

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER CHAPTER 10 OF THE UNITED STATES – PERU TRADE PROMOTION AGREEMENT AND THE UNCITRAL ARBITRATION RULES (2010)**

In the arbitration proceeding between

**THE RENCO GROUP INC**  
Claimant

-and-

**REPUBLIC OF PERU**  
Respondent

**UNCT/13/1**

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**PARTIAL AWARD ON JURISDICTION**

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**Members of the Tribunal**

Dr. Michael J. Moser, Presiding Arbitrator  
The Honorable L. Yves Fortier, CC, QC, Arbitrator  
Mr. Toby T. Landau, QC, Arbitrator

**Tribunal Assistant**

Ms. Ruth Stackpool-Moore

**Tribunal Secretary**

Ms. Natalí Sequeira

**Date**

July 15, 2016

## REPRESENTATION OF THE PARTIES

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## **I. INTRODUCTION**

1. This arbitration concerns a dispute submitted under the United States–Peru Trade Promotion Agreement dated April 12, 2006 (“**the Treaty**”) and the UNCITRAL Arbitration Rules (2010). The Claimant is The Renco Group, Inc. (“**Renco**” or “**the Claimant**”). The Respondent is the Republic of Peru (“**Peru**” or “**the Respondent**”). The Claimant and the Respondent are collectively referred to in this Partial Award as “the Parties”.
2. This Partial Award contains the Tribunal’s ruling on Peru’s objection to jurisdiction as a result of Renco’s alleged non-compliance with the requirement contained in Article 10.18(2) of the Treaty for an investor to waive its right to initiate or continue before any administrative tribunal or court under the law of any Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Treaty Article 10.16.

## **II. PROCEDURAL HISTORY**

3. The full procedural history of these proceedings up to December 19, 2014 is set out in the Tribunal’s Scope Decision referred to in paragraph 14 below. This will not be repeated here, save to the extent that it is relevant to the issue of Respondent’s waiver.
4. On December 29, 2010, Renco served its Notice of Intent to Commence Arbitration.
5. On April 4, 2011, Renco served its Notice of Arbitration and Statement of Claim, which it subsequently amended on August 9, 2011. As set out in more detail in Section III below, the Notices both contained written waivers purportedly submitted in compliance with Article 10.18(2) of the Treaty.
6. On May 10, 2013, Peru submitted its Response to Renco’s Amended Notice of Arbitration and Statement of Claim dated August 9, 2011.
7. On July 18, 2013, the Tribunal held the first procedural session.
8. On August 22, 2013, the Tribunal issued Procedural Order No. 1, which set forth the procedural timetable for the arbitration. The procedural timetable was the subject of

extensive discussions and consultations between the Parties both before and during the first procedural session.

9. On February 20, 2014, Renco submitted its Memorial on Liability, including Witness Statements and Expert Reports.
10. On March 21, 2014, Peru submitted a notice of intention to make preliminary objections pursuant to Article 10.20(4) of the Treaty. Peru gave notice that it intended to raise three preliminary objections, the first of which was that Renco had violated the Treaty's waiver requirement in Article 10.18(2). The second and third objections related to the Tribunal's jurisdiction *ratione temporis* and Renco's compliance with various provisions of the investment agreements at issue in the arbitration.
11. On April 3, 2014, Renco filed a submission challenging the scope of Peru's preliminary objections. Renco submitted that Peru's objections in fact encompassed six separate preliminary objections, namely:
  - (a) The presentation of an invalid waiver;
  - (b) The violation of the waiver;
  - (c) The lack of jurisdiction *ratione temporis*;
  - (d) The violation of the Treaty's three-year limitation period;
  - (e) The failure to state a claim for breach of the investment agreement; and
  - (f) The failure to submit two factual issues for determination by a technical expert prior to commencement of the arbitration.
12. On April 23, 2014, Peru filed a submission on the scope of the preliminary objections.
13. Thereafter, the Parties filed further submissions in connection with the scope of Peru's preliminary objections.
14. On December 19, 2014, the Tribunal issued its Decision with respect to the Scope of Peru's Preliminary Objections under Article 10.20(4) of the Treaty ("**the Scope**

**Decision**”). The Spanish version of the Scope Decision was communicated to the Parties by the International Centre for Settlement of Investment Disputes (“**ICSID**” or “**the Centre**”) on February 13, 2015.

15. In its Scope Decision, the Tribunal concluded as follows:
  - (a) Article 10.20(4) objections relating to the Tribunal’s competence fall outside the mandatory scope of Article 10.20(4).
  - (b) Save for the preliminary objection that Renco had failed to state a claim for breach of the investment agreement, Peru’s preliminary objections related to the Tribunal’s competence and therefore fell outside the scope of Article 10.20(4). The Tribunal therefore declined to hear Peru’s competence objections in the Article 10.20(4) phase of these proceedings.
  - (c) Peru’s preliminary objection relating to the investment agreement should be briefed and heard as a preliminary objection in the Article 10.20(4) phase of these proceedings in accordance with a timetable to be set by the Tribunal following further submissions from the Parties.
16. After the Scope Decision was issued, by communications dated January 2, 2015, the Parties informed the Tribunal of their agreed schedule for submissions relating to Peru’s remaining preliminary objection pursuant to Article 10.20(4).
17. On January 27, 2015, a two-day hearing regarding Peru’s remaining preliminary objection pursuant to Article 10.20(4) was scheduled for September 1 and 2, 2015 in Washington, D.C.
18. On February 21, 2015, Peru filed its Preliminary Objection under Article 10.20(4) dated February 20, 2015 accompanied by Legal Opinions of John B. Bellinger, III and Carlos Cárdenas Quirós.
19. On February 23, 2015, Renco notified the Tribunal that it considered that Peru’s filing raised jurisdictional issues and other issues beyond the scope of objections permitted in its Decision on the Scope of Article 10.20(4) and that accordingly, Peru’s submissions should not be posted to the ICSID website. Renco reserved its right to address what it described as Peru’s “overreaching.”

20. On March 9, 2015, Peru wrote to the Tribunal indicating that its February 23, 2015 submission should be published on the ICSID website in accordance with the transparency provisions of the Treaty and Procedural Order No. 1.
21. On April 17, 2015, Renco submitted its Opposition to Peru's 10.20(4) Objection accompanied by the Legal Expert Report of Dr. Fernando de Trazegnies.
22. On April 30, 2015, Peru addressed to the Tribunal, in a letter dated April 29, 2015, a request seeking relief from alleged "ongoing prejudice" caused by Renco's conduct within and beyond the pending arbitration ("**Respondent's Request for Relief**"). Amongst other matters, in the Request for Relief, Peru complained that Renco had engaged in an ongoing violation of the waiver requirement contained in Article 10.18(2) of the Treaty as a result of the conduct of Renco's subsidiary company in domestic bankruptcy proceedings in Peru.
23. On May 4, 2015, the Tribunal invited Renco to comment on Peru's April 29, 2015 letter which it did on May 5, 2015.
24. On May 7, 2015, Peru wrote to the Tribunal requesting: (i) an opportunity to be heard with respect to Renco's response of May 5, 2015; and (ii) an immediate (and at least temporary) suspension of the briefing calendar until the procedural implications of the pending issues were resolved. Both Renco and Peru commented further to the Tribunal on the request for a suspension of the briefing calendar on May 8, 2015.
25. On May 11, 2015, the Tribunal informed the Parties of the temporary suspension of Peru's Article 10.20(4) filing deadline and invited Peru to submit a full reply to Renco's May 5, 2015 letter by May 18, 2015.
26. On May 19, 2015, Peru submitted a reply to Renco's letter of May 5, 2015, written further to Peru's letter of April 29, 2015, requesting relief from "ongoing prejudice" caused by Renco.
27. On May 21, 2015, the Tribunal informed Renco that if it wished to add anything to its submissions on the issues raised by Peru including and following its submission dated April 29, 2015, it must do so before May 25, 2015. Renco indicated by reply that it did not wish to comment further.

