>116</sup> *Id.*, ¶ 35.

increasing the volume of claims against the bankruptcy estate by US\$10.5 million, thereby reducing the percentages of each creditor of its share of the bankruptcy estate.

92. On **November 18, 2011**, *in a divided opinion*, the INDECOPI Tribunal reversed the INDECOPI Commission’s prior rejection of the MEM credit, thereby recognizing the Ministry’s credit claim.<sup>117</sup> The INDECOPI Tribunal found that because Doe Run Peru did not complete the final PAMA project, damages resulted in favor of the Peruvian State constituting a valid bankruptcy credit even though, as the Tribunal itself noted, “at the oral hearing, MEM’s representative denied that the claims invoked served as compensation for the breach of PAMA, but that they served as monetary valuation of the obligation to conduct the project undertaken by DRP before the Peruvian government.”<sup>118</sup>

93. In this regard, the majority of the INDECOPI Tribunal stated:

70. In this case, while the obligation that arises and sustains the credits invoked by the MEM is constituted by the compensation generated by the failure to comply with the obligation to perform the project, given that such non-fulfillment caused as a direct and immediate damage the failure to perform such conduct, the evidentiary element required to quantify the compensating amount is the valuation of the cited provision of executing the Project.

73. Given that the company under bankruptcy proceedings itself quantified its performance in executing the PAMA project in its report dated January 27, 2010, this Court considers that the declaration set out in such report constitutes evidentiary means of the amount of the invoked credits.

94. This decision elicited a sharp dissent from INDECOPI Tribunal Member Soledad Ferreyros Castaneda who explained clearly why the estimated investment necessary to complete the PAMA at some future date does not constitute a valid bankruptcy credit:

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<sup>117</sup> **Exhibit C-136**, Resolution No. 1743-2011/SC1-INDECOPI, Chamber No. 1 for the Defense of Competition of INDECOPI, Nov. 18, 2011.

<sup>118</sup> *Id.*, ¶ 57.

Supreme Decree No. 016-93-EM, as amended, only empowers MEM (or the appropriate state body in compliance with the current regulations) to take the following actions in case of a breach of the environmental investment commitment made by DRP: (i) the imposition of fines on the mining company and/or the enforcement of the asset-backed securities issued to ensure the actual compliance with the project included in the PAMA; and (ii) if the breach continues to exist, the temporary and, eventually, permanent closure of the mining deposits. As it can be noted, none of those actions derive from a monetary right quantifiable in relation to the pecuniary value of the investment project, but they rather derive from the administrative authority's sovereign powers, which is in charge of supervising and controlling the attainment of the environmental goals through said program's implementation.<sup>119</sup>

**8. *The First Creditor Committee Meeting: Doe Run Peru Proposed a Restructuring Plan***

95. The Creditor Committee's ("Committee") first meeting occurred on **January 13, 2012** and continued on **January 18, 2012**. The Committee approved the restructuring of Doe Run Peru, which submitted its restructuring plan to the Committee for approval (it was not approved). The Committee proposed a "mixed management" structure in which Doe Run Peru management's would operate the company with support from Apoyo Consultoria S.A, an outside management consultant.

**9. *Doe Run Peru Appealed to the Administrative Court***

96. On **January 18, 2012**, Right Business, as legal representative of Doe Run Peru, filed a challenge to INDECOPI Resolution 1743-2011/SC1- INDECOPI before Fourth Contentious Administrative Transitory Court of Lima ("Fourth Administrative Court") by means of an "accion contencioso administrativa."<sup>120</sup> This is the equivalent of an appeal of the INDECOPI Tribunal's decision and is the only means by which the final decision of an administrative body, *i.e.*, the INDECOPI Tribunal's decision recognizing the MEM credit, can

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<sup>119</sup> **Exhibit C-136**, Resolution No. 1743-2011/SC1-INDECOPI, Chamber No. 1 for the Defense of Competition of INDECOPI, Nov. 18, 2011 at 36.

<sup>120</sup> **Exhibit C-214**, *Acción Contencioso Administrativa* filed by Doe Run Peru, Fourth Administrative Court, Jan. 18, 2012.

be reviewed.<sup>121</sup> Peru claims that this is a new “proceeding”, but it is merely the continuation of Doe Run Peru’s defense of the bankruptcy estate and the rights of the creditors.<sup>122</sup>

**10. *The Second Creditor Committee Meeting: the Committee Voted to Liquidate Doe Run Peru; the Liquidator Continued Challenging the Ministry’s Credit***

97. On **April 12, 2012**, at the second meeting of the Creditors’ Committee, and after Doe Run Peru had submitted an initial restructuring plan and three amended restructuring plans to INDECOPI between January and April 2012, the creditors rejected Doe Run Peru’s restructuring plan and decided to change the course of Doe Run Peru’s future to liquidation instead of reorganization.

