

**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 Rejoinder on Waiver**

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**August 24, 2015**

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## **I. SUMMARY OVERVIEW**

1. Renco demonstrated in its Counter Memorial on Waiver that this Tribunal can resolve all of Peru's waiver objections by answering two questions:

- a. In its Amended Notice of Arbitration, Renco noted that if this Tribunal declines to hear Renco's claims on jurisdictional or admissibility grounds, Renco would not be precluded from attempting to pursue such claims elsewhere. Does that observation invalidate Renco's waiver?
- b. Is Renco asserting claims on behalf of Doe Run Peru in this Treaty Arbitration (which would require a waiver from Doe Run Peru)?<sup>1</sup>

Taking into account Peru's Reply on Waiver, the answer to both of these questions remains "no." As to the first, the written waiver that the Treaty requires does not bar a claimant from pursuing claims on the merits in another forum in the event that its Treaty case is dismissed on jurisdictional or admissibility grounds. Accordingly, Renco's observation of that remote possibility does not cause its written waiver to be defective or invalid. Renco's interpretation of the Treaty on this issue comports with the waiver's object and purpose of preventing double recovery, inconsistent results, and parallel proceedings, as well as the Treaty's object and purpose of creating effective mechanisms to resolve investment disputes.

2. In contrast, Peru's interpretation fails to comport with the waiver's object and purpose and would produce a manifestly unreasonable result, because it would create a scenario by which no tribunal or court could hear the claims. Such a result would frustrate justice, without accomplishing the waiver's object and purpose of preventing double-recoveries, inconsistent results, or parallel proceedings. Further, international law allows claimants to remedy a formal jurisdictional defects where, as here, the respondent has suffered no prejudice. Thus, even assuming that Peru's unprecedented interpretation were correct and Renco's written waiver is formally defective (which it is not), the Tribunal should not dismiss Renco's case due to a formal defect.

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<sup>1</sup> Claimant's Counter Memorial Concerning Peru's Waiver Objections, Aug. 10, 2015, ¶ 30 ("Renco's Counter Memorial on Waiver").

3. As to the second question, Renco is asserting its own claims under Article 10.16.1(a) for injuries that Renco has incurred itself as a result, in part, of measures Peru inflicted on its enterprise, Doe Run Peru. Those types of claims are legitimate under Article 10.16.1(a), and they do not require a waiver from Doe Run Peru. The authorities that have addressed that issue confirm this analysis.

4. Because the answer to the two key questions is “no,” this Tribunal can reject all of Peru’s waiver objections without analyzing events related to Doe Run Peru’s Bankruptcy Proceeding. Nevertheless, two additional points demonstrate why Doe Run Peru’s conduct does not violate the Treaty’s waiver requirement even if Doe Run Peru’s waiver were required.

5. First, the actions about which Peru complains are defensive in nature and are part and parcel of the involuntary bankruptcy proceeding that Doe Run Peru did not initiate. Peru argues in its Reply that the administrative action is not an “appeal” in the bankruptcy proceeding, and yet INDECOPI itself describes it as an appeal, as does Peruvian Bankruptcy Law. Peru claims that the *amparo* is independent from the bankruptcy process, but the Peruvian Bankruptcy Law provides that an *amparo* is an appropriate way defend against actions within a bankruptcy proceeding. Thus, it is clear that Doe Run Peru’s conduct in connection with the involuntary bankruptcy proceeding constitutes obligatory, defensive measures that would not violate the waiver, and several tribunals that have analyzed analogous circumstances with respect to fork-in-the-road provisions confirm that analysis.

6. Second, the waiver requirement does not bar investment claims, like those here, based on measures that are separate from or go beyond the measures at issue in other proceeding. In its Reply, Peru has no response to the several legal authorities that Renco cited for this legal proposition except to “maintain” its position. Renco’s claims in this arbitration are based on numerous measures that are not at issue in any proceeding in Peru and thus nothing in Peru precludes this Tribunal from ruling on those claims.

## **II. RENCO HAS PROVIDED A VALID WRITTEN WAIVER**

7. In its Counter Memorial on Waiver, Renco explained that the reservation set forth in Renco’s Notice of Arbitration does not invalidate the waiver requirement because the Treaty does not require claimants to waive the right to pursue claims elsewhere in the event that they are

dismissed on grounds of jurisdiction or admissibility.<sup>2</sup> This would not create a risk of double recovery, parallel proceedings, or inconsistent results, whereas Peru’s interpretation would create a system in which certain claims could never be heard on the merits in any forum.<sup>3</sup> Renco also explained that the Tribunal’s reasoning in *Waste Management II* supports Renco’s position and that the decisions on which Peru relies (*Waste Management I* and *Detroit Bridge International*) are inapposite on both the facts and the law.<sup>4</sup>

**A. RENCO’S RESERVATION COMPORTS WITH THE WAIVER’S OBJECT AND PURPOSE**

8. In its Reply, Peru argues that Renco’s reservation undermines the waiver’s object and purpose to encourage claimants to resort to local proceedings before international arbitration and “prevent[] U-turns.”<sup>5</sup> But Peru’s characterization of the waiver’s object and purpose is incorrect. The waiver’s object and purpose is not to encourage resort to local proceedings prior to initiating an international arbitration proceeding.<sup>6</sup> Rather, international arbitration tribunals have held consistently that the waiver’s object and purpose is to prevent double-recovery, inconsistent results, and parallel proceedings.<sup>7</sup>

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<sup>2</sup> Renco’s Counter Memorial on Waiver ¶¶ 53-64.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, ¶¶ 60-64.

<sup>5</sup> Peru’s Reply on Waiver, Aug. 17, 2015, ¶ 11 (“Peru’s Reply on Waiver”).

<sup>6</sup> If Peru and the United States wished to encourage resort to local proceedings before initiation of international arbitration, they could have included an exhaustion-of-local-remedies requirement in the Treaty. The Treaty does not contain an exhaustion requirement. Instead, it sets forth a three-year statute of limitations in which an investor may bring its claims under the Treaty. Given that short time frame, it is very unlikely that prior local proceedings will have reached their conclusion before a claimant would need to terminate them before initiating an international arbitration.

<sup>7</sup> **RLA-102**, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, June 2, 2000, ¶ 27.3 (Keith Hight, Eduardo Siqueiros T., Bernardo M. Cremades (President)) (“*Waste Management I* Award”), (“However, when both legal actions [parallel domestic and NAFTA claims] have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid.”); **RLA-103**, *Waste Management 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, ¶ 27 (Benjamin R. Civiletti, Eduardo Magallón Gómez, James Crawford (President)) (“*Waste Management II*”) (“No doubt the concern of the NAFTA parties in inserting Article 1121 was to achieve finality of decision and to avoid multiplicity of proceedings.”); **CLA-019**, *International Thunderbird Gaming Corporation v. United Mexican States, Ad hoc – UNCITRAL*, Award, Jan. 26, 2006 ¶ 118, (Agustín Portal Ariosa, Thomas W. Wälde, Albert Jan van den Berg (President)) (“*Thunderbird v. Mexico* Award”) (the “specific purpose [of Article 1121 is] to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double

9. Renco explained in its Counter Memorial on Waiver that its reservation/observation is consistent with the waiver’s object and purpose, because if this Tribunal dismisses the claims on jurisdictional grounds, *without a ruling on the merits*, there will be no risk of double-recovery, inconsistent results, or parallel proceedings if Renco subsequently attempts to bring claims in a different forum.<sup>8</sup> In its Reply, Peru did not address this argument, and did not endeavor to explain how such a scenario could create a risk of double-recovery, inconsistent results, or parallel proceedings.

10. Similarly, Renco showed in its Counter Memorial that Peru’s interpretation conflicted with the Treaty’s purpose of creating an effective, dispute-resolution mechanism, and would produce a manifestly unreasonable and unfair result because claimants would be barred from having *any* forum rule on the merits of their claims.<sup>9</sup> Peru also did not respond to this argument in its Reply on Waiver.

11. Peru argues that under Renco’s position, a “rush to treaty arbitration” would commence because claimants whose claims are dismissed without a ruling on the merits might be able to pursue those claims in a domestic forum.<sup>10</sup> Like most “floodgate” arguments, Peru’s concern is hyperbole. Given the expense and time involved in an investment arbitration—especially in comparison with most effective domestic remedies—one need have little fear of a rush to treaty arbitration. Regardless, to Claimant’s knowledge, no authority has ever articulated

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redress for the same conduct or measure.”); **CLA-095**, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Article 1128 Submission of the United States of America, ¶ 6, Feb. 14, 2014 (“*Detroit Int’l v. Canada* U.S. Submission”) (“This construction of the phrase is consistent with the purpose of the waiver provision: 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 (and thus legal uncertainty).” [citing *International Thunderbird*]); **CLA-120**, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of Mexico Pursuant Article 1128 of NAFTA, Feb. 14, 2014, ¶¶ 10-13 (citing with approval *Waste Management I* ¶27.3 and *International Thunderbird* ¶1118); **CLA-116**, *Detroit International Bridge Company v. 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, ¶ 19 (“The U.S. and Mexico Article 1128 Submissions confirm that one of the goals of Article 1121 is to avoid “conflicting outcomes (and thus legal uncertainty).”).

<sup>8</sup> Renco’s Counter Memorial on Waiver ¶ 56.

<sup>9</sup> *Id.*, ¶ 58 (“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>10</sup> Peru’s Reply on Waiver ¶ 11.

preventing a “rush to treaty arbitration” as being the object and purpose of the Treaty’s waiver provision, and Peru has cited none.

**B. ARBITRAL JURISPRUDENCE SUPPORTS RENCO’S POSITION**

12. In its Counter Memorial on Waiver, Renco cited the Tribunal’s reasoning in *Waste Management II*.<sup>11</sup> In its Reply, Peru argues that Renco’s reliance is misplaced because according to Peru, *Waste Management II* did not concern the meaning of the waiver requirement, but instead the res judicata effect of the decision of a previous NAFTA tribunal.<sup>12</sup>

13. Peru misreads *Waste Management II*. In that arbitration, Mexico advanced three separate arguments. The second concerned the res judicata effect of the prior dismissal, and the third concerned abuse of process.<sup>13</sup> But Mexico’s *first* argument in *Waste Management II* was that NAFTA’s waiver provision [NAFTA Article 1121] barred *Waste Management* from commencing a new proceeding after its first was dismissed for lack of jurisdiction: “According to the Respondent, it is implicit in Chapter 11, and especially Article 1121, that an election under that provision is irrevocable and allows a Claimant a single opportunity to vindicate its NAFTA claim before a Chapter 11 tribunal.”<sup>14</sup> Like Peru here, Mexico argued that it did not matter that the case was dismissed without a ruling on the merits: “Whatever the grounds on which it failed, its failure put an end to NAFTA procedures in respect of the claim.”<sup>15</sup> Indeed, the *Waste Management II* Tribunal characterized Mexico’s position based on NAFTA’s waiver provision as Mexico’s principal argument.<sup>16</sup>

14. The *Waste Management II* Tribunal provided two main reasons for why it rejected Mexico’s waiver argument. The first was that even if it were the case that a claimant could

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<sup>11</sup> Renco’s Counter Memorial on Waiver ¶ 59.