28. On June 2, 2015, the Tribunal issued its Decision Regarding Peru's Requests for Relief. The Spanish version of the Decision was communicated to the Parties by ICSID on July 24, 2015. The Tribunal reached the following conclusion with respect to Peru's contention that Renco violated the waiver requirement in Article 10.18(2)(b) of the Treaty:

Given the importance of this issue, and the urgency with which it has been pressed by Peru, the Tribunal has decided in accordance with Article 23(3) of the UNCITRAL Rules to grant Peru's request to hear and decide as a preliminary issue in the arbitration the question of whether Renco has violated the waiver requirement contained in Article 10.18 of the Treaty.

29. Pursuant to the Tribunal's Decision of June 2, 2015, the Parties proposed a procedural calendar for the Tribunal to consider on June 10, 2015.

30. By letter dated June 10, 2015, Renco requested:

... that the Tribunal's December 18, 2015 Scope Decision in respect of Peru's waiver objection be reinstated [and that the Tribunal] ... reconsider and reverse the portion of its June 2, 2015 Decision requiring full briefing on Peru's objection that Renco violated the waiver provisions of the Treaty, and reaffirm its previous ruling that such objection be brought by Peru together with its Counter-Memorial on Liability in accordance with the timetable set out in Annex A to Procedural Order No. 1.

31. On June 17, 2015, Peru submitted its reply to Renco's request of June 10, 2015.
32. On June 20, 2015, the Tribunal issued Procedural Order No. 3 reiterating its direction to the Parties to agree on a new briefing schedule including Renco's responsive submissions on the arguments raised by Peru in its Preliminary Objection under Article 10.20.4. The Tribunal further declined to reconsider its Decision of June 2, 2015. Accordingly, the Tribunal reiterated its direction to the Parties to agree on a "separate and streamlined timetable" to address the alleged ongoing breaches by Renco of the waiver requirement. Counsel were invited to inform the Tribunal of the new agreed briefing schedule, hearing dates and timetable by Wednesday, June 24, 2015. The Spanish version of Procedural Order No. 3 was communicated to the Parties by ICSID on July 24, 2015.

33. Following the issuance of Procedural Order No. 3, the Parties exchanged their views<sup>1</sup> on the procedural calendar and hearing dates.
34. On July 6, 2015, the Tribunal issued Procedural Order No. 4, establishing a procedural schedule to address the Article 10.20(4) objections and a “separate and streamlined” schedule for the waiver objection. The Spanish version of Procedural Order No. 4 was communicated to the Parties by ICSID on July 24, 2015.
35. Pursuant to the schedule established by the Tribunal in Procedural Order No. 4, Peru filed its Memorial on Waiver on July 10, 2015 (“**Memorial on Waiver**” or “**Memorial**”).
36. On July 30, 2015, Renco filed its Supplemental Opposition to Peru’s Preliminary 10.20(4) Objection.
37. On August 10, 2015, Renco filed its Counter-Memorial Concerning Peru’s Waiver Objections (“**Counter-Memorial on Waiver**” or “**Counter-Memorial**”).
38. On August 17, 2015, the United States Government indicated that it had been monitoring the developments in the case and it was “studying the most recent pleadings on waiver, which were obtained from the ICSID website, and is considering whether to make a submission to the Tribunal on issues of interpretation of the U.S.–Peru Trade Promotion Agreement pursuant to Article 10.20.2”. The United States Government further informed the Tribunal and the disputing Parties of its intention to attend the hearing on waiver.
39. On August 17, 2015, Peru submitted its Reply on Waiver (“**Reply on Waiver**” or “**Reply**”).
40. On August 21, 2015, the Tribunal invited the Parties to submit their observations, if any, on the United States Government’s letter of August 17, 2015. The Parties did not raise any objections to the United States Government’s letter.

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<sup>1</sup> See Renco’s correspondence of June 22, 25, 27 and 29, 2015 and July 3, 2015. See also Peru’s correspondence of June 22, 25, 26 (received on June 27), 27, 29 and, 30, 2015 and July 3, 2015.

41. On August 24, 2015, Renco submitted its Rejoinder on Waiver (“**Rejoinder on Waiver**” or “**Rejoinder**”).
42. On September 1, 2015, pursuant to Procedural Order No. 1 and Article 10.20.2 of the Treaty, the United States Government submitted its second non-disputing Party written submission regarding interpretation of the Treaty (“**Second Submission of the United States of America**”).
43. On September 2, 2015, the Tribunal held a hearing in Washington D.C. to hear the Parties’ oral arguments on the waiver objection. Present at the hearing were the members of the Arbitral Tribunal, the Tribunal Secretary and the following Party representatives and other attendees:

*On behalf of Renco:*

Mr. Edward G. Kehoe	King & Spalding, LLP
Mr. Henry G. Burnett (Harry)	King & Spalding, LLP
Mr. Guillermo Aguilar-Alvarez	King & Spalding, LLP
Ms. Margarete Stevens	King & Spalding, LLP
Mr. David H. Weiss	King & Spalding, LLP
Ms. Jessica Bees und Chrostin	King & Spalding, LLP
Ms. Ashley Grubor	King & Spalding, LLP
Ms. Veronica Garcia	King & Spalding, LLP
Mr. Dennis A. Sadlowski	The Renco Group, Inc.