98. Thus, at the creditors meeting on **May 22, 2012**, which was continued on **May 25, 2012**, the Creditors Committee appointed Right Business as liquidator.<sup>123</sup> After appointment of the liquidator, the functions of the legal representatives, managers, administrators and directors are therefore fully assumed by the liquidator. Pursuant to the LGSC, the main functions of the liquidator are to: (i) diligently conduct all acts corresponding to its role, (ii) represent the general interests of the debtor and creditors, (iii) act to safeguard the interests of the bankruptcy assets or of the debtor, in proceedings or otherwise, with full representation of the debtor and the creditors; and (iv) enter into acts and agreements necessary to preserve, maintain and safeguard the debtor’s assets.<sup>124</sup> This is consistent with the General Law of Companies which, in Article 188 related to the manager’s authorities, states that powers include, “2. Representing the company, with all general and special powers provided for in the Code of Civil Procedure and

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<sup>121</sup> See **Exhibit C-215**, Supreme Decree No. 013-2008-JUS, Article 1 – General Regulations, “The purpose of the contentious administrative action in Article 148 of the Political Constitution is the legal control by the Judicial Power over actions by the public administration subject to administrative law and the effective guardianship over the rights and interests of the administration’s subjects. For the effects of this Law, the contentious administrative action is called the contentious administrative process.

<sup>122</sup> **Exhibit C-215**, Supreme Decree No. 013-2008-JUS – Ordered Text of Law 27584 – Law which regulated the Contentious Administrative Process, sets forth in Article 10, paragraph 1, that the claim must be filed within the term of three months as of the date on which the challenged action was known or notified, whichever occurs earliest.

<sup>123</sup> **Exhibit C-216**, Minutes of the Meeting of Creditors of Doe Run Peru, May 22-25, 2012.

<sup>124</sup> **Exhibit C-208**, Peruvian General Law of Bankruptcy System No. 27809, Article 83.

the powers provided for in the Arbitration Law.”<sup>125</sup> This means that [the liquidator] enjoys the general and special powers of procedural representation set forth in Articles 74 and 75 of the Code of Civil Procedure by the sole act of being appointed.

99. Accordingly, as of that date, Right Business was charged, among other things, with continuing Doe Run Peru’s defense against the MEM credit and was under a strict legal duty to act in the best interest of the bankruptcy estate and the creditors.<sup>126</sup> If Right Business were to have discontinued Doe Run Peru’s appeal before the Fourth Administrative Court, it would have exposed itself to civil lawsuits by creditors for acting against their interests as well as potential criminal penalties.<sup>127</sup>

100. Thereafter, on **June 12, 2012**, the Ministry itself made a submission to the court advising that Right Business was the new legal representative of Doe Run Peru in the action and that the Fourth Administrative Court should recognize Right Business as such to prevent any procedural irregularities in the proceeding.<sup>128</sup> On **July 24, 2012**, the Fourth Administrative Court issued Resolution No. 15 accepting Right Business’ as the new and sole legal representation of Doe Run Peru in that proceeding.<sup>129</sup>

#### **11. *Doe Run Cayman Intervened as “Tercero Co-adyuvante”***

101. On **May 24, 2012**, Doe Run Cayman Ltd. (“DRCL”), whose credit claim for US\$ 139,062,500 was recognized by the INDECOPI Commission on **March 2, 2011**, requested permission to intervene the DOE RUN PERU case as a “tercero coadyuvante.” On **June 21, 2012**, the Court declared Doe Run Cayman’s intervention to support the liquidator Right

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<sup>125</sup> **Exhibit C-217**, Peruvian General Law of Companies No. 26887, Article 188.

<sup>126</sup> *See Exhibit C-208*, Peruvian General Law of Bankruptcy System No. 27809, Article 83– Liquidator authorities, powers and obligations: 83.2 The following are the Liquidator’s authorities and powers a) Act to safeguard the interests of the bankruptcy assets or the debtor, in trial or external thereto, with full representation of the latter and of the creditors...”

<sup>127</sup> **Exhibit C-208**, Peruvian General Law of Bankruptcy System No. 27809, Article, 51.2. Creditors forming part of the Committee, as well as administrators and liquidators, respond, without limitation and severally, before the creditors themselves, shareholders and third parties for damages caused by the agreement or acts contrary to Law, the bylaws or those conducted with willful misconduct, abuse of powers, or gross negligence.