<sup>12</sup> Peru’s Reply on Waiver ¶ 16.

<sup>13</sup> **RLA-103**, *Waste Management II* ¶ 17.

<sup>14</sup> *Id.*

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

<sup>16</sup> **RLA-103**, *Waste Management II* ¶ 26 (“The Respondent’s principal argument was based on the language and intention of Article 1121, which in its view implies that a disputing investor may have one but only one attempt at an international arbitration under Chapter 11.”).

submit a claim only once, this contemplates adjudication on the merits. Specifically, the Tribunal held:

“Thus, even if it were the case that a Claimant could only submit a claim under Article 1120 on one occasion, this would not necessarily apply to a submission which was defective by reason of a failure to comply with a condition precedent under Article 1121, such that the Tribunal lacked jurisdiction. What Article 1120 contemplates is a submission of a claim *for adjudication on the merits*.<sup>17</sup>

15. The second reason that the *Waste Management II* Tribunal rejected Mexico’s argument was that a purpose of NAFTA is to “create effective procedures...for resolution of disputes” and that the waiver should not therefore be interpreted in a manner that prevents a claimant from ever obtaining a ruling on the merits in any forum: “The Claimant has not had its NAFTA claim heard on the merits before *any* tribunal, *national or international*; and if Respondent is right, that situation is now irrevocable. Such a situation should be avoided if possible.”<sup>18</sup>

16. In its Reply on Waiver, Peru cites a new legal authority, *Consolidated Softwood Lumber*, but that authority undermines Peru’s argument on this point and provides further support for Renco’s position.<sup>19</sup> Specifically, Peru notes that the *Consolidated Softwood Lumber* Tribunal terminated claims that one of the claimants sought to withdraw, but the Tribunal declined to decide whether its dismissal was with prejudice, reasoning that a “subsequently constituted tribunal would have the sole authority” to address that issue.<sup>20</sup> Relying on this analysis, Peru argues:

The same holds true here. To the extent that this Tribunal dismisses Renco’s claims for lack of jurisdiction or admissibility,

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<sup>17</sup> **RLA-103**, *Waste Management II* ¶ 34 (emphasis added).

<sup>18</sup> *Id.*, ¶ 35 (emphasis added).

<sup>19</sup> Peru’s Reply on Waiver ¶ 17, citing **RLA-116**, *Canfor Corp. v. United States of America, Tembec et al. v. United States of America, and Terminal Forest Products Ltd. v. The United States of America*, (“*Consolidated Softwood Lumber*”), Article 1126 NAFTA Arbitration, Order for the Termination of the Arbitral Proceedings with Respect to Tembec et al., Jan. 10, 2006 (Armand L.C. de Mestral, Davis R. Robinson, Esq., Albert Jan van den Berg (President)).

<sup>20</sup> Peru’s Reply on Waiver ¶ 17.



and Renco chooses to bring these claims in another forum, *that forum will have the sole authority to determine whether Renco's claims are barred by the waiver* which it was required to submit in order to commence this Treaty claims. *Whatever decision that future court or tribunal might make, is irrelevant to whether this Tribunal is or is not competent to decide Renco's claims;* that decision depends upon Renco having submitted a waiver that fully complies with the Treaty, which it has failed to do.<sup>21</sup>

17. Peru's "reservation" argument is premised on Peru's contention that *this* Tribunal should decide *now* that the Treaty requires Renco to preemptively and affirmatively waive its right to pursue its claims before another forum in the hypothetical event that this Tribunal dismisses the claims on jurisdictional or admissibility grounds. Yet, under Peru's stated interpretation of the *Consolidated Softwood Lumber* case quoted above, a court or tribunal hypothetically constituted in the future will have "*sole authority*" to determine whether Renco's written waiver bars its claims in *that* forum, and that potential court's or tribunal's decision is irrelevant to whether this Tribunal is competent to decide Renco's claims in this arbitration.

18. Renco agrees with Peru on this point, and the analysis confirms that Renco has provided the full waiver that the Treaty requires. If this Tribunal asserts jurisdiction over Renco's claims, then Renco's reservation is entirely moot and of no object.<sup>22</sup> If the Tribunal dismisses Renco's claims on jurisdictional or admissibility grounds unrelated to the waiver, nothing in the language of the Treaty, the UNCITRAL Rules, or international law prevents Renco from attempting to have its claims that are dismissed for jurisdictional reasons heard on the merits in another forum. And as Peru states in the quoted language above interpreting the *Consolidated Softwood Lumber Award*, that forum would have sole authority to determine whether Renco's claims in that forum are barred by the waiver that Renco was required to submit in this arbitration to commence this Treaty case. Whatever decision that theoretical future court or tribunal might make is *irrelevant* to whether this Tribunal is or is not competent to decide Renco's claims. In other words, Renco's reservation of rights to potentially bring its

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<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> See, e.g., **RLA-20**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, Nov. 17, 2008, ¶ 45 (Andrés Rigo Sureda, Stuart E. Eizenstat, James Crawford (President)) (rejecting Guatemala's jurisdictional objection based on a reservation of rights that had no object) ("*RDC v. Guatemala Decision on Jurisdiction*").

jurisdictionally dismissed claims in another forum cannot form the basis of a dismissal of this arbitration for lack of a proper written waiver.

19. In its Counter Memorial, Renco explained that *Waste Management I* and *Detroit International Bridge*—cases that Peru cited in its Memorial on Waiver—were inapposite on both the facts and the law.<sup>23</sup> Those cases concerned carve-outs of *ongoing* parallel proceedings regarding all of the same measures at issue in the arbitration, and those claimants actively were pursuing those other proceedings.<sup>24</sup> In contrast, Renco has not carved out any measure, claim, or proceeding, and it has not initiated any proceeding regarding the measures at issue in this arbitration. And neither *Waste Management I* nor *Detroit International Bridge* held that the waiver provision at issue barred claimants from pursuing claims dismissed on jurisdictional or admissibility grounds in another forum. In its Reply, Peru did not attempt to rebut Renco’s explanation as to why those two cases do not support Peru.

20. In short, Renco’s reservation does not conflict with the waiver’s object and purpose, and Peru’s interpretation is incorrect. Arbitral jurisprudence, in particular *Waste Management II* and *Consolidated Softwood Lumber*, support Renco’s position and no authority supports Peru’s position.

21. Renco’s reservation, like Peru’s reservation of its right to dispute the merits of Renco’s claims that Renco noted in its Counter Memorial on Waiver, is superfluous. In a footnote in its Reply, Peru argues that its reservation of rights to contest the merits of Renco’s claims cannot be compared to Renco’s reservation because “Peru is not seeking to qualify a more general statement with this reservation, as Renco is doing with its waiver reservations. Peru is merely stating that it will respond to Renco’s substantive claims in later submissions.”<sup>25</sup> Peru’s assertion does not rebut Renco’s argument—it proves it. Peru argued in its Memorial on Waiver that the “very inclusion of the reservation demonstrates” that Renco had waived *fewer* rights than the Treaty requires.<sup>26</sup> Renco responded to that argument, in part, by noting Peru’s own

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<sup>23</sup> Renco’s Counter Memorial on Waiver ¶¶ 60-63.

<sup>24</sup> *Id.*, ¶ 61.

<sup>25</sup> Peru’s Reply on Waiver ¶ 11 n15.

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

unnecessary reservation. Peru's assertion that its own reservation does not qualify a more general statement demonstrates that a reservation does not necessarily mean that a more general statement has been qualified. Renco's reservation does not qualify the full waiver that the Treaty requires, which Renco maintains it provided with its Amended Notice of Arbitration.

### **III. THE TRIBUNAL SHOULD NOT DISMISS RENCO'S CLAIMS BECAUSE ANY DEFECT IN ITS WAIVER IS MERELY FORMAL AND NOT MATERIAL**

22. In its Counter Memorial on Waiver, Renco explained that investment tribunals have refused to dismiss cases on jurisdictional grounds due to mere formal defects (which is what Renco's reservation would be even under Peru's interpretation) and where, as here, a respondent has suffered no prejudice. In support of that position, Renco cited *Thunderbird v. Mexico* and *Ethyl v. Canada* as two examples of cases in which investment tribunals have refused to dismiss claims based on mere formal waiver defects during the course of the arbitration.<sup>27</sup> Renco also cited a long line of holdings by the Permanent Court of International Justice ("PCIJ") and the International Court of Justice ("ICJ") from the 1920s to as recently as 2008, holding that formal jurisdictional defects should not result in dismissal. On the other hand, the investment tribunals that *have* dismissed claims based on waiver violations were confronted with cases concerning material waiver breaches (*i.e.*, carve outs for parallel proceedings where claimants were actively pursuing the parallel proceedings during the pendency of the arbitration).<sup>28</sup>

23. Here, if this Tribunal determines there is any defect in Renco's waiver because of the superfluous reservation language in the last sentence, it would be a mere formal defect. Renco has not initiated or continued any parallel proceedings during the pendency of this arbitration, and it has agreed it will not do so. The language in Renco's waiver relates only to a scenario in which Renco's claims are dismissed on jurisdictional or admissibility grounds such that this Tribunal *never considers Renco's claims on the merits*. Then, and only then, would Renco consider seeking to have its claims heard on the merits elsewhere. It cannot be disputed that Renco has not violated the specific purpose of the waiver requirement, namely, to prevent a

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<sup>27</sup> Renco's Counter Memorial on Waiver ¶ 66.

<sup>28</sup> *Id.*

party from pursuing concurrent domestic and international proceedings that would either give rise to conflicting outcomes or double redress. Thus, Peru has suffered no prejudice and Renco has, to date, effectively complied with the requirements of Article 10.18 of the Treaty. In these circumstances outright dismissal of Renco's claims would require the Tribunal to construe the waiver requirement in an excessively technical manner. This would be fundamentally unjust and would not further the object and purpose of the waiver requirement itself.