*On behalf of Peru:*

Mr. Jonathan C. Hamilton	White & Case LLP
Ms. Andrea Menaker	White & Case LLP
Mr. Francisco X. Jijón	White & Case LLP
Ms. Michelle Grando	White & Case LLP
Ms. Jacqueline Argueta	White & Case LLP
Mr. Guillermo Cuevas	White & Case LLP
Mr. Alejandro Martínez de Hoz	White & Case LLP
Mr. Carlos Natera	White & Case LLP
Ms. María del Carmen Tovar	Estudio Eche copar
Ambassador Luis Miguel Castilla	Ambassador of Peru to Washington D.C
Mr. Carlos José Valderrama Bernal	Republic of Peru
Mr. Rafael Suarez	Republic of Peru

*On behalf of the United States Government (as a non-disputing Party):*

Ms. Lisa Grosh	Assistant Legal Adviser
Ms. Alicia Cate	Attorney-Adviser
Mr. John Blanck	Attorney-Adviser
Ms. Anna Estrina	Financial Economist

Mr. Brooks Allen  
Mr. Juan Millan

Assistant General Counsel  
Acting Assistant U.S. Trade Representative  
for Monitoring & Enforcement

*Court Reporters:*

Mr. Dante Rinaldi  
Ms. Gail Verbano

Court Reporter – Spanish Language  
Court Reporter – English Language

*Interpreters:*

Ms. Judith Letendre  
Ms. Stella Covre  
Ms. Karin Ruckhaus

English /Spanish  
English /Spanish  
English /Spanish

44. On September 3, 2015, and as permitted at the conclusion of the hearing, Renco added two additional legal authorities to the record.
45. On September 9, 2015, the Centre provided copies of the audio recordings of the hearing to the Parties.
46. On September 13, 14, 15, 16 and 17, 2015 the Parties exchanged observations with respect to additional legal authorities addressed by the Parties at the close of the Hearing on Waiver.
47. On September 16, 2015 the Tribunal posed four specific questions and invited the Parties to submit their responses within seven (7) days and submissions in reply, if any, within seven (7) days thereafter.
48. The Parties submitted consolidated corrections to the transcripts of the Hearing on Waiver on September 22, 2015.
49. Renco's responses to the Tribunal's questions of September 16, 2015, were received on September 23, 2015 ("**Renco's Post-hearing Submissions**"). Peru's responses were received on September 24, 2015 ("**Peru's Post-hearing Submissions**").
50. On September 27, 2015, the Tribunal invited the Parties to comment on the relevance of the principle of severability to the question of the legal effect of the reservation of rights contained in Renco's waiver.

51. The Parties submitted their replies to the Tribunal's invitation on September 30, 2015 ("**Renco's Post-hearing Reply Submissions**" and "**Peru's Post-hearing Reply Submissions**").
52. On October 11, 2015, the United States Government submitted its third non-disputing Party written submission regarding interpretation of the Treaty in relation to the relevance of the principle of severability ("**Third Submission of the United States of America**").
53. On October 18, 2015, Peru submitted a Post-hearing Supplemental Submission, responding to Renco's submission dated September 30, 2015 ("**Peru's Supplemental Post-hearing Submissions**").
54. On October 23, 2015, Renco submitted its comments on the Third Submission of the United States of America and Peru's Supplemental Post-hearing Submissions ("**Renco's Supplemental Post-hearing Submissions**").
55. On October 23, 2015, Peru wrote to the Tribunal to confirm the agreement between the United States and Peru regarding the interpretation of the waiver requirement contained in Article 10.18 of the Treaty.

### **III. OVERVIEW OF THE ISSUES AND THE PARTIES' CONTENTIONS**

56. In its Notice of Arbitration dated April 4, 2011, Renco submitted a claim to arbitration on its own behalf under Article 10.16(1)(a) of the Treaty and a claim on behalf of its wholly-owned local enterprise, Doe Run Peru S.R. LTDA ("**DRP**"), under Article 10.16(1)(b).
57. In its Amended Notice of Arbitration dated August 9, 2011, Renco withdrew its enterprise claim under Article 10.16(1)(b). However, Renco retained the claim it had submitted to arbitration on its own behalf under Article 10.16(1)(a). DRP also purported to withdraw its written waiver.

58. Renco’s Notice of Arbitration and Amended Notice of Arbitration were accompanied by written waivers in the following terms:<sup>2</sup>

Waiver Accompanying Renco’s Notice of Arbitration	Waiver Accompanying Renco’s Amended Notice of Arbitration
<p>“Finally, as required by Article 10.18(2) of the Treaty, Renco and its affiliate DRP waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimants reserve the right to bring such claims in another forum for resolution on the merits.”</p>	<p>“Finally, as required by Article 10.18(2) of the Treaty, Renco waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. <b><i>To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits.</i></b>”</p>

59. In this Partial Award, The Tribunal will refer to the italicised text in the waiver accompanying Renco’s Amended Notice of Arbitration as “the reservation of rights”.
60. It is common ground that the provisions of Article 10.18(2)(b) dealing with waiver encompass two distinct requirements: a *formal* requirement (the submission of a written waiver which complies with the terms of Article 10.18(2)(b)) and a *material* requirement (the investor abstaining from initiating or continuing local proceedings in violation of its written waiver).<sup>3</sup> As the arbitral tribunal held in *Waste Management I*, when considering the waiver provision in Article 1121 of the North American Free Trade Agreement (“NAFTA”):<sup>4</sup>

Any waiver, and by extension, that one which is now the subject of debate, implies a formal and material act on the part of the person tendering [the] same. To this end, this Tribunal will therefore have to ascertain whether Waste Management did indeed submit the waiver in accordance with the formalities envisaged under NAFTA and whether it has respected the terms of same through the material act of either dropping or desisting from initiating parallel proceedings before other courts or tribunals.

<sup>2</sup> The redlined text appears in the original version of Renco’s Amended Notice of Arbitration. The Tribunal has added the emphasis in bold and italics to the final sentence of the waiver.

<sup>3</sup> Memorial on Waiver ¶ 15; Counter-Memorial on Waiver ¶ 65.

<sup>4</sup> *Waste Management Inc v United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated June 2, 2000 ¶ 20.

61. Peru contends that Renco has failed to comply with the formal and material requirements of the waiver provision in Article 10.18(2)(b) of the Treaty. Peru cites the following reasons:
- (a) As to formal compliance:
    - (i) By its “reservation of rights” Renco has purported to reserve its right to bring claims in another forum for resolution on the merits if the Tribunal dismisses any claims on jurisdictional or admissibility grounds. As a consequence, says Peru, Renco’s waiver is non-compliant.
    - (ii) DRP has failed to submit a waiver in the Amended Notice of Arbitration, despite the fact that Renco is submitting claims on behalf of DRP under the Treaty.
  - (b) As to material compliance, Peru contends that Renco has (through DRP) initiated and/or continued proceedings in the Peruvian courts concerning measures alleged to constitute a breach of the Treaty in this arbitration.
62. As a result of Renco’s alleged non-compliance with the Treaty’s waiver requirements, Peru submits that the Tribunal lacks jurisdiction over Renco’s claims. Peru asks the Tribunal to render an award dismissing Renco’s claims for lack of jurisdiction, together with an award of costs in its favor.
63. Renco contends that it has complied with both the formal and material requirements of Article 10.18(2)(b) of the Treaty. Renco relies on the following grounds:
- (a) As to formal compliance:
    - (i) The Treaty does not prevent a claimant from pursuing claims on the merits in another forum if its Treaty case is dismissed on jurisdictional or admissibility grounds. Therefore, Renco’s waiver is compliant.
    - (ii) Renco is asserting its own claims under Article 10.16(1)(a) for loss and damage that it has suffered as a result, in part, of measures that Peru has inflicted on its enterprise, DRP. Such claims, Renco asserts, may

be submitted under Article 10.16(1)(a) and do not require a waiver from DRP.