<sup>128</sup> **Exhibit C-218**, Submission filed by Ministry of Energy and Mines to the Fourth Administrative Court, June 12, 2012.

<sup>129</sup> **Exhibit C-219**, Resolution No. 15, Fourth Administrative Court, July 24, 2012.

Business as valid.<sup>130</sup> Peru seems to assert that Doe Run Cayman was a party to Doe Run Peru's challenge to the Ministry's US\$163 million credit claim.<sup>131</sup> However, a "tercero coadyuvante" is not a party to the action in which it intervenes, cannot assert a claim in matter, and its ability to intervene, and therefore its continued participation, depends solely on party asserting the claim (here the Ministry). Thus, if the party dismisses its claims, the coadyuvante shall be dismissed because it does not have its own independent claim. Thus, its participation is in connection with an ongoing action and it does not initiate or continue a judicial proceeding. Its purpose is to provide assistance in order to try to shield itself from harm arising from an unfavorable decision.<sup>132</sup>

## **12. The Administrative Court Rejected Doe Run Peru's Appeal; the Liquidator Appealed**

102. On **October 18, 2012**, the Fourth Administrative Court denied Doe Run Peru's request for annulment of the INDECOPI Tribunal's Resolution thereby admitting MEM's US\$ 163 million bankruptcy credit claim against Doe Run Peru.<sup>133</sup> The Court did so even in light of a **May 9, 2012** Opinion of the Attorney General supporting Doe Run Peru's position that non-compliance with PAMA does not give rise to a bankruptcy credit under Peruvian law.<sup>134</sup>

103. On **November 6, 2012**, Doe Run Peru, represented by Right Business and legal counsel appointed by Right Business, appealed the **October 18, 2012** decision of the Fourth Administrative Court upholding the US\$ 163 million MEM credit.<sup>135</sup> **On July 25, 2014**, in a 3-2 split decision, the Eighth Contentious Administrative Chamber Specialized in INDECOPI-

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<sup>130</sup> **Exhibit C-220**, Decision declaring Doe Run Cayman's Intervention as *tercero coadyuvante*, Fourth Administrative Court, June 21, 2012.

<sup>131</sup> Peru's Memorial on Waiver, ¶ 51-52.

<sup>132</sup> **CLA-113**, Enrique Palacios Pareja 48 LA INTERVENCIÓN DEL TERCERO EN EL PROCESO CIVIL PERUANO 66-67 (Derecho, Facultad de Derecho de la Pontificia Universidad Católica del Perú 1994) ("despite in the proceedings in which the third party intervenes what is being disputed is not its own right, but rather solely the right of the party being aided, from which the third party is removed, however, the third party knows that if in such proceedings the aided party is defeated, such defeat will indirectly impact said third party, preventing it from exercising a right in the future in the same favorable conditions in which it could have exercised it had the party aided by it been successful.")

<sup>133</sup> **Exhibit C-139**, Decision No. 24 rejecting Doe Run Peru's Appeal, Fourth Administrative Court, Oct. 18, 2012.

<sup>134</sup> **Exhibit C-221**, Opinion of the Attorney General in Support of Doe Run Peru, May 9, 2012, Section 5 at 9-11.

<sup>135</sup> **Exhibit R-26**, Appeal by Doe Run Peru, Fourth Administrative Court, Nov. 5, 2012.

related matters of the Superior Court of Lima, issued Resolution 38 confirming the October 18, 2012 decision of the Fourth Administrative Court upholding the MEM credit.<sup>136</sup> Thereafter, on **August 25, 2014**, Doe Run Peru filed an appeal writ to the Peruvian Supreme Court (as did Doe Run Cayman as co-adyuvante) and, to date, the Supreme Court has not ruled whether it will accept the appeal writ.

104. As is obvious from the description of the Doe Run Peru Involuntary Bankruptcy proceedings, above, and the relevant principles of Peruvian law, Doe Run Peru's defensive conduct in connection with the Doe Run Bankruptcy Proceeding falls outside Article 10.18's waiver requirement because it: (i) does not relate to a *proceeding* that Doe Run Peru initiated or continued; (ii) is purely defensive in nature, taken by Doe Run Peru as debtor-in-possession, in direct response to the Peruvian government's action against the Doe Run Peru Bankruptcy estate itself; and (iii) was undertaken by Doe Run Peru, as debtor-in-possession, and carried on by the subsequently appointed liquidators, pursuant to fiduciary obligations under Peruvian law to protect the integrity of the bankruptcy estate and for the benefit of all legitimate creditors pending appointment the liquidator.