24. Disregarding the alleged formal defect would be entirely consistent with the holdings in *Ethyl* and *Thunderbird*, and holdings of the PCIJ and ICJ. In *Ethyl*, Canada argued that Ethyl's failure to provide *any* waiver with the notice of arbitration meant that Canada did not consent to arbitration even though the claimants provided a waiver well after commencement of the arbitration.<sup>29</sup> The Tribunal held that Ethyl's unexplained delay for failing to comply with the waiver requirement until later in the proceeding did not warrant dismissal on jurisdictional grounds.<sup>30</sup>

25. In *Thunderbird*, Mexico argued that because no waiver of behalf of Thunderbird's enterprises had been filed with the notice of arbitration, those enterprises' claims were not admissible.<sup>31</sup> The *Thunderbird* tribunal rejected Mexico's request that the case be dismissed and in so doing stated:

Article 1121 of NAFTA is concerned with conditions precedent to the submission of a claim to arbitration. One cannot therefore treat lightly the failure by a party to comply with those conditions. The Tribunal finds however that the waivers filed for EDM-Puebla, EDM-Monterrey, and EDM-Juarez were valid within the meaning of Article 1121 of the NAFTA, for the following reasons.

Although Thunderbird failed to submit the relevant waivers with the Notice of Arbitration, Thunderbird did proceed to remedy that failure by filing those waivers with the [Particularized Statement of Claim]. *The Tribunal does not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in*

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<sup>29</sup> **CLA-103**, *Ethyl Corporation v. Government of Canada*, NAFTA/UNCITRAL Case, Award on Jurisdiction, June 24, 1998, ¶ 89 (Charles B. Brower, Marc Lalonde, Karl-Heinz Böckstiegel (President)).

<sup>30</sup> *Id.*

<sup>31</sup> **CLA-019**, *Thunderbird v. Mexico* Award, ¶ 112.

*the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA. The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings. The Tribunal joins the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.*

In construing Article 1121 of the NAFTA, one must also 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 could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure. In the present proceedings, the Tribunal notes that the EDM entities did not initiate or continue any remedies in Mexico while taking part in the present arbitral proceedings. Therefore, the Tribunal considers that Thunderbird has effectively complied with the requirements of Article 1121 of the NAFTA.<sup>32</sup>

26. Thus, the *Thunderbird* tribunal refused to dismiss the investor's claims on jurisdictional grounds based on a mere formal violation of the waiver requirement, *i.e.*, no waiver provided at all until well into the proceedings. The tribunal further found, like here, that the entities that did not provide the waiver had not initiated or continued any proceedings in Mexico while the arbitration was pending and therefore they "effectively complied with the requirements of Article 1121 of the NAFTA."<sup>33</sup> Peru asserts that both *Ethyl* and *Thunderbird* are distinguishable from the instant case, because in those cases the investor did not provide *any* written waiver, and this case involves a reservation.<sup>34</sup> That is not the relevant point. The point is that the waiver defects at issue in *Ethyl* and *Thunderbird* were mere formal defects, which both the Tribunals concluded did not warrant dismissal on jurisdictional grounds.

27. That is the situation here. If the Tribunal were to find the superfluous reservation/observation constitutes a mere formal defect in Renco's waiver (which it respectfully

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<sup>32</sup> **CLA-019**, *Thunderbird v. Mexico* Award, ¶ 116-18 (emphasis added).

<sup>33</sup> *Id.*

<sup>34</sup> Peru's Reply on Waiver, ¶ 13.

should not), the same result should apply. Dismissal of Renco’s claims based upon a purported formal defect (assuming the Tribunal finds there is one) would be fundamentally unfair and would further neither the object nor purpose of the waiver requirement.

28. Peru also ignores cases that Renco cited from the PCIJ and ICJ holding that mere defects of form should not bar adjudication.<sup>35</sup> Under the rules of customary international law codified in the Vienna Convention on the Law of Treaties, “any relevant rules of international law applicable in the relations between the parties” “shall be taken into account” when interpreting a treaty.<sup>36</sup> Article 38 of the Statute of the International Court of Justice is generally regarded as a complete statement on the sources of international law.<sup>37</sup> Under that Statute, there are four sources: 1) treaties, 2) customary international law, 3) general principles of law, and 4) judicial decisions and the teachings of the most highly qualified publicists, which are regarded as a “subsidiary means for the determination of rules of law.”<sup>38</sup> Thus, the holdings of the PCIJ and ICJ are a means to determine rules of international law.

29. In the context of treaties, a specific rule set forth in a treaty’s text will prevail over other rules of international law (*i.e.*, a rule of *lex specialis*), but if the treaty’s text does set forth a

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<sup>35</sup> Renco’s Counter Memorial on Waiver ¶ 66 n.77 (citing **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 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”); **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).

<sup>36</sup> **CLA-083**, Vienna Convention on the Law of Treaties, Article 31.

<sup>37</sup> See, e.g., **CLA-121**, Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 4-5 (Oxford Univ. Press, 7<sup>th</sup> ed. 2008).

<sup>38</sup> **CLA-122**, Statute of the International Court of Justice, Article 38.

specific rule applicable to the situation or if the treaty's text is ambiguous, then otherwise applicable rules of international law inform the interpretation of the treaty's text or otherwise apply. As the Official Commentary to Article 55 of the International Law Commission's Articles on State Responsibility states, "[f]or the *lex specialis* to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernable intention that one provision is to exclude the other."<sup>39</sup>

30. That interpretive approach also applies to Renco's formal defect argument. There are three potential sources of law that might apply to the question of whether Renco's alleged formal waiver defect, should result in dismissal: 1) the Treaty, 2) the UNCITRAL Rules, and 3) rules of general international law. Nothing in the Treaty or the UNCITRAL Rules provides that a formal defect in a waiver that is, in effect, mere surplusage that can easily be disregarded as such, should result in dismissal. And, as Renco explained in its Counter Memorial and Peru ignored in its Reply, under rules of general international law, treaty provisions should not be construed in an overly formalistic manner. Numerous holdings of the PCIJ and ICJ, which constitute a recognized "means for the determination of rules of [international] law" support Renco's position.<sup>40</sup>

31. Peru argues that since the 2004 U.S. Model BIT, the United States has "amended the waiver language" and that "this clarification leaves no room for doubt that the Treaty's waiver requirement is not a mere 'procedural' or 'formal' requirement that can be remedied at any time by unilateral action taken by the claimant, but rather is a condition to the State's consent to arbitrate and, therefore, to the jurisdiction of the tribunal."<sup>41</sup> Renco does not dispute that the issue of waiver ultimately goes to the question of consent. In its own Memorial on Waiver, however, Peru drew an express distinction between "formal" waiver defects and

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<sup>39</sup> **CLA-123**, James Crawford, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY INTRODUCTION, TEXT AND COMMENTARIES*, Article 55 cmt. 4 (Cambridge Univ. Press, 2002).

<sup>40</sup> **CLA-122**, Statute of the International Court of Justice, Article 38.

<sup>41</sup> Peru's Reply on Waiver ¶ 14.

“material” waiver breaches and characterized Renco’s reservation has a “formal” breach of the waiver.<sup>42</sup>

32. Similarly, in the present case, allowing Renco’s case to proceed would be consistent with the waiver’s object and purpose because Renco’s reservation/observation creates no risk whatsoever of parallel proceedings, inconsistent results, double recovery, or any other prejudice to Peru. This result also would be consistent with international law, which prioritizes substance and procedural efficiency over excessive form and hyper-technicalities. Unlike the material (not formal) defects at issue in *Waste Management I*, *Detroit Bridge*, and *RDC* (which concerned express carve-outs of other, ongoing, offensive proceedings regarding the same measures at issue in the arbitration), Renco simply stated its understanding of the scope of the waiver that it has already provided, which would not prohibit Renco from pursuing its claims on the merits should this Tribunal dismiss them on jurisdictional or admissibility grounds. When Renco submitted its Amended Notice of Arbitration, Renco intended to provide the complete waiver that Article 10.18 requires. Renco reaffirms that intent now.

33. In sum, if this Tribunal disagrees that the reservation language in Renco’s waiver is superfluous and therefore not in violation of the waiver requirement and that, instead, it constitutes a formal defect, Peru has suffered no prejudice, Renco has effectively complied with Article 10.18 because it has not initiated or continued any parallel proceedings (nor under the language in its waiver can it ever do so) and Renco’s claims should proceed to a determination on the merits.

#### **IV. BECAUSE RENCO IS NOT ASSERTING DOE RUN PERU’S CLAIMS UNDER ARTICLE 10.16.1(B), A WRITTEN WAIVER FROM DOE RUN PERU IS NOT REQUIRED**

34. In its Counter Memorial on Waiver, Renco explained the straightforward distinction between investor claims under Article 10.16.1(a) and enterprise claims under Article 10.16.1(b).<sup>43</sup> The former concerns claims by an investor itself, for damages that the investor itself has suffered. Whereas, the latter concerns claims on behalf of the enterprise for damages

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<sup>42</sup> Peru’s Memorial on Waiver ¶ 17 (“Renco has failed to comply with the formal component of Article 10.18”); *see, also, Id.* ¶¶ 7, 15-16.

<sup>43</sup> Renco’s Counter Memorial on Waiver ¶¶ 35-52.



that the enterprise suffers as a result of State measures that cause injuries to the enterprise (without any need to examine how those injuries, in turn, injured the enterprise's shareholders, if at all).

35. In this arbitration, Renco is asserting its own claims under Article 10.16.1(a). Some of those claims—such as those regarding Peru's failure to honor its obligations with respect to the St. Louis Litigation—concern injuries that Renco is suffering directly, without regard to the damages that Renco suffers as shareholder of Doe Run Peru.

36. The other claims that Renco brings on its own behalf under Article 10.16.1(a) concern Peru's treatment of Renco's enterprise, Doe Run Peru, and the resulting injuries that *Renco itself* has suffered as a result of measures that Peru has inflicted on Doe Run Peru. This second category of claims is proper under Article 10.16.1(a), and common in investment arbitration. In fact, they are the most common type of claim in investment arbitration. If the Tribunal determines that measures Peru took against Doe Run Peru violate Peru's obligations under the Treaty, the Tribunal should determine how those measures indirectly harmed Renco as the ultimate shareholder of Doe Run Peru, and award Renco those damages. Because Renco is not asserting enterprise claims under Article 10.16.1(b), or seeking damages for Doe Run Peru, Doe Run Peru's waiver is not required, and Peru's objection fails.

37. As set forth in more detail below, it is well known and accepted that calculating loss or damages to an investor's shareholder interest in its investment enterprise may be (and oftentimes is) different than the calculation of loss or damage incurred by the enterprise itself. As Renco stated in its Counter Memorial on Waiver, Renco's damages as a shareholder will be calculated during the damages phase of this case (after the liability phase per Procedural Order No. 1) through a "flow through" damages calculation, which is a different type of damages calculation than one that would calculate the direct damages to Doe Run Peru.