(b) As to material compliance:

(i) The Peruvian proceedings relate to defensive measures taken by DRP, and defensive measures taken by an investor to defend itself against claims asserted in local proceedings do not breach the waiver requirement in Article 10.18(2)(b).

(ii) The local proceedings do not relate to the same measures that are alleged to constitute a breach of Article 10.16(1)(a).

64. For these reasons, Renco submits that the Tribunal should dismiss Renco's waiver objections. Renco also seeks an award of costs.

65. The foregoing is only a brief summary of the gist of the Parties' positions in relation to Renco's compliance or non-compliance with the formal and material requirements of Article 10.18(2)(b). The Tribunal has had the benefit of extensive written and oral submissions from the Parties in relation to the issues presented. The Tribunal has carefully considered all of these submissions and, while not setting out every such submission in the body of this Award, refers in more detail to the central points raised by the Parties in the next section.

#### **IV. THE TRIBUNAL'S ANALYSIS AND DECISIONS**

##### **A. Introduction**

66. The Tribunal will begin by considering Peru's contention that Renco has failed to comply with the formal requirement of Article 10.18(2)(b) by including the reservation of rights in the waiver accompanying its Amended Notice of Arbitration.

##### **B. Relevant Treaty Provisions and their Interpretation**

67. The issues raised by the Parties involve complex issues of interpretation of the relevant provisions of the Treaty. The principal provisions engaged are Articles 10.16, 10.17 and 10.18. These provisions establish the procedures by which an investor may submit an investment dispute to arbitration. Given their importance to

the issues at hand, it is appropriate to set out the text of these provisions in full below:

**Article 10.16: Submission of a Claim to Arbitration**

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
  - (i) that the respondent has breached
    - (A) an obligation under Section A,
    - (B) an investment authorization, or
    - (C) an investment agreement; and
  - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
  - (i) that the respondent has breached
    - (A) an obligation under Section A,
    - (B) an investment authorization, or
    - (C) an investment agreement; and
  - (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement [...]

**Article 10.17: Consent of Each Party to Arbitration**

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;
- (b) Article II of the New York Convention for an “agreement in writing;” and
- (c) Article I of the Inter-American Convention for an “agreement.”

**Article 10.18: Conditions and Limitations on Consent of Each Party**

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

2. No claim may be submitted to arbitration under this Section unless:
- (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
  - (b) the notice of arbitration is accompanied,
    - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
    - (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
- of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

4. (a) No claim may be submitted to arbitration:
- (i) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or
  - (ii) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C),
- if the claimant (for claims brought under 10.16.1(a)) or the claimant or the enterprise (for claims brought under 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.
- (b) For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B.

68. The Tribunal must interpret these provisions in accordance with the rules of treaty interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"). The provisions of the Treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (VCLT, Article 31(1)).

69. For the purposes of interpretation, the "context" comprises the text, the preamble of the Treaty and its Annexes as well as the matters set out in Article 31(1)(a) and (b) of the VCLT. Furthermore, the Tribunal must "take into account, together with context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions..." (VCLT, Article 31(3)).

70. The VCLT provides that the Tribunal may have recourse to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”. Neither Party has referred to relevant parts of the *travaux préparatoires* in relation to the issues which arise for consideration.

**C. Background: Waiver as a Precondition to the Existence of a Valid Arbitration Agreement and the Tribunal’s Jurisdiction**

71. It is axiomatic that the Tribunal’s jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru. Under the Treaty, an arbitration agreement is formed when an investor accepts Peru’s standing offer to arbitrate claims by submitting a claim to arbitration in accordance with the requirements set forth in Section B of Chapter 10 of the Treaty. Peru’s consent to arbitrate and “the submission of a claim to arbitration under [Section B]” are deemed to satisfy the requirements of a written arbitration agreement for the purposes of, *inter alia*, Article II of the New York Convention (see Article 10.17(2)).
72. The Treaty establishes several important conditions and limitations on Peru’s consent to arbitrate claims under the Treaty. This is made clear by the title to Article 10.18 (“Conditions and Limitations on Consent of Each Party”). Under Article 10.18(2), “no claim may be submitted to arbitration” under Section B unless:
- (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
  - (b) the notice of arbitration is accompanied,
    - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and
    - (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waiversof any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.
73. Accordingly, an arbitration agreement will be formed under the Treaty *only* if the investor satisfies the *formal* and *material* waiver requirements of Article 10.18(2)(b). This is so because compliance with Article 10.18(2) is a condition and limitation upon

Peru's consent to arbitrate. Article 10.18(2) contains the terms upon which Peru's non-negotiable offer to arbitrate is capable of being accepted by an investor. Compliance with Article 10.18(2) is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal's jurisdiction.<sup>5</sup>

74. In terms of compliance with the *formal* requirement, an investor's waiver must be given in writing and it must be "clear, explicit and categorical". As emphasized by the tribunal in *Waste Management (No I)*.<sup>6</sup>

The act of waiver *per se* is a unilateral act, since its effect in terms of extinguishment is occasioned solely by the intent underlying same. The requirement of a waiver in any context implies a voluntary abdication of rights, inasmuch as this act generally leads to a substantial modification of the pre-existing legal situation, namely, the forfeiting or extinguishment of the right. Waiver thus entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect.

Whatever the case, any waiver must be clear, explicit and categorical, it being improper to deduce same from expressions the meaning of which is at all dubious.

On the basis of the foregoing, any waiver submitted pursuant to the provisions of NAFTA Article 1121(2)(b) must, depending upon the petition or request filed, be clear in all its terms with regard to abdication of given rights by the party proposing to make said waiver.

75. Arbitral tribunals which have been called upon to interpret the validity of waivers submitted by investors have repeatedly held that a waiver is invalid if an investor purports to carve out from its scope certain domestic court proceedings which cover the same ground as the measures being challenged in arbitration. For example, in *Waste Management (No I)* the claimant's waiver stated as follows:

This waiver does not apply, however, to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico.

Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties

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<sup>5</sup> See *Commerce Group Corp v The Republic of El Salvador* ICSID Case No. ARB/09117, Award, March 14, 2011 ¶ 115 (interpreting Article 10.18 of CAFTA-DR Treaty: "[i]f the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties' CAFTA dispute"). See also *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction, CAFTA Article 10.20.5, November 17, 2008 ¶ 56 ("Only if' and 'unless' have the same meaning and, whether the term 'precedent' is used or not, the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected").

<sup>6</sup> *Waste Management Inc v United Mexican States (No I)*, ICSID Case No. ARB(AF)/98/2, Award, June 2, 2000 ¶ 18.

imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico.

76. The arbitral tribunal concluded that the claimant had “issued a statement of intent different from that required in a waiver pursuant to NAFTA Article 1121”. As a result, the tribunal concluded that the waiver was invalid and therefore that the tribunal lacked jurisdiction.<sup>7</sup>

#### **D. The Validity of Renco’s Waiver and Reservation of Rights**

77. Against the background set out above, the Tribunal now turns to consider whether Renco’s waiver complies with the formal requirements of Article 10.18(2)(b).