**B. DEFENSIVE OR OBLIGATORY LEGAL ACTIONS DO NOT VIOLATE THE WAIVER OBLIGATION**

105. In its Memorial on Waiver, Peru appropriately compares Treaty waiver provisions with the fork-in-the-road clauses.<sup>137</sup> Like fork-in-the-road provisions, the waiver requirement is designed to prevent a respondent State from having to defend its measures in multiple fora, thus risking double-recovery or inconsistent outcomes. But if a respondent or a third party chooses to pursue actions *against* a claimant in another forum, the waiver does not obligate a claimant to lie supine as a railroad train turns over it.

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<sup>136</sup> **Exhibit R-27**, The Eighth Court Specialized in Administrative Contentious Matters of the Lima Superior Court of Justice Decision, July 25, 2014.

<sup>137</sup> **CLA-095**, *Detroit Int'l v. Canada* U.S. Submission, ¶ 6 citing *International Thunderbird Gaming Corp. v. Mexico*, NAFTA/UNCITRAL, Award, January 26, 2006, ¶ 118 (“In construing Article 1121 of NAFTA, one must take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which would give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure”); *See, e.g.*, Peru's Memorial on Waiver, ¶¶ 2, 13.

106. This principle is consistent with a line of arbitral case law holding that defensive measures in local courts do not trigger fork-in-the-road clauses. The tribunals in *Enron v. Argentina* and *CMS v. Argentina* both held that an investor’s defensive actions in local litigation commenced by another party do not provide any basis for a jurisdictional objection to a subsequent treaty claim by the investor.<sup>138</sup> The policy reasons for this are evident and compelling. As the *Occidental v. Ecuador* Tribunal explained, the fork-in-the-road clause by its very definition assumes that the investor “has made a choice between alternative avenues. This in turn requires that the choice be made entirely free and not under any form of duress.”<sup>139</sup> When the investor does not have a “real choice,” the fork-in-the-road clause does not apply.<sup>140</sup>

107. Similarly, in *Chevron v. Ecuador*, Ecuador argued that Chevron had triggered the fork-in-the-road by raising its release rights under a 1995 Settlement Agreement as an affirmative defense in a local Ecuadorian litigation that Chevron had not initiated.<sup>141</sup> The Tribunal rejected this argument holding that the fork-in-the-road provision only applied to proceedings that a claimant begins, and does not apply to defensive actions that a claimant takes in a proceeding that it did not begin. “The raising of a plea in defence to a claim in national courts, however, cannot properly be described as the submission of a dispute for settlement in those courts. The notion of ‘submission’ of a dispute connotes the making of a choice and a voluntary decision to refer the dispute to the court for resolution: as a matter of the plain and ordinary meaning of the term, it does not extend to the raising of a defence in response to another’s claim submitted to that court.”<sup>142</sup>

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<sup>138</sup> **CLA-114**, *Enron Corp., et al., v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan. 14, 2004, ¶¶ 78-80, 98 (Héctor Gros Espiell, Pierre-Yves Tschanz, Francisco Orrego Vicuña (President)).

<sup>139</sup> **CLA-021**, *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, ¶ 60 (Charles N. Brower, Patrick Barrea Sweeney, Francisco Orrego Vicuña (President)) (“*Occidental v. Ecuador* Award”).

<sup>140</sup> **CLA-021**, *Occidental v. Ecuador* Award, ¶ 61.

<sup>141</sup> **CLA-084**, *Chevron Corp., v. The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012, ¶¶ 3.79-3.82 (Horacio A. Grigera Naón, Vaughn Lowe, V.V. Veeder (President)) (“*Chevron v. Ecuador* Third Interim Award on Jurisdiction and Admissibility”).

<sup>142</sup> **CLA-084**, *Chevron v. Ecuador*, Third Interim Award on Jurisdiction and Admissibility, ¶ 4.82.



108. Peru does not—and cannot—cite to any arbitration decision holding that a claimant’s defensive measures violate the waiver provision. In each of the cases to which Peru refers—including *Waste Management I*, *Commerce Group*, *Detroit Bridge*, and *RDC*, the claimants were seeking monetary compensation, or return of revoked mining rights before a domestic forum regarding the same measures for which they sought relief before the international forum.<sup>143</sup> Those claimants had the choice not to initiate those domestic proceedings, and the power to discontinue them before commencing the investment arbitration. They were all optional, offensive actions in stand-alone proceedings that those claimants commenced and chose to pursue for their own interests. They were not responding as a debtor-in-possession to claims asserted against them in an involuntary bankruptcy proceeding, acting under a fiduciary obligation to defend the bankruptcy estate and act in the interests of the bankruptcy estate’s creditors.<sup>144</sup>

109. In sum, even if Doe Run Peru’s defensive obligatory actions could be imputed to Renco (which they cannot), do not violate the waiver obligation.