38. As Ripinsky and Williams state in their treatise *Damages in International Investment Law*, "[t]he claimant-shareholder will be limited to claiming only in respect of damages it incurred by virtue of the consequential impact on the shares themselves. A number

of arbitral awards confirms this position.”<sup>44</sup> The treatise goes on to explain: “[t]he review of cases where shares were treated as the protected investment reveals two dominant approaches in quantifying the loss of the claimant-shareholder: (a) by reference to dividends; (b) by reference to the decrease in value of the shareholding.”<sup>45</sup> Contrary to Peru’s assertion that this form of damages calculation could somehow deprive legitimate creditors of Doe Run Peru of payment of their claims, both of these flow-through damages calculations “take account of the local enterprise’s indebtedness to third parties.”<sup>46</sup>

39. Nevertheless, Peru insists that under the Treaty, Renco must bring claims “on behalf of” the enterprise Doe Run Peru (and thus provide a written waiver for Doe Run Peru), and that Renco is somehow precluded from bringing claims for damages on its own behalf as shareholder. But the Treaty has no such requirement. To the contrary, it expressly allows the investor to bring either, or both types claims. When the investor brings claims on its own behalf, the investor can-not seek damages with respect to those claims for injury to the enterprise. The investor may only seek damages for injury to the enterprise if the investor brings claims on behalf of the enterprise. But Renco is not seeking damages for injury to the enterprise in this case. It is only seeking damages to itself.

40. According to Peru, the reason that Renco must bring claims only on behalf of its enterprise, and not on its own behalf, is because Renco is asserting “de facto enterprise claims.” In its Counter Memorial on Waiver, Renco explained that Peru’s unprecedented “de facto enterprise claims” theory conflicts with:

- The express text of the Treaty;
- Basic Principles of international investment law;

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<sup>44</sup> **CLA-098**, Sergey Ripinsky & Kevin Williams, *DAMAGES IN INTERNATIONAL INVESTMENT LAW*, § 5.4.5 at 155 (British Institute of Int’l and Comparative Law, 2008) (“*Ripinsky & Williams*”)

<sup>45</sup> *Id.*, § 5.4.6 at 157.

<sup>46</sup> **CLA-098**, *Ripinsky & Williams*, § 5.4.6 at 157. *See also* **CLA-130**, Mark Kantor, *VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE* at 197 (Wolters Kluwer, 2008) (“If the issue before the arbitrators involves measuring the loss of value suffered by an equity investor as a consequence of injury to the underlying business, the ‘equity value’ is the proper measure of value, the ‘enterprise value’ adjusted to reflect the fact that the equity investors are subordinated to claims by the debt holders of the company.”).

- Numerous awards from investment treaty tribunals;
- Arguments that counsel for Peru asserted successfully 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.<sup>47</sup>

41. Peru appears to be asserting two distinct arguments on this topic. First, Peru argues that as a matter of treaty interpretation, if an investor asserts a claim for damages that the investor suffers itself as a shareholder due to state measures that cause damage to that investor's enterprise, then the claim may not be asserted under 10.16.1(a) and must be asserted under 10.16.1(b). Second, Peru states that Renco is asking this Tribunal in its claims under 10.16.1(a) to award Renco damages *that Doe Run Peru has suffered* without also further examining what damage Renco itself has suffered as a result of the damage caused to Doe Run Peru (*i.e.*, to act as if Renco were Doe Run Peru).

42. Both of these arguments are incorrect, for different reasons. The first argument conflicts with the treaty's clear text, basic principles of investment law, and to claimant's knowledge, every authority that has addressed the issue. Nothing requires Renco to bring claims for damages on behalf of Doe Run Peru. The second argument distorts Renco's case. Renco, as the Claimant, can decide what claims it is asserting and what remedies it is requesting. In this arbitration, Renco is *not* asking this Tribunal to award Renco compensation as if it were Doe Run Peru. For Peru to insist otherwise ignores reality.

### **1. The Text of the Treaty and Basic Principles of International Investment Law Confirm Renco's Right to Bring 10.16.1(a) Claims**

43. Dolzer & Schreuer's BASIC PRINCIPLES ON INVESTMENT LAW, and Ripinsky & Williams's DAMAGES IN INTERNATIONAL INVESTMENT LAW, both explain not only that modern investment treaties' definitions of investment are designed to allow shareholders to assert claims regarding injuries that they suffer from measures taken against the companies they own, but also

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<sup>47</sup> Renco's Counter Memorial on Waiver ¶¶ 32, 35-52.

that arbitral authorities confirming this analysis are extensive.<sup>48</sup> Thus, because the Treaty defines investment to include direct and indirect ownership of an enterprise, Renco may assert claims under Article 10.16.1(a) for injuries that it has suffered as a shareholder for measures that the Respondent inflicted upon Doe Run Peru.

44. Peru admits that the Treaty defines investment to include direct and indirect ownership of an enterprise.<sup>49</sup> Yet, in a footnote, Peru asserts that Renco’s citation to Dolzer & Schreuer, and this extensive arbitral precedent, is incorrect because according to Peru these authorities “concern the interpretation of investment rather than the type of rules set forth in Article 10.16(1) of the Treaty...This is clear from a reading of the entire paragraph of which Renco quotes only the last two sentences.”<sup>50</sup>

45. Although Renco quoted only the last two sentences of the paragraph in Dolzer & Schreuer to which Peru refers, the entire paragraph supports the two concluding sentences of that paragraph, and confirms Renco’s point.<sup>51</sup> The paragraph focuses on the first type of claim (*i.e.*, investor claims under Article 10.16.1(a)), stating that a shareholder may pursue damages for its lost value and profitability arising from actions by a State against the local enterprise.<sup>52</sup> And in describing that type of claim and how it is created via the definition of investment, the paragraph contrasts that type of claim with a claim on behalf of an enterprise, such as those permitted under Article 10.16.1(b). Thus, Peru is incorrect when it asserts that Dolzer & Schreuer’s treatise—as

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<sup>48</sup> *Id.*, ¶ 45.

<sup>49</sup> Peru’s Reply on Waiver ¶ 20.

<sup>50</sup> Peru’s Reply on Waiver ¶ 20 n. 40.

<sup>51</sup> Peru’s Reply on Waiver ¶ 20 n. 40 (quoting **CLA-097**, Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* at 57 (2d ed. 2012) (Peru’s emphasis removed). The entire paragraph reads as follows:

Most investment treaties offer a solution that gives independent standing to shareholders: the treaties include shareholding or participation in a company in their definitions of ‘investment.’ In this way, it is not the locally incorporated company that is treated as a foreign investor; rather, the participation in the company becomes the investment. Even though the local company may be unable to pursue the claim internationally, the foreign shareholder in the company may pursue the claim in its own name. Put differently, even if the local company is not endowed with investor status, the investor’s participation therein is seen as the investments. 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>52</sup> *Id.*

well as Ripinsky & Williams and the extensive authorities on which they rely—are inapplicable because they are discussing the interpretation of investment and not “the type of rules” in Article 10.16(1). Those authorities demonstrate that the definition of investment informs the interpretation of these “rules” in Article 10.16(1).

46. Ripinsky & Williams’s Treatise, *DAMAGES IN INTERNATIONAL INVESTMENT LAW*, examines the distinction between investor and enterprise claims in detail. Renco cited this Treatise in addition to Dolzer & Schreuer’s Treatise, and Peru did not address it in its reply.

47. A hypothetical further illustrates the difference between investor claims and enterprise claims. A hypothetical company incorporated in Delaware, USA, named Global Services, Inc., indirectly owns and controls 100% of the shares in Acme, Inc., a company incorporated under the laws of Peru. Peru is obligated to pay Acme US\$ 100 million by a specific date. Instead of paying that sum when due, Peru issues a decree that violates several provisions of the Treaty, including fair-and-equitable treatment and the most-favored-nation clause, and nullifies the obligation under Peruvian law.

48. While the harm to Acme may very well result in harm to Global Services, this does not support the contention that Global Services can bring an investor claim under Article 10.16.1(a) for the US \$100 million loss or other damage incurred by Acme. Rather, if Global Services incurs a loss or damage to *its interest* in Acme because of the loss or damage incurred by Acme, Global Services may bring a claim under Article 10.16.1(a) for the loss or damage *to its interest* in Acme.

49. The hypothetical tribunal would evaluate how Acme’s loss of US\$ 100 million affected Global Services. It might be that, in the but-for causation damages analysis, Acme would have paid a debt of US\$ 25 million before it paid any dividends. In that instance, the Tribunal may conclude that Global Services should receive US\$ 75 million. Alternatively, Global Services might be able to prove that it suffered even more damages than the US \$ 100 million loss incurred by Acme. For instance, Peru’s failure to pay Acme US\$ 100 million may have pushed Acme into a financial downward spiral that eviscerated several hundred million dollars worth of value in Acme’s shares. Or Global Services may have granted a security interest in its own assets as collateral for a US\$ 500 million loan that Acme used to build a

hospital, and Peru's failure to pay the US\$ 100 million obligation to Acme violated a covenant in that loan, which caused creditors to seize US\$ 500 million in assets from Global Services.

50. In another example, Peru might expropriate all of Acme's shares. In that instance, Global Services might suffer a complete loss of its investment and seek compensation via an investor claim under Article 10.16.1(a) even though it might have no potential claim under Article 10.16.1(b) on behalf of Acme because Acme itself would not have suffered any damage at all. But if Peru expropriates all of Acme's assets and leaves Acme as nothing but an empty corporate shell, Global Services might have viable claims under both Article 10.16.1(a) and 10.16.1(b). Depending on the facts, the analysis may be simple or complex, but the analysis will always be different depending on which type of claims are being asserted. And simply because Global Services could assert an enterprise claim under Article 10.16.1(b) on behalf of Acme does not mean that Global Services cannot assert a claim under Article 10.16.1(a) on its own behalf for losses that it suffers directly in addition to—or instead of—its enterprise claims under Article 10.16.1(b).

## **2. An Article that Peru Cites in its Memorial on Waiver for Other Legal Propositions and Numerous Investment Awards Supports Renco**

51. Peru asserts that Ms. Thornton's article demonstrates that Renco was obligated to bring its claims under Article 10.16.1(b).<sup>53</sup> In fact, Ms. Thornton's article confirms that Renco may assert its claims under Article 10.16.1(a), because she explains the distinction between enterprise claims and investor claims in the same manner as Dolzer & Schreuer and Ripinsky & Williams. Specifically, in a paragraph that Peru quotes in its Reply, Ms. Thornton states, "These provisions distinguish between claims brought by an investor on its own behalf [*i.e.*, investor claims] and claims brought by an investor on behalf of locally incorporated enterprises [*i.e.*, enterprise claims]."<sup>54</sup> In that same paragraph, Ms. Thornton explains further that enterprise claims are asserted on the enterprise's behalf and, unlike investor claims, do not require that the investor have suffered any damage itself. In particular, Ms. Thornton states, "[NAFTA] Article 1117 [*i.e.*, enterprise claims] is intended to resolve the *Barcelona Traction* problem by

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<sup>53</sup> Peru's Reply on Waiver ¶ 23.