##### *(1) Express Terms of Article 10.18(2)(b)*

78. In accordance with Article 10.18(2)(b), in order to engage Peru’s consent to arbitrate under the Treaty, Renco must submit a written waiver:

of *any* right to initiate or continue before *any* administrative tribunal or court under the law of *any* Party, or other dispute settlement procedures, *any* proceeding with respect to *any* measure alleged to constitute a breach referred to in Article 10.16

(emphasis added).

79. In the Tribunal’s opinion, the repeated references to the word “any” in Article 10.18 demonstrate that an investor’s waiver must be comprehensive: waivers qualified in any way are impermissible.
80. Renco has purported to qualify its written waiver by reserving its right to bring claims in another forum for resolution on the merits if this Tribunal were to decline to hear any claims on jurisdictional or admissibility grounds.
81. In the Tribunal’s opinion, this qualification is not permitted by the express terms of Article 10.18(2)(b). The only express exception to the waiver requirement set out in Article 10.18(2)(b) is for proceedings seeking “interim injunctive relief and [which do] not involve the payment of monetary damages before a judicial or administrative

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<sup>7</sup> *Waste Management Inc v United Mexican States (No I)*, ICSID Case No. ARB(AF)/98/2, Award, June 2, 2000 ¶¶ 31-32.

tribunal of the respondent” (Article 10.18(3)). It is common ground that this exception does not apply here.

82. In the considered judgment of this Tribunal, the term “any proceeding” in Article 10.18(2)(b) must be interpreted to cover proceedings which are or may be “initiated or continued” either:

- (a) At the time the notice of arbitration is filed;
- (b) During the pendency of the arbitration; and/or
- (c) After the arbitration has concluded, whether or not the investor’s claims are dismissed on jurisdictional or admissibility grounds or on the merits.

83. The Tribunal considers that this interpretation is clear from the ordinary meaning of the words “any proceeding” in Article 10.18(2)(b). There is no basis in the text of the Treaty for qualifying the temporal scope of the “proceeding[s]” in respect of which a written waiver must be provided, for example by excluding future proceedings which may be “initiated” by an investor if the Tribunal were to decide that it lacked jurisdiction or that Renco’s claims were inadmissible.

(2) *Object and Purpose of Article 10.18(2)(b)*

84. The Tribunal’s interpretation of Article 10.18(2)(b) is consistent with the object and purpose of the waiver provision. Renco, Peru and the United States all agree that the object and purpose of Article 10.18(2)(b) is to protect a respondent State from having to litigate multiple proceedings in different fora relating to the same measure, and to minimise the risk of double recovery and inconsistent determinations of fact and law by different tribunals.<sup>8</sup>

85. Investment tribunals have concluded that the comparable waiver provision in Article 1121 of NAFTA has a similar object and purpose. For example:

- (a) In *Waste Management Inc v United Mexican States (No I)*, the tribunal held that “when both legal actions [parallel domestic and NAFTA claims] have a

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<sup>8</sup> Memorial on Waiver ¶ 2; Counter-Memorial on Waiver ¶ 56; Second Submission of the United States of America ¶ 5.

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”.<sup>9</sup>

- (b) In *Waste Management Inc v United Mexican States (No II)*, the tribunal held that “[n]o doubt the concern of the NAFTA parties in inserting Article 1121 was to achieve finality of decision and to avoid multiplicity of proceedings”.<sup>10</sup>
- (c) In *International Thunderbird Gaming Corp v United Mexican States*, the tribunal observed that “[t]he 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”.<sup>11</sup>

- 86. Renco submits that its reservation of rights does not undermine the object and purpose of Article 10.18(2)(b) because if the Tribunal were to dismiss all claims on jurisdictional or admissibility grounds there would be no risk of concurrent proceedings, double recovery or inconsistent findings of fact or law.
- 87. The Tribunal cannot accept Renco’s submission. The burden and risk of a multiplicity of proceedings arises whether or not the proceedings are commenced in parallel or sequentially. The fact that one set of proceedings terminates, and another set then commences, may be just as prejudicial to the respondent State as two sets of proceedings running in parallel.
- 88. Renco’s argument also overlooks the possibility that only some of its claims may be dismissed on jurisdictional or admissibility grounds. If Renco then chose to litigate

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<sup>9</sup> *Waste Management Inc v United Mexican States (No I)*, ICSID Case No. ARB(AF)/98/2, Award, June 2, 2000 ¶ 27.3.

<sup>10</sup> *Waste Management Inc v United Mexican States (No 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.

<sup>11</sup> *International Thunderbird Gaming Corp v United Mexican States* Ad-hoc UNCTRAL, Award, January 26, 2006 ¶ 118. See also *Detroit International Bridge Company v Government of Canada*, PCA Case No. 2012-25, Article 1128 Submission of the United States of America, February 14, 2014 ¶ 6 (“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)”.”)

the dismissed claims in a domestic court or tribunal, while at the same time pursuing the remaining claims before this Tribunal, Peru would be forced to litigate concurrent proceedings before a domestic court and before this Tribunal. In this scenario, the respondent State would confront a multiplicity of proceedings. There is also a risk that Renco may recover twice for the same damage and/or that the domestic court or tribunal may reach conflicting findings of fact or law. In the Tribunal's opinion, Article 10.18(2)(b) is designed to avoid these risks from eventuating.

(3) *“No U-turn” Structure of Article 10.18(2)(b)*

89. Peru submits that Renco's reservation of rights is also incompatible with the “no U-turn” structure of Article 10.18(2)(b). The United States, in its Second Submission as a non-disputing Party, agrees with Peru that Article 10.18(2)(b) is a “no U-turn” waiver provision”. As such, so it is argued, Article 10.18(2)(b) is designed to encourage investors to investigate possible remedies within the host state's municipal law before seeking to internationalise their dispute by filing a notice of arbitration under the Treaty. However, once an investor has chosen to invoke the dispute settlement provisions in the Treaty, the waiver requirement prevents an investor from subsequently returning to a domestic court, irrespective of the outcome of the arbitration.
90. Renco disagrees with Peru's and the United States' interpretation. Renco argues that an investor may not perform a U-turn once it has received a determination on the merits from an arbitral tribunal but, until that point is reached, the investor may pursue claims in a domestic court which have been dismissed on jurisdictional or admissibility grounds. Renco also points out that the object and purpose of Article 10.18(2)(b) cannot be to encourage investors to investigate possible remedies in the domestic courts because the Treaty includes a “fork in the road” provision.
91. Renco is correct to point out that, under Article 10.18(4) of the Treaty, an investor is prevented from submitting an investment agreement claim to arbitration if the claimant or its enterprise “has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure”. Article 10.18(4)(b) provides as follows:

For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B.

92. Annex 10-G of the Treaty also contains a “fork in the road” provision for Section A obligations (for example, the prohibition against expropriation without compensation in Article 10.7 and the fair and equitable treatment obligation in Article 10.5). Paragraph (1) of Annex 10-G provides that “[a]n investor of the United States may not submit to arbitration under Section B a claim that a Party has breached an obligation under Section A ... if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of that Party”. Paragraph (2) of Annex 10-G provides as follows:

For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Party other than the United States, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.