**V. EVEN ASSUMING *ARGUENDO* THAT DOE RUN PERU’S DEFENSE OF THE MINISTRY’S CREDIT VIOLATES THE WAIVER, THE TRIBUNAL RETAINS JURISDICTION OVER RENCO’S CLAIMS IN THIS ARBITRATION STAND**

110. Even if this Tribunal were to rule that the waiver requirement applied to Doe Run Peru, and even if Doe Run Peru’s defensive measures in connection with the Doe Run Peru Bankruptcy Proceeding violated the waiver requirement, none of Renco’s claims can be dismissed. The only legal issue in Doe Run Peru’s defensive actions is whether the Ministry’s US\$163 million credit should be “recognized” as a valid credit under Peruvian law. As the Tribunal is well aware, based upon Renco’s Amended Statement of Claim and Memorial on Liability, Renco claims that Peru breached the Treaty in two main ways: *First*, by refusing to assume liability for the St. Louis Litigation (the St. Louis Litigation Claims). *Second*, through many acts that resulted in Renco’s loss of its mining investment in Peru (the Taking Without

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<sup>143</sup> **RLA-102**, *Waste Management I* ¶ 4, 31; **CLA-115**, *Commerce Group Corp., and San Sebastian Gold Mines, Inc., v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, Mar. 14, 2011, ¶ 101 (Horacio A. Grigera Non, J. Christopher Thomas, Albert Jan Van den Berg (President)) (“*Commerce Award*”); **RLA-100**, *Detroit Award on Jurisdiction*, ¶¶ 305-312; **RLA-20**, *RDC v. Guatemala*, Decision on Jurisdiction, ¶¶ 10, 52.

<sup>144</sup> **RLA-100**, *Detroit Award on Jurisdiction*, ¶¶ 305-312.

Compensation Claim). The measures that comprise the St. Louis Litigation Claims have nothing to do with the Ministry's US\$163 million credit in the local, involuntary bankruptcy proceedings. The Taking without Compensation Claims are made up of a series of acts with aggregate effect of which the Ministry's US\$163 million credit in the Doe Run Peru Bankruptcy Proceeding is only a small, separate and distinct, part. Renco's Taking without Compensation claims are not dependent on that single measure which could easily be separated or "teased apart" from the others.

111. Thus, as set forth more fully below, none of Renco's claims should be dismissed if, in the unlikely event, the Tribunal determines that Doe Run Peru's defensive actions against the Ministry's US\$163 million credit violate the waiver requirement.

**A. DOE RUN PERU'S DEFENSIVE ACTIONS INVOLVE ONE ISSUE: THE LEGALITY OF THE MINISTRY'S CREDIT; RENCO ASSERTS MULTIPLE CLAIMS BASED ON MEASURES SEPARATE AND DISTINCT FROM MINISTRY'S CREDIT**

112. Within a single "investment dispute," a claimant can, and usually does, assert several distinct "claims." Chapter 10 of the Treaty uses the term "claim" consistently to mean each *individual* cause of action that a claimant asserts in an investment dispute. In *RDC v. Guatemala*, the tribunal interpreted "claim" under a very similar waiver provision in the same manner, emphasizing the principle that a word or phrase is presumed to bear the same meaning throughout a text.<sup>145</sup> The Treaty also defines the term "measure" as "any law, regulation, requirement, or practice."<sup>146</sup> Because only acts attributable to the Respondent State under international law can "constitute a breach" of the Treaty,<sup>147</sup> the waiver provision's reference to "any *measure* alleged to constitute a breach" must refer to attributable government acts that could constitute a breach of the Treaty, an investment authorization, or an investment agreement, and *not* investor claims.

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<sup>145</sup> **RLA-20**, *RDC v. Guatemala*, Decision on Jurisdiction, ¶ 69 ("it would odd that the same word in the same grammatical construction would mean something different when used subsequently in other paragraphs of the same article.")

<sup>146</sup> **CLA-001**, Treaty, Article 1.3.

<sup>147</sup> *See, e.g.*, The International Law Commission's Articles on State Responsibility Article 2.