<sup>54</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.

permitting the investor to assert a claim for injury to its investments even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.’”<sup>55</sup>

52. After explaining the difference between investor and enterprise claims, including that a claimant does not have to prove that it suffered any damage itself when asserting enterprise claims, Ms. Thornton explains that NAFTA “muddied” this distinction because it requires a waiver on behalf of an enterprise even when the claimant asserts only investor claims. Ms. Thornton explains that CAFTA-DR (as does the Treaty) *eliminates that requirement*—namely, the very requirement that Peru’s argument improperly seeks to impose upon Renco. Ms. Thornton states:

*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>

In short, Ms. Thornton’s analysis completely supports Renco’s position.

53. Peru interprets Ms. Thornton’s article differently. NAFTA’s waiver provision provides in part that, “the investor and, where the claim is for loss or damage to an interest in an enterprise, ... the enterprise [must provide a written waiver].”<sup>57</sup> According to Peru, that text could be interpreted to allow investors to claim for losses that the enterprise suffers under Article

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> **CLA-131**, NAFTA art. 1121.

1116 (investor claims).<sup>58</sup> In fact, Peru argues that the *Pope & Talbot* and *UPS* Tribunals adopted that incorrect interpretation.<sup>59</sup>

54. In other words, according to Peru, NAFTA did not “muddy” the distinction between investor and enterprise claims by requiring an investor to provide an enterprise waiver even when the investor asserts its own investor claims under Article 1116. Rather, Peru argues that NAFTA muddied the distinction by allowing investors to recover an enterprise’s damages itself under Article 1116, and that to prevent future tribunals from potentially adopting this erroneous interpretation, the CAFTA-DR and later US Model BITs do not contain this allegedly confusing text. In other words, Peru states that the more recent US treaties provide, “the investor ~~and, where the claim is for loss or damage to an interest in an enterprise, ... the enterprise~~ [must provide a waiver],” so that no investment tribunal mistakenly interprets the relevant treaty as allowing a claimant to recover an enterprise’s losses in an investor claim.<sup>60</sup>

55. Peru’s underlying premise and resulting thesis are incorrect. Neither the *Pope & Talbot* Tribunal nor the *UPS* Tribunal mistakenly interpreted NAFTA as allowing a claimant to obtain an enterprise’s losses as damages in a claim that the investor brought on its own behalf under Article 1116. In *Pope & Talbot*, Canada advanced the argument that Peru asserts in this arbitration. According to the *Pope & Talbot* Tribunal:

Canada submitted an argument along the following lines: Article 1116 provides for claims for loss or damage incurred by an investor, whereas Article 1117 addresses claims for loss or damage incurred by an investment owned or controlled by an investor. Because, as noted, the sole basis for the claim here was Article 1116, the Investor may not recover damages due to injuries to its Investment, and any elements of its claims that are derivative from injuries suffered by the Investment must be disallowed. They would be recoverable under Article 1117, but that claim has not been made.<sup>61</sup>

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<sup>58</sup> Peru’s Reply on Waiver ¶ 26.

<sup>59</sup> Peru’s Reply on Waiver ¶ 26.

<sup>60</sup> Peru’s Reply on Waiver ¶ 26.

<sup>61</sup> **CLA-086**, *Pope & Talbot Inc. v. Government of Canada*, Award in Respect of Damages, May 31, 2002, ¶ 75 (Benjamin J. Greenberg Q.C., Murray J. Belman, Lord Dervaird (President)) (“*Pope & Talbot* Award”).



56. The *Pope & Talbot* Tribunal rejected Canada’s argument, but it did not hold that the claimant could obtain the enterprise’s losses as the investor’s damages under Article 1116. Rather, the Tribunal recognized the distinction that Dolzer & Schreuer, Ripinsky & Williams, and Ms. Thornton have recognized—an investor can recover damages for their own injuries under Article 1116 and such claims are distinct from enterprise-claim damages under Article 1117. Specifically, the *Pope & Talbot* Tribunal held:

In the view of the Tribunal it could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns. In the present case, therefore, where the investor is the sole owner of the enterprise (which is a corporation, and thus an investment within the definitions contained in Articles 1139 and 201), it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116.<sup>62</sup>

In other words, the *Pope & Talbot* Tribunal’s analysis confirms Renco’s position.

57. Peru has argued (without citing to any authority) that an investor is disqualified from bringing claims for damages on its own behalf when the investor is the sole owner of the enterprise.<sup>63</sup> Neither the text of the Treaty nor sources of international law support the distinction that Peru draws on this issue, and the quoted text from the *Pope and Talbot* award affirmatively rejects it.

58. The *UPS* Tribunal also did not mistakenly interpret Article 1116 as allowing investors to claim for losses that the enterprise suffers. That Tribunal held that UPS had properly brought its claims for damages on its own behalf under Article 1116, and then stated that “in the context of this dispute,” the distinction between claims under Article 1116 and 1117 was mostly formal. But the *UPS* Tribunal did not hold, as Peru suggests, that an investor may recover an enterprise’s losses under Article 1116. To the contrary, the *UPS* Tribunal recognized the fundamental distinction between investor claims and enterprise claims noting that in a different

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<sup>62</sup> Peru’s Reply on Waiver ¶ 26.

<sup>63</sup> Peru’s Reply on Waiver ¶ 27.

context the question of “how much of UPS Canada’s losses flow through to UPS – the question posed by Canada here – may have very different purchase.”<sup>64</sup>

59. Peru claims “it is notable” that in *Mondev*, *UPS*, and *Pope & Talbot*, the claimants provided waivers on behalf of themselves and their enterprises.<sup>65</sup> Peru argues that because the claimants had provided waivers on behalf of their enterprises, the *Mondev* Tribunal stated that it was “immaterial” that *Mondev* had not asserted enterprise claims under NAFTA Article 1117, and the *UPS* Tribunal stated that the distinction between investor and enterprise claims in that dispute was “entirely almost formal, without any significant implications...”.<sup>66</sup> In contrast, Peru argues, the distinction between investor and enterprise claims in this case is significant because Renco has not provided Doe Run Peru’s waiver.<sup>67</sup>

60. Peru’s argument ignores a fundamental difference between NAFTA and the Treaty. NAFTA requires a claimant to provide a waiver even when the claimant only asserts investor claims and not enterprise claims. For that reason, the claimants in *Mondev*, *UPS* and *Pope & Talbot* provided waivers on behalf of the enterprise. But as Ms. Thornton explains, CAFTA-DR eliminates that requirement – as does the Treaty.

61. No authority of which Claimant is aware has interpreted NAFTA Article 1116 as allowing an investor to claim for losses that the enterprise suffers, and that alleged interpretation is not what “muddied” the distinction between investor claims and enterprise claims under NAFTA as Peru argues here. What “muddied” the distinction is exactly what Ms. Thornton stated in her article: under NAFTA’s waiver provision, an investor must provide a waiver on behalf of its enterprise even if that investor only asserts its own claims.

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<sup>64</sup> **CLA-87**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits, May 24, 2007, ¶ 35 (Dean Ronald A. Cass, L. Yves Fortier, Kenneth Keith (President)).

<sup>65</sup> Peru’s Reply on Waiver ¶ 27.

<sup>66</sup> Peru’s Reply on Waiver ¶ 27.

<sup>67</sup> Peru’s Reply on Waiver ¶ 27.

62. In its Reply, Peru quotes a submission by the United States in *Pope & Talbot v. Canada* for the proposition that a claimant *must* bring damages claims on behalf of the enterprise. But neither the quoted language nor any other portion of the U.S. submission stands for this proposition. Specifically, the United States stated:

[I]f a NAFTA Party violated Article 1109(1)'s requirement that 'all transfers relating to an investment of an investor of another Party in the territory of the Party...be made freely and without delay,' the investor might be able to claim under Article 1116 [Article 10.16.1(a) of the Treaty] an injury stemming from interference with its right to be paid corporate dividends, and the investor might be able to claim under Article 1117 [Article 10.16.1(b) of the Treaty] an injury relating to its enterprise's inability to make payments necessary for the day-to-day conduct of the enterprise's operations.<sup>68</sup>

63. This quote confirms Renco's position. In the United States' hypothetical, the same measure (interfering with an enterprise's ability to pay dividends) can give rise to investor claims under Article 10.16.1(a) *and* enterprise claims under Article 10.16.1(b). In other words, while the harm to an investment may result in harm to the investor, this does not support the contention that an investor may bring a claim for damages under Article 10.16.1(a) of the Treaty for loss or damages *incurred by the enterprise*. Rather, where an investor incurs a loss or damage to its interest in the enterprise because of loss or damage incurred by that enterprise, the investor's recourse is to bring a claim under Article 10.16.1(a) for the loss or damage to its interest, and if it so chooses, another claim under Article 10.16.1(b) on behalf of the enterprise to recover for the loss or damage incurred by the enterprise.

64. In short, all of the authorities on point in the record of this arbitration—including treatises, arbitral awards, academic articles, and submission by the United State in investment proceedings—confirm Renco's position and rejects Peru's position.

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<sup>68</sup> Peru's Reply on Waiver ¶ 22 (quoting **RLA-119**, Seventh Submission of the United States of America in *Pope & Talbot, Inc. v. Government of Canada*).

### **3. Arguments that Peru’s Counsel has Successfully Asserted in Another Investment Arbitration Contradict its Current Position**

65. Peru argues that Renco’s reliance on *TECO* is “misplaced” because *TECO* could not assert enterprise claims because, as a minority shareholder, it did not control the locally incorporated company that constituted the investment vehicle.<sup>69</sup> The fact that *TECO* did not own or control the enterprise and thus could not bring claims on behalf of the enterprise is irrelevant. Nothing in the Treaty or any other authority suggests, as Peru does here, that a claimant cannot bring an investor claim under Article 10.16.1(a) simply because it could also bring an enterprise claim under Article 10.16.1(b). In fact, the *Pope & Talbot* Tribunal expressly rejected Peru’s argument: “the existence of Article 1117 does not bar bringing a claim under Article 1116.”<sup>70</sup>

### **4. Peru Impermissibly Asserts Contradictory Arguments in its Preliminary Objections Under Article 10.20.4**

66. In its Counter Memorial, Renco explained that Peru’s “de facto enterprise claims” theory is inconsistent with Peru’s own Preliminary Objections Under Article 10.20.4.<sup>71</sup> In its waiver submissions, Peru insists that Renco’s claims are “de facto enterprise claims” under Article 10.16.1(b) that require Doe Run Peru’s waiver. Yet in Peru’s Preliminary Objections Under Article 10.20.4, Peru argues that “Renco has only asserted – and, indeed can only assert – claims under Article 10.16.1(a)(i)(C) for breach of an investment agreement.”<sup>72</sup> Because Renco is not a party to the investment agreements, Peru continues, this Tribunal lacks jurisdiction over Renco’s claims. But if Renco’s claims are “de facto enterprise claims,” then they are claims on behalf of Doe Run Peru. Peru acknowledges that Doe Run Peru is a party to the investment agreements, and so Peru’s Preliminary Objections fail if its “de facto enterprise claims” theory is correct.