93. The Tribunal observes that, unlike Article 10.18(4)(b) and paragraph (2) of Annex 10-G, Article 10.18(2)(b) does not explicitly provide that an investor’s election to submit a claim to arbitration “shall be definitive” and that the investor “may not thereafter” submit its claim to a court or administrative tribunal.
94. However, in the Tribunal’s opinion, the absence of such language does not assist Renco’s argument. Article 10.18(2) sets out the requirements which must be satisfied as part of the submission of a claim to arbitration: in particular, the formal requirement of the provision of a written waiver. Article 10.18(2) does not address the effect of commencing proceedings before another forum, and so there is simply no place for the phrase “shall be definitive” which is found in Article 10.18(4) and Annex 10-G.
95. In any event, Article 10.18(2) does provide, in effect, that the investor “may not thereafter submit its claim to a domestic court” by insisting upon a written waiver of “*any* right to initiate or continue before *any* [forum] *any* proceeding with respect to *any* measure alleged to constitute a breach...” (emphasis added). In the Tribunal’s opinion, this language must be interpreted to require an investor definitively and irrevocably to waive all rights to pursue claims before a domestic court or tribunal.

96. The Tribunal accepts the submission of Peru and the United States that Article 10.18(2)(b) is a “no U-turn” provision which is intended to provide flexibility, by allowing recourse to other fora up to a point, and certainty, by prohibiting any such recourse thereafter. In particular, it prevents an investor from returning to a domestic court after submitting its claims to arbitration. Renco’s reservation of rights is incompatible with this “no U-turn” structure because it purports to reserve Renco’s right to initiate subsequent proceedings in a domestic court and perform the very “U-turn” which Article 10.18(2)(b) is designed to prohibit.
97. Support for this interpretation of Article 10.18(2)(b) can be derived from the decision of the arbitral tribunal in *Waste Management II*.<sup>12</sup> The claimant’s original waiver was held to be invalid by a previous arbitral tribunal constituted under NAFTA because it purported to exclude certain proceedings from its scope which the claimant had continued to litigate in the domestic courts. The claimant then filed a new NAFTA proceeding, accompanied by an unequivocal waiver of the domestic proceedings. The respondent State argued that the first unsuccessful NAFTA proceeding prevented the claimant from bringing any further claim with respect to the measures that were alleged to be in contravention of NAFTA.
98. The arbitral tribunal found that the claimant was not prevented from bringing a second claim before the second NAFTA tribunal. In the course of its decision, the tribunal made a number of important findings, the first of which appears at paragraph 31 of the decision. The tribunal held as follows:

*[I]t seems that the waiver contemplated by Article 1121(1)(b) is definitive in its effect, whatever the outcome of the arbitration. The waiver concerns the right “to initiate or continue” domestic proceedings for damages or similar relief. A dismissal of the NAFTA claim would, it seems, be final not only with respect to NAFTA itself but also any domestic proceedings with respect to the measure of the disputing Party that was alleged to be a breach of NAFTA. Such proceedings may not be initiated or continued (except as permitted by Article 1121) at any time after the claim has been submitted to arbitration. (emphasis added)*

99. Article 1121 of NAFTA is drafted in similar terms to Article 10.18(2)(b) of the Treaty. The Tribunal is satisfied that the same interpretation should be given to Article 10.18(2)(b). Once a valid waiver has been given under Article 10.18(2)(b), the waiver

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<sup>12</sup> *Waste Management Inc v United Mexican States* ICSID Case No ARB(AF)/00/3, Decision of the Tribunal concerning Mexico’s Preliminary Objection concerning the Previous Proceedings, June 27, 2002 (“*Waste Management II*”).

is irrevocable. A claimant may not thereafter “initiate” any subsequent proceedings in a domestic forum in respect of the same measure. The waiver required by Article 10.18(2)(b) is intended to operate as a “once and for all” renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits).

100. Renco argues that it would be contrary to the object and purpose of the dispute resolution procedures contained in Chapter 10 of the Treaty to require it to waive its right to initiate subsequent proceedings in a domestic court if its claim were dismissed on jurisdictional or admissibility grounds. In Renco’s submission, the purpose of Chapter 10 of the Treaty is to create “effective procedures” for the resolution of disputes. This purpose would be frustrated if Renco were not able to have its dispute resolved in any forum. In this regard, Renco relies on paragraph 35 of the *Waste Management II* decision, where the tribunal held as follows:

An investor in the position of the Claimant, who had eventually waived any possibility of a local remedy in respect of the measure in question but found that there was no jurisdiction to consider its claim at the international level either, might be forgiven for doubting the effectiveness of the international procedures. The Claimant has not had its NAFTA claim heard on the merits before any tribunal, national or international; and if the Respondent is right, that situation is now irrevocable. Such a situation should be avoided if possible.

101. The tribunal’s findings in *Waste Management II* must be placed in context. The tribunal was responding to an argument that the claimant only had one chance to present its claim before the first NAFTA tribunal. In other words, the respondent State argued that because the claimant’s original waiver was invalid, the claimant could not start a second arbitration even if it was accompanied by a valid waiver.
102. The tribunal held that the respondent State’s argument was contrary to the purpose of the dispute resolution procedure in NAFTA, which was designed to create effective procedures for the resolution of disputes. If the respondent State’s argument had prevailed, the claimant would have had no forum in which to seek a resolution of its dispute because it had waived its rights to pursue a claim at the domestic level.
103. Renco argues that it should be entitled to litigate its claims in a domestic forum if they are dismissed by this Tribunal on jurisdictional or admissibility grounds. In *Waste Management II*, the claimant was attempting to litigate before two separate

NAFTA tribunals. The claimant was not seeking to return to a domestic forum after the first NAFTA tribunal dismissed the claim for lack of jurisdiction. Accordingly, the *Waste Management II* decision cannot be invoked in aid of Renco's submission that it is not required to waive rights to pursue a claim in a domestic forum.

104. Renco's next argument is that if its claims are dismissed for lack of jurisdiction or admissibility, any such dismissal does not affect Renco's underlying rights. In such a case, there has been no determination of Renco's claims "on the merits" and therefore the principle of *res judicata* does not apply. Renco relies on paragraph 36 of the *Waste Management II* decision, where the tribunal held as follows:

Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant re-commencing its action. This applies equally to claims which fail on (remediable) grounds of inadmissibility, such as failure to exhaust local remedies.

105. Renco also argues that a dismissal based on lack of jurisdiction or inadmissibility does not preclude a later claim before a tribunal which has jurisdiction. In support of this submission, Renco cites paragraph 43 of *Waste Management II*, where the tribunal held as follows:

Thus there is no doubt that, in general, the dismissal of a claim by an international tribunal on grounds of lack of jurisdiction does not constitute a decision on the merits and does not preclude a later claim before a tribunal which has jurisdiction. The same is true of decisions concerning inadmissibility ... The point is simply that a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute *res judicata* as to those merits.