113. In other words, given the precise meaning of the terms “claim” and “measure” as used in Article 10.18, the waiver requirement concerns claims based on specific government measures that are at issue in other proceedings. The waiver requirement does *not* affect arbitral jurisdiction with respect to arbitration claims that are based on measures beyond (*i.e.*, separate and distinct from) those at issue in the other proceeding, because such measures are not subject to the waiver requirement in the first instance. Thus, for example, if a claim in arbitration is made up of ten distinct measures, but only one is at issue in the parallel proceedings, and the arbitration claim remains viable without that single measure, the claim cannot be dismissed, but the claimant may not rely on the single overlapping measure in the arbitration.

114. *RDC v. Guatemala* is instructive. There, the Tribunal refused to dismiss the entire arbitration simply because one claim involved one of the same measures that was the subject of local arbitration proceedings, stating:

In the Tribunal’s view, the phrase ‘No claim’ in Article 10.18(2) has the same meaning as it does in Article 10.18(1): it refers to a specific claim made against a State under Chapter 10. This interpretation respects the rationale and purpose of the waiver to which the Respondent has often alluded to in support of its arguments. It would not give rise to conflicting outcomes nor to double redress for the same conduct or measures. It is also more in consonance with the objective of CAFTA to introduce effective procedures of dispute settlement. The effect of the interpretation proposed by the Respondent would be the dismissal of the entire proceeding, but it would not prevent the Claimant from initiating a new ICSID arbitration by submitting a request for arbitration with a waiver modified accordingly, a rather ineffective and procedurally inefficient result....The Tribunal concludes that the word ‘claim’ in Article 10.18 means the specific claim and not the whole arbitration in which the claim is maintained.<sup>148</sup>

115. After the *RDC* Tribunal issued its Decision on Jurisdiction holding that the domestic arbitrations precluded only claims based on the measures at issue in those arbitrations, but not *RDC*’s other claims, Guatemala sought clarification. The two measures found to have violated the waiver provision were a failure to remove squatters and a failure to make payments

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<sup>148</sup> **RLA-20**, *RDC v. Guatemala*, Decision on Jurisdiction ¶¶ 72-75.

to a trust fund.<sup>149</sup> RDC had asserted claims in two domestic arbitrations regarding those two measures, but those two measures also were related to the principal measure about which RDC complained in the investment arbitration (the so-called *Leviso* Resolution). Guatemala argued that there was an inconsistency in the Tribunal's decision. The Tribunal rejected Guatemala's request and reiterated that RDC's claims encompassed *other* measures potentially violative of the Treaty:

It is the Tribunal's view that the reasoning of the Tribunal leading to its decision clearly excludes claims based on measures at issue in the local arbitrations under Deed 402 and Deed 820 irrespective of the article of CAFTA under which they would be advanced. On the other hand, Article 10.5 provides for the minimum standard of treatment under customary international law. This is a general and wide ranging standard of treatment that **may cover claims based on other measures taken by Respondent beyond those at issue in the local arbitrations.** It would be inappropriate for the Tribunal to exclude them *a priori* or to speculate on how Claimant may articulate its claims.<sup>150</sup>

116. Non-Party State submissions in NAFTA proceedings support RDC's (and Renco's) legal conclusion as well. In *Detroit International Bridge Company v. Canada*, the United States submitted a Non-Party opinion asserting that the waiver language in NAFTA "does not require a waiver of domestic proceedings where the measure at issue in the NAFTA arbitration is, for example, only tangentially or incidentally related to the measure at issue in those domestic proceedings."<sup>151</sup> In response to that submission, Canada argued that the US position was consistent with its own and that the prohibited domestic proceedings were those that "require[ ] for its disposition making determinations of facts or determinations of legal rights, or that might award compensation, 'in regards to or with reference to' a measure alleged to breach the NAFTA."<sup>152</sup>

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<sup>149</sup> **RLA-20**, *RDC v. Guatemala*, Decision on Jurisdiction ¶ 10.

<sup>150</sup> **CLA-096**, *RDC v. Guatemala* Clarification Decision, ¶ 13 (emphasis supplied).

<sup>151</sup> **CLA-095**, *Detroit Int'l. v. Canada* U.S. Submission, ¶ 6.

<sup>152</sup> **CLA-116**, *Detroit International Bridge Company v. The Government of Canada*, PCA Case No. 2012-25, Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States, Mar. 3, 2014, ¶ 20.