67. Renco explained this inconsistency in its Counter Memorial on Waiver, and Peru did not respond in its Reply.

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<sup>69</sup> Peru’s Reply on Waiver ¶ 29.

<sup>70</sup> **CLA-086**, *Pope & Talbot v. Canada* Award ¶ 80.

<sup>71</sup> Renco’s Counter Memorial on Waiver ¶ 51.

<sup>72</sup> Peru’s Preliminary Objections Under Article 10.20(4), Feb. 20, 2015, ¶ 35.

68. The international law principle of preclusion bars Peru's inconsistency. That principle reflects maxims such as *venire contra factum proprium* ("no one may set himself in contradiction to his own previous conduct") and *allegans contraria non audiendus est* ("one making contradictory statements is not to be heard") and several international authorities have recognized this principle.

69. The tribunal in the *Argentine-Chile Frontier Case* described the preclusion principle as barring "inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith."<sup>73</sup> Similarly, the sole arbitrator in *The Lisman* found that the claimant was precluded from adopting an inconsistent factual position:

By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful . . . claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim.<sup>74</sup>

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<sup>73</sup> **CLA-124**, *Argentine-Chile Frontier Case (Arg. v. Chile)*, Award, Dec. 9, 1966 ("Argentine-Chile Frontier Award"), 16 R.I.A.A. 109, 164 (1969).

It seems clear from the decision of the International Court of Justice in the Case concerning the Temple of Preah Vihear (*Cambodia v. Thailand*), Merits, (I.C.J. Reports 1962, p. 6), and especially from the learned Separate Opinion of Vice-President Alfaro in that case, that there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence, according to which 'a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation'. (See Vice-President Alfaro's Opinion at page 39 of the report.) This principle is designated by a number of different terms, of which 'estoppel' and 'preclusion' are the most common. But it is also clear that these terms are not to be understood in quite the same sense as they are in municipal law. With that qualification in mind, this Court will employ the term "estoppel". Again to quote from the same Opinion of Vice-President Alfaro: 'Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*)'. That this principle can operate with decisive effect in international litigation . . . is clear from the Temple case itself'. **CLA-124**, *Argentine-Chile Frontier Award* at 109, 164.

While some debate remains as to whether the principle of preclusion is a general principle of law recognized by civilized nations or has attained the status of custom, there is no debate that the principle exists. See also **CLA-125**, I.C. MacGibbon, *Estoppel in International Law*, 7 Int'l & Comp. L. Q. 468, 468-70 (1958).

<sup>74</sup> **CLA-126**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 142 (1987) (emphasis in original) (citing *The S.S. Lisman (U.S. v. U.K.)*, Award, Oct. 5, 1937 ("Lisman Award"), 3 R.I.A.A. 1767, 1790 (1950)).

The preclusion principle was likewise illustrated in the Iran-US Claims Tribunal case of *Oil Fields of Texas*.<sup>75</sup> The PCIJ and ICJ have also supported a broad concept of preclusion. For example, in the case of the *Legal Status of Eastern Greenland*, the Court stated that because “Norway reaffirmed that she recognized the whole of Greenland as Danish,” Norway “has debarred herself from contesting Danish sovereignty over the whole of Greenland.”<sup>76</sup>

70. In sum, the underlying basis of the preclusion doctrine “is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation.”<sup>77</sup> Thus, in this arbitration, Peru cannot characterize Renco’s claims as investor claims under Article 10.16.1(a) for purposes of its Preliminary Objections Under Article 10.20.4 and, at the same time, characterize those exact same claims as enterprise claims under Article 10.16.1(b) for purposes of its waiver objections. Thus, this Tribunal should require Peru to adopt one position or the other.

## **5. Principles of Corporate Separateness Under Peruvian Law Support Renco**

71. Peru argues that requiring Doe Run Peru’s waiver would be consistent with the waiver’s objective of preventing multiple proceedings “based on loss or damage to that enterprise.” Peru’s argument, yet again, mischaracterizes Renco’s position. Renco is not seeking damages owed to Doe Run Peru. Renco explained that Peru’s argument implicitly treats Renco and Doe Run Peru as if they were the same juridical person, which is inconsistent the principles of corporate separateness. In a footnote, Peru asserts that it is not asking the Tribunal to treat Renco and Doe Run Peru as if they were the same person and that its position is based on “the words of Article 10.16.1(b).”<sup>78</sup> In other words, Peru’s argument assumes the issue in

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<sup>75</sup> **CLA-127**, Concurring Opinion of Richard M. Mosk with respect to Interlocutory Award, *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, Oil Service Company of Iran*, No. ITL 10-43-FT, 1982 WL 229382, at 23-24 (emphasis added) (internal citations omitted).

<sup>76</sup> **CLA-128**, *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment (“*Legal Status of Eastern Greenland Judgment*”), 1933 P.C.I.J., Ser. A/B, No. 53 at 68-69 (Apr. 5). Although this case is often cited as evidence of the principle of estoppel (more precisely, estoppel by conduct), the Court in fact did not concern itself with the question of whether or not one of the parties had relied, to their detriment, on Norway’s statements; it was sufficient that the statement had been made, intending to produce legal effects.

<sup>77</sup> **CLA-125**, I.C. MacGibbon, *Estoppel in International Law*, 7 Int’l & Comp. L. Q. 468, 468 (1958).

<sup>78</sup> Peru’s Reply on Waiver ¶ 30 n.72.

dispute—namely, that Renco is asserting Doe Run Peru’s claims under Article 10.16.1(b). Renco is not asserting claims under Article 10.16.1(b) and this argument, which assumes otherwise, does not undermine Renco’s position.

**V. PERU FAILS TO REBUT THAT DOE RUN PERU’S ACTIONS ARE DEFENSIVE IN NATURE, ARE PART AND PARCEL OF THE BANKRUPTCY, AND FALL OUTSIDE OF THE WAIVER REQUIREMENT**

72. Peru attempts to characterize Doe Run Peru’s actions challenging recognition of the Ministry’s credit as non-defensive in nature and “autonomous judicial actions independent from DRP’s bankruptcy proceedings as a matter of Peruvian law.”<sup>79</sup> Peru is incorrect. Both the administrative appeal of the INDECOPI Tribunal’s Resolution No. 1743-2011/SCI-INDECOPI by way of contentious administrative proceeding, and the constitutional *amparo* each have one purpose, and one purpose only, namely, defending the bankruptcy estate against recognition by INDECOPI of the Ministry’s US\$ 163 million credit claim because Doe Run Peru believes the credit is invalid under Peruvian bankruptcy law.

73. In its Counter Memorial, Renco sets forth, in detail, the relevant events relating to the Doe Run Peru Bankruptcy Proceeding.<sup>80</sup> Renco did this to demonstrate to the Tribunal that Peru mischaracterizes the local actions by alleging they are standalone proceedings unrelated to the bankruptcy and are not defensive in nature. In addition, reviewing the bankruptcy proceeding in detail makes clear that those actions were an integral part of Doe Run Peru’s defensive action, and do not violate the Treaty’s waiver requirement because:

- they relate to the Doe Run Peru involuntary bankruptcy proceedings, which Doe Run Peru did not initiate or continue;
- they were taken by Doe Run Peru in defense against the Ministry’s \$163 million credit claim asserted against the Doe Run Peru bankruptcy estate;
- Doe Run Peru was under an obligation under Peruvian law to investigate and challenge credits that lack merit;

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<sup>79</sup> Peru’s Reply on Waiver ¶ 36.

<sup>80</sup> Renco’s Counter Memorial on Waiver ¶¶ 73-104.

- Doe Run Peru does not seek double recovery, but merely to preserve the *status quo ante*, *i.e.*, a bankruptcy estate free of a large improper credit, and there is no risk of inconsistent results; and
- the liquidators appointed by the Creditors’ Committee have maintained these actions in order to comply with their duties to protect the bankruptcy estate and act in the best interest of all of the creditors, without favoring any particular creditor; and
- Doe Run Peru was (and the liquidator is) powerless to stop the involuntary bankruptcy proceedings.

**A. DEFENSIVE ACTIONS DO NOT IMPLICATE THE WAIVER REQUIREMENT**

74. Peru claims that jurisprudence regarding fork-in-the-road provisions, which clearly supports Renco’s argument that defensive actions do not violate the waiver requirement, is inapposite.<sup>81</sup> Peru is incorrect. Peru first argues that the waiver provision of Article 10.18(2), unlike a fork in the road provision, “does not require a choice between two proceedings.”<sup>82</sup> This does not make sense. Both fork-in-the-road and waiver provisions impose consequences on claimants depending on which forum they choose for particular claims and require a choice—and, as discussed above—the object and purpose of both fork-in-the-road and waiver provisions is the same, *i.e.*, to prevent a claimant from initiating or continuing simultaneous and overlapping proceedings in multiple fora, to minimize the risks of double recovery, conflicting outcomes and legal uncertainty. It is therefore not surprising that both the waiver and fork-in-the-road provisions are set forth in the same Article of the Treaty.<sup>83</sup> As such, fork-in-the-road jurisprudence is instructive and reliance upon it appropriate.

75. Despite Peru’s claims to the contrary, the fork-in-the-road cases that Renco cites can easily be compared to the actions taken by Doe Run Peru in connection with its involuntary bankruptcy proceedings.<sup>84</sup> In *Chevron Corp., v. The Republic of Ecuador*, like here, the dispute was not submitted to the courts by the claimants, but they were required to defend themselves

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<sup>81</sup> Peru’s Reply on Waiver ¶¶ 34-35

<sup>82</sup> *Id.*, ¶ 35.

<sup>83</sup> See **CLA-001**, Treaty, Article 10.18(1)-(3) (waiver) and Article 10.18.4 and Annex 10-G (fork-in-the-road).