106. In the Tribunal's opinion, Renco's argument fails to address the underlying question of whether Article 10.18(2)(b) *requires* an investor to waive its rights to pursue a subsequent claim in a domestic forum if the claim is dismissed on jurisdictional or admissibility grounds. Whether a subsequent claim may or may not be precluded by principles of *res judicata* is an entirely separate question.

107. The Tribunal has already determined that Article 10.18(2)(b) is a "no U-turn" provision such that an investor may not subsequently initiate domestic proceedings if a claim is dismissed, whether on jurisdictional or admissibility grounds or on the merits. Accordingly, the fact that principles of *res judicata* might not preclude a later claim is beside the point.

(4) *Reservation as “superfluous”*

108. Renco has argued that its reservation of rights should have no effect on the validity of its waiver because the language is “superfluous”. In Renco’s submission, the reservation of rights is merely a “belt and braces” provision of the kind that is regularly included in legal documents.
109. Responding to this argument at the oral hearing, counsel for Peru referred to a number of hypothetical scenarios where a claim could be dismissed on jurisdictional or admissibility grounds but where a waiver (without the reservation of rights) might still prevent a subsequent claim in a domestic court or tribunal. Each of these scenarios is discussed in turn below.
110. *Scenario 1: Where a claim is dismissed on jurisdictional or admissibility grounds for reasons of illegality.* Peru refers by way of example to *Metal-Tech v Uzbekistan* where the tribunal held that it lacked jurisdiction because the claimant’s investment was tainted by illegality.<sup>13</sup> If Renco’s reservation of rights were upheld in a hypothetical scenario of this kind, Peru submits that it would not be able to invoke a waiver containing Renco’s reservation of rights to bar any subsequent claim in a domestic court because the claim was only dismissed on jurisdictional grounds. This could be extremely significant, and indeed extremely burdensome for Peru, since the practical result could be a full re-hearing of all issues that had previously been heard and determined in the arbitration. Peru submits that it should be entitled to rely on a clean waiver without the reservation of rights, rather than having to re-litigate the issue of whether there was illegal conduct or argue that the prior award created a *res judicata* on this issue.
111. Significantly, Renco concedes that “if a domestic forum were available to the claimant in *Metal-Tech* to assert those dismissed treaty claims or claims under domestic law regarding the underlying measures, the waiver requirement under the US-Peru TPA per se would not bar those claims”.<sup>14</sup> In the Tribunal’s opinion, Renco’s concession demonstrates that its reservation of rights is in fact not superfluous. The Tribunal stresses that no allegation or suggestion of corruption,

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<sup>13</sup> *Metal-Tech Ltd v Uzbekistan*, ICSID Case No. ARB/10/3, Award, October 4, 2013 ¶¶ 372, 423.

<sup>14</sup> Renco’s Letter to the Tribunal dated September 23, 2015 at 2.

fraud or illegality has been made against Renco in this arbitration. However, the hypothetical scenario referred to by Peru shows quite clearly that a respondent State may be prejudiced by a reservation of rights of the kind that Renco has included in its waiver because the respondent State may be deprived of a potential waiver defence in any subsequent domestic proceeding.

112. Renco goes on to argue that if “the bribery or other illegality finding [by the investment tribunal] were not a bar to those claims in that domestic forum, or if another claim regarding the same or related measures were available to the claimant (for example, unjust enrichment regarding the benefits that a State obtained under a contract that is subsequently voided), that domestic forum could proceed to rule on the merits of the claims dismissed in the investment arbitration”.<sup>15</sup>
113. In the Tribunal’s opinion, Renco’s submission illustrates again why Renco’s reservation of rights is not superfluous. If an investor were to advance a subsequent claim in a domestic court relying on principles of unjust enrichment, the respondent State might not be able to rely on *res judicata* principles to bar the subsequent claim.<sup>16</sup> The respondent State may also be deprived of a potential waiver defence in any subsequent domestic proceeding because the reservation of rights excludes claims which were dismissed for lack of jurisdiction or inadmissibility.
114. *Scenario 2: Where a claim is dismissed on jurisdictional or admissibility grounds but the tribunal, having heard the complete case, indicates the claim would have failed on the merits.* Peru refers by way of example to *Loewen v United States of America* where a bankruptcy and reorganisation led to a change in the investor’s nationality which deprived the tribunal of jurisdiction. This fact did not come to light until after a full and extensive hearing on the merits. Nevertheless, having conducted a full hearing, and having progressed so far in its deliberations, the tribunal indicated (in an *obiter dictum*) that the claim would have failed on the merits.<sup>17</sup> There are many

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<sup>15</sup> Ibid.

<sup>16</sup> For example, there may be a lack of identity between the parties, cause of action and/or subject matter of the subsequent domestic claim and the earlier investment arbitration claim. In this scenario, a complete waiver without the reservation could potentially still bar the reformulated domestic claim.

<sup>17</sup> *The Loewen Group Inc and Raymond L Loewen v United States of America* ICSID Case No ARB(AF)/98/3, Award, June 26, 2003 ¶ 2 (“As our consideration of the merits of the case was well advanced when Respondent filed this motion to dismiss and as we reached the conclusion that Claimants’ NAFTA claims should be dismissed on the merits, we include in this Award our reasons for this conclusion. As will appear, the conclusion rests on the Claimants’ failure to show that Loewen had no reasonably available and

other similar examples, including *Methanex v USA*.<sup>18</sup> In each case, claims were dismissed on jurisdiction or admissibility grounds, but following a full hearing and full deliberations, such that the tribunal was able to set out the reasons why the claims would have failed on their merits in any event. And in each case, if Renco's reservation of rights were upheld, Peru submits that the respondent State would not be able to rely on the waiver in order to bar any subsequent action on the same claims, because the claim was only dismissed on jurisdictional or admissibility grounds. Peru submits that a respondent State should be entitled to invoke the waiver as a defence to the subsequent claim in such a situation, and thereby avoid a complete re-hearing of the entire case.

115. *Scenario 3: Where an expropriation claim is held to be inadmissible because it is plainly unarguable.* Peru refers by way of example to *Occidental v Ecuador* where the tribunal found it was so evident that there was no expropriation that it disposed of this claim on the basis that it was inadmissible.<sup>19</sup> The tribunal also found a breach of the fair and equitable treatment and national treatment standards. Peru asked the Tribunal to assume that both of these claims had been dismissed. In this hypothetical scenario, the claimant could not re-litigate the fair and equitable treatment or national treatment breaches because these were dismissed on the merits. But Peru submits that, were Renco's reservation of rights in its waiver to be permitted, the even-more-unmeritorious expropriation claim that did not make it to the merits (because it was plainly unarguable) could potentially be re-litigated

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adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA").