117. The Tribunal in *Detroit International Bridge Company v. Canada* adopted the same reasoning as the Tribunal in *RDC v. Guatemala*:

[A] measure is a discrete act. The fact that multiple discriminatory acts may be part of a common plan does not make them one measure. If a State discriminates against a foreign investor by successively denying a license, imposing a special tax, and subsidizing a domestic competitor, these constitute separate measures, and need not all be pursued in one forum.<sup>153</sup>

This interpretation is also consistent with the holdings in *Waste Management I* and *Commerce Group*, as those tribunals were addressing claims in which there was a complete overlap between the measures at issue in the local proceedings and those at issue in the arbitration.<sup>154</sup>

118. Under the rules of treaty interpretation codified at Articles 31-33 of the Vienna Convention, principles of international law inform treaty interpretation.<sup>155</sup> The general principles on severability and judicial economy under international law further support Renco's interpretation. For instance, in the *Abyei* Arbitration, the tribunal held that it should sever annulable parts of a judgment from other parts that do not contain annulable error in order to preserve the original decision as much as possible.<sup>156</sup> Failure to do so would violate the principle of judicial economy.<sup>157</sup>

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<sup>153</sup> **RLA-100**, *Detroit Award on Jurisdiction*, ¶ 304.

<sup>154</sup> **RLA-102**, *Waste Management I* ¶ 4, 31; **CLA-115**, *Commerce Award*, ¶¶ 101, 110-11 (“Claimants counter Respondent’s argument with reference to the Tribunal’s decision in *RDC*. In Claimant’s view, *RDC* stands for the proposition that a partial overlap of claims between a CAFTA arbitration and parallel proceedings cannot render a CAFTA waiver invalid in its entirety. Claimants consider that claims not heard in the parallel proceedings can still be heard in the CAFTA arbitration....The Tribunal does not disagree with Claimant’s reading of the decision in *RDC*.”)

<sup>155</sup> **CLA-083**, Vienna Convention on the Law of Treaties, Article 31(3)(c).

<sup>156</sup> **CLA-117**, *The Government of Sudan v. The Sudan People’s Liberation Movement/Army (Abyei Arbitration)* Final Award, July 22, 2009 ¶¶ 416-24 (H.E. Judge Awn Al-Khasawneh, Gerhard Hafner, W. Michael Reisman, Stephen M. Schwebel, Pierre-Marie Dupuy (President)).

<sup>157</sup> **CLA-118**, *Compañía de Aguas del Aconquija, S.A., and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ¶ 68 (James R. Crawford, José Carlos Fernández Rozas, L. Yves Fortier (President)); **CLA-119**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on the AD HOC Committee on the Application For Annulment of the Argentine Republic, Sept. 25, 2007, ¶ 99 (Nabil Elaraby, James R. Crawford, Gilbert Guillaume (President)).

119. In short, the waiver requirement does not bar claims in an investment arbitration based on measures that are separate and distinct from and go beyond those at issue in another proceeding.

**B. A WAIVER VIOLATION DOES NOT EXCLUDE ARBITRATION CLAIMS BASED ON MEASURES DIFFERENT THAN OR BEYOND THOSE AT ISSUE IN A LOCAL PARALLEL PROCEEDING**

120. The only issue in the Doe Run Peru involuntary bankruptcy proceeding is whether the Ministry's US\$163 million credit claim should be "recognized" as a valid claim under Peruvian law. In this arbitration, Renco asserts that Peru, by a pattern of unfair and discriminatory conduct, caused such harm to Doe Run Peru that resulted in Renco's loss of its investment. Separate and apart from that series of acts, Peru asserted the MEM credit and abused its position as Doe Run Peru's largest creditor to influence bankruptcy proceeding to Doe Run Peru's and Renco's detriment. Renco is asserting several claims concerning many other measures that are distinct. For example, Renco's St. Louis Litigation Claims are based upon measures that do not relate to the Ministry's Credit and therefore do not implicate the waiver requirement.<sup>158</sup> Similarly, Renco's several Taking without Compensation Claims are based upon a series of discrete measures, over a long period of time, most of which do not relate to the US\$163 million Ministry's credit claim, but which, both on their own and in the aggregate, constitute Treaty breaches.<sup>159</sup>

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<sup>158</sup> See Claimant's Amended NOA, ¶¶ 5-6, 19-27, 35-44, 51, 56-57; see also Claimant's Memorial on Liability, ¶¶ 51-90, 239-306 (*Peru refused to assume liability for claims in the St. Louis Lawsuits in breach of the Stock Transfer Agreement and Guaranty*); ¶¶ 91-112, 274 (*Peru failed to remediate areas around the Complex in breach of the Stock Transfer Agreement and Guaranty*).