<sup>84</sup> Peru’s Reply on Waiver ¶ 35, fn. 81.



against claims asserted against them. Here, the Doe Run Peru bankruptcy proceeding was not commenced by Doe Run Peru and the Ministry asserted a claim *against* the estate requiring Doe Run Peru to defend itself. Both the challenge before INDECOPI and *amparo* were purely defensive in nature and in direct response to the Ministry's credit claim. Treating those as anything other than defensive would be favoring form over substance. The *Chevron v. Ecuador* Tribunal found: "The raising of a plea of defense to a claim in the 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 plain and ordinary meaning of the term, it does not extend to the raising of a defense to another's claim submitted to that court."<sup>85</sup> Here too, Doe Run Peru's defensive actions were not the product of a real choice.

76. In *Occidental v. Ecuador*, the Tribunal determined that the fork-in-the-road provision was not triggered where the tax authorities issued a resolution that might affect the investor and Ecuadorian tax law required the taxpayer to apply to the local courts within twenty days, or the resolution would become binding, leaving the investor with no real choice.<sup>86</sup> The *Occidental* Tribunal stated:

There is one further powerful reason for this Tribunal finding that the 'fork in the road' mechanism has not been triggered in this dispute. The 'fork in the road' mechanism by its very definition assumes that the investor has made a choice between alternative avenues. This is [sic] turn requires that the choice be made entirely free and not under any form of duress. It has been explained above that in the instant case the Ecuadorian Tax Law requires the taxpayer to apply to the courts within the brief twenty days following the issuance of any resolution that might affect it. If this is not done, as noted above, the resolution becomes final and binding.

The Tribunal is of the view that in this case the investor did not have a real choice. Even if it took the matter instantly to

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<sup>85</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, ¶¶ 4.79-4.82 (Horacio A. Grigera Naón, Vaughn Lowe, V.V. Veeder (President)).

<sup>86</sup> **CLA-021**, *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, ¶¶ 60-61 (Charles N. Brower, Patrick Barrea Sweeney, Francisco Orrego Vicuña (President)).

arbitration, which is not easy to do, the protection of its right to object to the adverse decision of the SRI would have been considered forfeited if the application before the local courts was not made within the period mandated by the Tax Code.<sup>87</sup>

77. This is similar to the instant case where Doe Run Peru had only ten days to submit its opposition to the Ministry's credit or risk the credit being recognized by INDECOPI with no further recourse available. Contrary to Peru's assertion, other authorities cited by Renco also support its position that the waiver requirement should not apply where Doe Run Peru is simply defending itself against claims asserted against it by Peru.<sup>88</sup>

78. On September 14, 2010, approximately seven months before the arbitration began, the Ministry filed its application with INDECOPI to have its US\$ 163,046,495 credit claim against the Doe Run Peru bankruptcy estate recognized.<sup>89</sup> Doe Run Peru had only ten (10) business days after being notified by the Technical Secretary of INDECOPI to challenge the Ministry's application, which it considered invalid, or the credit would be recognized.<sup>90</sup> Accordingly, Doe Run Peru, as debtor-in-possession, had no real choice but to oppose the proposed credit for the benefit of the estate and all creditors, or the estate would end up being saddled with a huge credit and Doe Run Peru's management would be subject to civil, and potential criminal, penalties.<sup>91</sup> By failing to investigate and challenge the Ministry's credit,

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<sup>87</sup> *Id.*

<sup>88</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)) ("Moreover, the actions by TGS itself have been mainly in the defensive so as to oppose the tax measures imposed, and the decision to do so has been ordered by ENARGAS, the agency entrusted with the regulation of the gas sector"); **CLA-129**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, ¶ 78 (Nabil Elaraby, James R. Crawford, Gilbert Guillaume (President)) (Argentina alleged that the local enterprise's appeal to the Argentine Supreme Court and seeking other administrative remedies triggered the fork-in-the-road provision. In denying Argentina's jurisdictional objection, the Tribunal took into account, among other things, Claimant's argument that the appeal related to proceedings commenced by the Argentine Ombudsman, local entity only participated as a third-party intervenor, both the Argentine Government and state agency regulating the gas industry also appealed the decision, and that the local entity "was only undertaking defensive and reactive actions in those proceedings").

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

<sup>91</sup> **Exhibit C-217**, Peruvian General Law of Companies, Article 288 ("Managers are liable before the company for damages and losses caused by fraud, abuse of authority and gross negligence"); **Exhibit C-208**, Article V of the Preliminary Title of the Peruvian General Law on Bankruptcy ("[...] Bankruptcy proceedings seek the

which Doe Run Peru believes to be invalid, it would not be acting in accordance with the obligation of accuracy, probity, faithfulness and good faith, but would be favoring one creditor (the largest of which just happens to be the Peruvian government) over all legitimate creditors, obligations that any subsequently appointed liquidator is required to undertake upon appointment.<sup>92</sup>

79. Thereafter, on February 23, 2011, the INDECOPI Commission *rejected* the Ministry's credit,<sup>93</sup> and on March 7, 2011, the Ministry appealed the decision of the INDECOPI Commission to the INDECOPI Tribunal.<sup>94</sup> Thus, when the arbitration began on April 4, 2011, Doe Run Peru had succeeded in challenging the Ministry's credit and the Ministry had appealed to the INDECOPI Tribunal. Again, Doe Run Peru, as debtor-in-possession, had no real choice but to oppose the Ministry's appeal, which it did on May 20, 2011.<sup>95</sup> Six months later, on November 18, 2011, *in a divided opinion*, the INDECOPI Tribunal reversed the INDECOPI Commission's prior rejection of the Ministry's credit, thereby recognizing the Ministry's US\$ 163 million credit claim.<sup>96</sup> On January 18, 2012, Doe Run Peru filed a challenge to the INDECOPI Tribunal's resolution recognizing the Ministry's credit claim by means of a "*accion contencioso administrativa*."<sup>97</sup>

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participation and benefit of all creditors involved in the debtor's crisis. The collective interest of the body of creditors supersedes the individual interests in collection of each creditor"); Preliminary Title Art. VIII ("The subject 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. Reckless, bad faith or any other willful misconduct shall be sanctioned, according to law").

<sup>92</sup> **Exhibit C-208**, Peruvian General Bankruptcy Law, Articles 75 ("...the functions of the legal representation and of all administration bodies shall expire, which shall be assumed by the Liquidator. The expiration shall operate by law as of the execution of the Liquidation Agreement."); *see also* Art. 82(b) and (c) (providing that upon execution of the Liquidation Agreement the powers of the management of the debtor-in-possession cease and "[T]he administration and legal representative shall fall under the responsibility of the Liquidator appointed by the [Creditors] Committee for such purpose...")

<sup>93</sup> **Exhibit C-130**, Resolution No. 1105-2011/CC-INDECOPI, Comisión de Procedimientos Concursales del INDECOPI, Feb. 23, 2011.

<sup>94</sup> **Exhibit C-212**, Motion to Appeal INDECOPI Resolution No. 1105-2011/CC-INDECOPI filed by the Ministry of Energy & Mines, Mar. 7, 2011.

<sup>95</sup> **Exhibit C-213**, Brief in Opposition filed by Doe Run Peru to Appeal filed by Ministry of Energy of Mines, May 20, 2011.

<sup>96</sup> **Exhibit C-136**, Resolution No. 1743-2011/SC1-INDECOPI, Nov. 18, 2011.

<sup>97</sup> **Exhibit C-214**, *Acción Contencioso Administrativa* filed by Doe Run Peru, Fourth Administrative Court, Jan. 18, 2012. **Note:** this appeal action was filed by Doe Run Peru and Right Business had not yet been appointed as

80. In an attempt to create the impression that Doe Run Peru chose to commence the contentious administrative action, Peru refers to Doe Run Peru's contentious administrative action dated January 18, 2012 as the "Second Proceeding"<sup>98</sup> and alleges that under Peruvian law such actions "are not an appeal of an administrative agency's decision."<sup>99</sup> Peru is incorrect on both counts. First, the January 18, 2012 filing is the continuation of Doe Run Peru's challenge to the credit claim asserted *against* the Doe Run Peru bankruptcy estate, and therefore cannot fairly be characterized as a separate proceeding. On November 30, 2011, the INDECOPI Tribunal officially served Doe Run Peru with Resolution No. 1743.<sup>100</sup> The notice that the Technical Secretary of the INDECOPI Tribunal transmitted to Doe Run Peru contains the following information at the bottom of the letter:

- La presente Resolución surte efectos el día de su notificación y agota la vía administrativa, de conformidad con lo dispuesto en el numeral 1 del artículo 25° y literal e) del artículo 218° de la Ley de Procedimiento Administrativo General, respectivamente.
- La presente Resolución puede ser impugnada ante el Poder Judicial a través del proceso contencioso administrativo dentro del plazo de 3 meses posteriores a la notificación de la misma, de conformidad con lo dispuesto en el artículo 17, inciso 1) de la Ley N° 27584, Ley que regula el Proceso Contencioso Administrativo.

Translation:

This Resolution shall take effect on the day of its notice and exhausts the administrative channel, pursuant to that provided in number 1 of Article 25 and letter e) of Article 218 of the General Law on Administrative Procedure, respectively. *This Resolution may be appealed before the Judicial Power by way of a contentious administrative process within a term of 3 months following notice thereof, pursuant to that provided in Article 17, paragraph 1) of Law No. 27584, the Law that regulates the Contentious Administrative Process.*<sup>101</sup>

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legal representative of Doe Run Peru. The statement in the Renco's Counter Memorial at ¶ 96 is in error. Right Business, S.A., was appointed as administrator of the Doe Run Peru bankruptcy estate several months later on May 22, 2012. It thereafter became Doe Run Peru's legal representative and has, since that time, and consistent with the duties of a liquidator, maintained Doe Run Peru's defense against the Ministry's credit.

<sup>98</sup> **Exhibit C-214**, *Acción Contencioso Administrativa* filed by Doe Run Peru, Fourth Administrative Court, Jan. 18, 2012.

<sup>99</sup> Peru's Reply on Waiver ¶¶ 38-39.

<sup>100</sup> **Exhibit C-222**, Notification Letter from A. Bianchini Ayesta, INDECOPI, to Doe Run Peru S.R.L., Notice No. 9610-2011/SC1-INDECOPI, Nov. 30, 2011.

<sup>101</sup> *Id.* (emphasis added).

Thus, INDECOPI put Doe Run Peru on notice that Resolution No. 1743 exhausted administrative proceedings before INDECOPI and that Doe Run Peru had three (3) months in which to appeal by way of a contentious administrative process. If Doe Run Peru failed to do so, the INDECOPI Tribunal's decision would become *res judicata* and could no longer be challenged.<sup>102</sup>

81. At the same time Doe Run Peru challenged the Ministry's credit before INDECOPI, Doe Run Peru also challenged the Ministry's credit by filing the constitutional *amparo*. The *amparo*, like the INDECOPI challenge, sought to maintain the *status quo* and restrain Peru from asserting the US\$ 163 million credit claim against Doe Run Peru. While Peru tries to characterize the *amparo* as somehow unrelated to the Doe Run Peru bankruptcy proceedings, it is a legally sanctioned method to seek injunctive relief in bankruptcy proceedings as INDECOPI would recognize an interim measure order by the constitutional court hearing the *amparo*. In the same 2015 survey referenced in the preceding paragraph (fn. 102), the prominent Peruvian bankruptcy lawyers Rafael Corzo de la Colina and Giulio Valz-Gen de las Casas state unequivocally: "the Insolvency Law contains specific provisions in order to restrain actions of creditors or debtors through courts (*particularly through the commencement of constitutional proceedings such as the amparo proceeding*) related to aspects that are exclusively in charge of INDECOPI."<sup>103</sup>

82. Defensive actions such as these fall outside the scope of the waiver requirement of the Treaty altogether because it would be fundamentally unjust and unfair to forbid a party from defending itself in connection with a proceeding it did not initiate or continue. Both Doe Run Peru's challenge to the Ministry's credit before INDECOPI and later through the

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<sup>102</sup> See also, **Exhibit C-223**, Rafael Corzo de la Colina and Giulio Valz-Gen de las Casas, *Peru in GETTING THE DEAL THROUGH – RESTRUCTURING & INSOLVENCY – IN 46 JURISDICTIONS WORLDWIDE* at 306 (Law Business Research Ltd. 2015), (In response to Question 2 "What courts are involved in the bankruptcy process? Are there restrictions on the matters that the courts may deal with?" two prominent Peruvian bankruptcy lawyers, Rafael Corzo de la Colina and Giulio Valz-Gen de las Casas, confirmed that the contentious administrative action is a proper means of redress within the Peruvian bankruptcy process: "courts are competent to rule in contentious-administrative judicial review proceedings in which INDECOPI's Tribunal decisions are challenged"); **Exhibit C-208**, Peruvian General Law of Bankruptcy, Art. 132.2 (providing that resolutions that exhaust the administrative channel in the bankruptcy proceedings "may only be challenged in the *contencioso administrativo* (contentious-administrative) channel.")

<sup>103</sup> *Id.*, (*emphasis added*).

contentious administrative action and the constitutional *amparo* seek to preserve the *status quo* by prohibiting the Ministry from participating as a creditor in the Doe Run Peru bankruptcy proceedings. For example, had the first instance constitutional court admitted Doe Run Peru's complaint from a procedural standpoint ("*procedente*"),<sup>104</sup> Doe Run Peru would have been entitled to immediately request an injunction, even before an answer is filed.<sup>105</sup> The relief sought by Doe Run Peru, *i.e.*, preservation of the *status quo*, is consistent with the waiver exception in Article 10.18.3 of the Treaty which permits actions for interim injunctive relief not involving the payment of money damages.

83. Just like in *Occidental v. Ecuador* and *Chevron v. Ecuador*, Doe Run Peru had no real choice but to defend the Doe Run Peru bankruptcy estate, and the rights of all legitimate creditors, against the US\$ 163 million credit claim lodged against it by the Ministry.<sup>106</sup> To underscore this, Doe Run Peru's defensive actions were later taken over and maintained by the liquidators appointed by the Creditors Committee who owe the same fiduciary duties to the bankruptcy estate.

84. Peru accuses Renco of "omitting or misrepresenting facts" and giving a "contorted depiction of the background [of the bankruptcy]."<sup>107</sup> Peru then proceeds to provide its own "background and temporal context" which is nothing more than a mud-slinging exercise that offers no helpful information at all, but only seeks to argue issues related to the merits of this arbitration.<sup>108</sup> For example, Peru claims that: all of Renco's claims arise from Doe Run Peru's

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<sup>104</sup> See **Exhibit C-224**, Certified translation of a resolution issued by the Superior Court of Justice of Lima, Fifth Constitutional Court, March 15, 2010, procedurally admitting a constitutional action relating to INDECOPI proceeding.

<sup>105</sup> See **Exhibit C-225**, Certified translation of a resolution issued by the Superior Court of Justice of Lima, Fifth Constitutional Court, March 4, 2010, granting injunctive relief suspending the effects of a resolution issued by INDECOPI.

<sup>106</sup> With respect to Doe Run Cayman Ltd's ("Doe Run Cayman") intervention as of June 21, 2012 as "tercero coadyuvante," Doe Run Cayman, a creditor in the Doe Run Peru bankruptcy proceeding and separate corporate entity, is not a party to Doe Run Peru's challenge to the Ministry's credit claim, cannot assert a claim and its participation is solely based on the continued existence of Doe Run Peru as a party. In the event Doe Run Peru were to dismiss its challenge, then Doe Run Cayman's status would terminate. If Doe Run Cayman discontinued its participation, Doe Run Peru's challenge would be unaffected. Thus, Doe Run Cayman's status as "tercero coadyuvante" is of no moment with respect to Peru's waiver objection.

<sup>107</sup> Peru's Reply on Waiver ¶ 42.

<sup>108</sup> *Id.*, § III.B.1-3, ¶¶ 41-52.

failure to implement the Environmental Remediation and Management Program (“PAMA”);<sup>109</sup> Doe Run Peru, and not the actions of the Peruvian government, caused the Doe Run Peru bankruptcy; Doe Run Peru’s restructuring plan requesting governmental flexibility with respect to certain environmental standards was part of a plan to “build a Treaty case where none exists”;<sup>110</sup> and Renco has acted improperly with regard to its defense of the St. Louis Lawsuits.<sup>111</sup> These allegations are meritless as Renco conclusively demonstrated otherwise in its February 20, 2014 Memorial on the Merits with accompanying witness statements, expert reports and documentary evidence. As such, Peru’s sideshow should be disregarded entirely and Peru should raise these issues in its Counter Memorial on Liability and not in connection with its waiver objection.

**B. EVEN IF IT IS HELD THAT THE DEFENSIVE BANKRUPTCY ACTIONS VIOLATE THE WAIVER REQUIREMENT, RENCO’S CLAIMS STAND**

85. 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.<sup>112</sup> As with the majority of its reply submission, and by addressing only one authority cited by Renco, Peru largely ignores the fact that even in the unlikely event the Tribunal determines that the defensive actions undertaken by Doe Run Peru to protect the bankruptcy estate for the benefit of all the creditors are both attributable to Renco and violate the waiver requirement, Renco’s claims stand.<sup>113</sup>

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<sup>109</sup> *Id.*, ¶¶ 43-46.

<sup>110</sup> *Id.*, ¶¶ 47-51.

<sup>111</sup> *Id.*, ¶ 52.

<sup>112</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)) (excluding claims based on specific measures at issue in the local arbitrations but noting that FET “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”); *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)) (“[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.”).

<sup>113</sup> Peru’s Reply on Waiver, ¶ 62.

86. Because Renco’s claims either: (i) have nothing to do with the legality of the Ministry’s credit (the St. Louis Claims); or (ii) are comprised of a series of discrete measures or acts separate and distinct from the sole issue in the local bankruptcy-related actions (the Taking without Compensation Claims), dismissing this entire arbitration, as Peru requests, based on the narrow issue being addressed in the Doe Run Peru bankruptcy process, would be fundamentally unfair and would not further the object and purpose of the waiver requirement itself. To the extent Renco can make out its claims without allegations related to the legality of the Ministry’s US\$ 163 million credit claim against the Doe Run Peru bankruptcy estate, which it can, it should be permitted to do so. Like the claimant in *RDC*, Renco should 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 – which they clearly are here.

87. 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.

## **VI. PERU’S WAIVER OBJECTION IS NOT, AND NEVER WAS, URGENT**

88. In its Reply on Waiver, Peru fails to rebut, and in fact ignores, that its claim of urgency is simply not true.<sup>114</sup> Peru, in what appears to be an attempt to rebut Renco’s showing of Peru’s improper conduct, adopts a “when on thin ice – skate fast” approach.<sup>115</sup> Buried in the back of its submission, Peru fills several paragraphs discussing the timing of various filings, the constitution of the tribunal and its objections pursuant to Article 10.20(4) of the Treaty.<sup>116</sup> Peru then states in conclusory fashion, “the waiver requirement includes no urgency requirement,” and “Renco’s reference to ‘Peru’s unfounded claim of new urgency’ is inaccurate and irrelevant.”<sup>117</sup> Peru misses the point that the waiver issue is no more urgent now than it was when the parties reached the agreement that resulted in Procedural Order No. 1, or when the

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<sup>114</sup> *Id.*, ¶¶ 53-57

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, ¶¶ 53-55.

<sup>117</sup> *Id.*, ¶¶ 55, 57.



Tribunal issued its Scope Decision directing Peru to bring its waiver objections (if any) in the liability and jurisdictional phase of the case, as agreed.

89. In fact, Peru actually concedes lack of urgency by arguing that the ongoing bankruptcy-related proceedings are irrelevant to its waiver objection.<sup>118</sup> This further demonstrates that Peru's feigned cries of urgency were designed to subvert the Parties' agreement, P.O. No. 1, and the Scope Decision.

90. In granting Peru's request to raise its waiver objections now, the Tribunal made clear that it would award costs against Peru should its objections fail.<sup>119</sup> Accordingly, because Peru cannot deny that it trumped up allegations of urgency, upon which the Tribunal relied, in order to avoid the Parties' agreement, P.O. No. 1 and the Scope Decision, and because, as set forth herein and in Renco's Counter Memorial, Peru's waiver objection is meritless, Renco respectfully requests that the Tribunal award Renco fees and costs incurred in connection with Peru's waiver objection.

## **VII. PRAYER FOR RELIEF**

91. 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.

92. 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, the agreement between the Parties, and consistent with the Tribunal's Scope Decision, which Peru chose willfully to ignore.

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<sup>118</sup> Peru's Reply on Waiver, ¶ 62 (arguing that if the Tribunal reaches the point of considering whether Doe Run Peru's actions violate the waiver, it "necessarily presupposes a finding by the Tribunal that DRP was obligated to submit a waiver" and that DRP "has failed to submit *any* waiver and, thus, Peru has not consented to arbitrate any claim..."). Accordingly, Peru itself acknowledges that no urgency ever existed.

<sup>119</sup> Decision Regarding Respondent's Request for Relief, June 2, 2015, ¶ 75 ("[P]eru is invited to note that there will be cost consequences in the event Peru's application does not succeed").

Respectfully submitted,

**King & Spalding LLP**

A handwritten signature in black ink, appearing to be 'E. Kehoe', written over a horizontal line.

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