<sup>159</sup> Claimant's Amended NOA, ¶¶ 7, 28-33, 46-50, 52-55; see also Claimant's Memorial on Liability, ¶¶ 141-158, 310, 328-331, 345-349, 365-367, (*Peru extracted concessions as a precondition to giving a PAMA extension based on economic force majeure*); ¶¶ 171, 174, 307-337, 355 (*Peru refused to sign agreed-upon MOU providing for an extension or to provide any details regarding the extension which resulted in Doe Run Peru's loss of crucial financing sources*); ¶¶ 178, 311, 356 (*Peru restricted use of funding offered by Renco; refused to let any be used as working capital*); ¶¶ 177, 311 (*Peru issued an Emergency Decree targeting Renco by restricting the participation of related creditors in bankruptcy proceedings*); ¶¶ 183, 370-379 (*Peru gave preferential treatment to Centromin with respect to its request for the extension of its PAMA deadlines and treated Doe Run Peru less favorably than Centromin*); ¶¶ 147-148, 154, 321, 362 (*Peru obligated Doe Run Peru to take on numerous environmental obligations, some of which addressed Centromin's own obligations*); ¶¶ 155-56 (*Peru imposed more stringent requirements on Doe Run Peru than the national standards imposed on other companies, including regulations that did not exist under Peruvian law*); ¶¶ 184-189, 314-339, 356-360, 362 (*Peru's Congress granted Doe Run Peru an extension but the Executive Branch undermined it by, among other things, imposing a requirement that all monies generated by Doe Run Peru be put into a trust*).

121. The object and purpose of the waiver provision is highly relevant, and must inform the interpretation and application of the waiver requirement. The object and purpose of the waiver provision is to prevent conflicting outcomes and double monetary recovery. Renco submits that neither of these are implicated in this case. Renco's St. Louis Litigation Claims will be determined exclusively by this Tribunal and no other forum. Similarly, Renco's Taking Without Compensation Claims will be determined by this Tribunal and involves a series of separate and distinct measures that can be teased apart from whether the Ministry's US\$163 million claim is valid. Moreover, Renco is not asking this Tribunal to decide whether or not the Ministry's US\$163 million claim should be recognized under Peruvian law. There is no risk of double monetary recovery because, at most, the allocation of eventual disbursement to Doe Run Peru's creditor will be affected. Nor is there any risk of conflicting outcomes since the Tribunal here can conclude that Peru violated the Treaty irrespective of the ultimate outcome in the Doe Run Peru Bankruptcy Proceeding.

122. Accordingly, even if the Tribunal were to find that Doe Run Peru's defensive actions in connection with the Doe Run Peru Bankruptcy Proceeding violate Article 10.18, this should not be fatal to any of Renco's claims. At most, Renco would be precluded from asserting, and the Tribunal would not consider, a claim that includes allegations regarding the Ministry's assertion of an invalid credit claim. But like the claimant in *RDC*, Renco would be free to assert all of its claims provided that they are based on measures that can be separated out from the sole issue in the Bankruptcy Proceeding.

123. For reasons of equity and justice, Renco must be allowed an opportunity to prove that Peru did commit serious violations of international law in its treatment of Renco's investment. Dismissal of Claimant's entire case based on a measure (the Ministry credit) readily severable from the other measures Renco has raised would neither be just nor legal.

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*account controlled by the Ministry); ¶¶ 209-214, 363-364 (Peru coerced and harassed Doe Run Peru and its employees); ¶¶ 209-214 (Peru continued baseless criminal actions against Renco and Doe Run Peru officers and management, accusing them of crimes related to Doe Run Cayman's issuance of an inter-company note and assertion of that debt as a credit in the INDECOPI proceeding).*

**VI. PRAYER FOR RELIEF**

124. For the foregoing reasons, this Tribunal should reject Peru’s Waiver Objection, and Renco respectfully requests that it be dismissed, in its entirety, and that Renco be afforded the opportunity to move forward with all of its claims such that Peru must now submit its counter-memorial in accordance with Procedural Order No. 1.

125. Consistent with the Tribunal’s statement in its June 2, 2015 Order that “there will be cost consequences in the event Peru’s application does not succeed,” Renco also seeks an award of fees and costs associated with Renco’s need to address Peru’s Waiver Objection as a preliminary question. Peru created this situation by falsely portraying as urgent its need to make the Waiver Objection on an expedited basis, as opposed to in its counter-memorial on liability pursuant to Procedural Order No. 1 and the agreement between the Parties and consistent with the Tribunal’s Scope Decision, which Peru chose to willfully ignore.

Respectfully submitted,

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