<sup>18</sup> *Methanex Corp v USA*, Final Award on Jurisdiction and Merits, Aug 3, 2005, Part IV – Ch.F ¶¶5-6 (“By virtue of the Tribunal’s decision above on the Disputing Parties’ respective cases under Article 1101 NAFTA, it follows that the Tribunal has no jurisdiction to decide the merits of Methanex’s claims... By virtue of the Tribunal’s decisions above on the Disputing Parties’ respective cases under Article 1102, 1105 and 1110 NAFTA, it follows that Methanex’s claims fail on the merits. Accordingly, assuming that the Tribunal had jurisdiction to determine the claims advanced by Methanex in its Second Amended Statement of Claim, the Tribunal decides, pursuant to Article 21(4) of the UNCITRAL Rules and Articles 1102, 1105 and 1110 NAFTA, to dismiss on their merits all claims there advanced by Methanex”).

<sup>19</sup> *Occidental Exploration & Production Co v The Republic of Ecuador* (LCIA Case No UN3467), Final Award dated July 1, 2004, ¶¶ 80, 89, 92 (“A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility ... The Tribunal holds that the Respondent in this case did not adopt measures that could be considered as amounting to direct or indirect expropriation. In fact, there has been no deprivation of the use or reasonably expected economic benefit of the investment, let alone measures affecting a significant part of the investment ... The Tribunal accordingly holds that the claim concerning expropriation is inadmissible”).

because the waiver would not apply to claims that were dismissed on the basis that they were inadmissible.

116. *Scenario 4: Where a tribunal holds that it lacks jurisdiction over a claim concerning a breach of an Investment Agreement.* Peru observes that in this arbitration Renco has argued that several of Peru's objections to Renco's investment agreement claims under Article 10.20(4) are jurisdictional objections, namely Peru's objections that:

- (a) Peru has not breached the Stock Transfer Agreement because Peru is not party to that Agreement;
- (b) Peru has not breached the Guaranty Agreement because it is void under Peruvian law; and
- (c) Renco has failed to submit factual issues to a technical expert.

117. If Renco's reservation were upheld, Peru submits that it may not be able to rely on Renco's waiver in order to bar any subsequent claim based on the Stock Transfer or the Guaranty Agreement because the claims may have been dismissed on jurisdictional grounds. Peru submits that it should not be forced to make the same arguments about being a non-signatory to the Stock Transfer Agreement, or about the Guaranty Agreement being void under Peruvian law or about Renco having failed to submit factual issues to a technical expert. Peru submits that it should be entitled to invoke a waiver to preclude such claims, and a re-hearing before some other forum.

118. Renco and Peru both agree that the Tribunal should refrain from making a determination as to whether Renco's waiver would in fact prevent Renco from initiating a claim in a subsequent court or tribunal.<sup>20</sup> The Tribunal accepts that this is a question for any subsequent court or tribunal to determine. For present

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<sup>20</sup> Renco's Letter to the Tribunal dated September 23, 2015 at 8; Hearing Transcript at p. 45 (Counsel for Peru, Ms Menaker): "But that question as to whether its waiver would bar that future claim from going forward must be resolved by that future court or Tribunal that is seized with that claim. That's not an issue that should be negotiated with Peru now, and it's certainly not an issue for this Tribunal to decide", citing *Canfor Corp v United States of America*, *Terminal Forest Products Ltd v United States of America and Tembec et al v United States of America*, Order for the Termination of the Arbitral Proceedings, January 10, 2006 ¶ 1.3.

purposes, the Tribunal simply observes that the hypothetical scenarios set out above demonstrate that Renco's reservation of rights is not "superfluous", as Renco contends. If Renco's reservation of rights were held to be valid and permissible under Article 10.18(2)(b), Peru could in each of the above scenarios be deprived of a potential waiver defence.

(5) *Conclusion*

119. For the reasons set out above, the Tribunal concludes that Renco has failed to comply with the formal requirements of Article 10.18(2)(b) by including the reservation of rights in the waiver accompanying its Amended Notice of Arbitration because:

- (a) The reservation of rights is not permitted by the express terms of Article 10.18(2)(b);
- (b) The reservation of rights undermines the object and purpose of Article 10.18(2)(b);
- (c) The reservation of rights is incompatible with the "no U-turn" structure of Article 10.18(2)(b); and
- (d) The reservation of rights is not superfluous.

**E. The Consequence of Renco's Non-compliance with Article 10.18(2)(b)**

(1) *Overview*

120. Having decided that Renco's waiver failed to comply with the formal requirements of Article 10.18(2)(b) of the Treaty, the Tribunal now turns to the question of what consequence should follow from this determination.

121. For its part, Peru submits that as a result of Renco's non-compliance with Article 10.18(2)(b) the Tribunal must dismiss Renco's claims for lack of jurisdiction. Renco contends otherwise and maintains that Peru's waiver objection should be dismissed.

122. At the outset, the Tribunal wishes to record the following observations which inform the Tribunal's approach to the ultimate disposition of the issue before it.

123. The Tribunal has been troubled by the manner in which Peru's waiver objection has arisen in the context of this arbitration. The arbitration had already been on foot for quite some time before Peru filed its Memorial on Waiver in July 2015. By this stage over four years had passed since Renco filed its Notice of Arbitration; the Tribunal had already issued Procedural Order No.1 which recorded the agreed briefing schedule for the arbitration; Renco had filed its Memorial on Liability; the Parties had exchanged voluminous submissions in connection with Renco's challenge to the scope of Peru's Preliminary Objections; and the Tribunal had issued a substantive decision on December 18, 2014 in relation to the Scope of Peru's Preliminary Objections under Article 10.20(4). Clearly, it would have been preferable for all concerned if Peru had raised its waiver objection in a clear and coherent manner at the very outset of these proceedings. Instead, they emerged piecemeal over a relatively lengthy period of time. This issue is considered further at paragraphs 180-183 below.
124. Against this background, the Tribunal has found the issue of Renco's non-compliance with Article 10.18(2)(b) to be extremely difficult to resolve, requiring extensive and intensive deliberations by the Tribunal over many months. This is not only because the issues raised by the Parties are inherently complex, but also because of the severe consequences which would follow for Renco if Peru's plea for dismissal were to be accepted by the Tribunal.
125. Despite the Tribunal's misgivings about the manner in which Peru's waiver objection was raised, the Tribunal has concluded that it is compelled by its mandate to reach a principled decision as to the consequences of Renco's non-compliance with Article 10.18(2)(b).
126. In the process of reaching its decision in this case the Tribunal has given careful consideration to a range of arguments which might weigh against dismissal of Renco's claims in these proceedings. These include:
- (a) Whether Renco should be permitted to cure its defective waiver by withdrawing the reservation of rights;
  - (b) Whether the Tribunal can sever the reservation of rights so as to decide that Renco's waiver complies with Article 10.18(2)(b); and

- (c) Whether Peru's arguments and conduct in relation to its waiver objection constitutes an abuse of rights.

Each is discussed in turn below.

(2) *Cure*

127. Renco submits that its waiver only suffers from a defect in "form" and that it should be entitled to cure this defect by withdrawing the reservation of rights or presenting a new waiver without the reservation of rights. Renco observes that this course of action would cause no prejudice to Peru because Renco has not committed any material breach of the waiver requirement in Article 10.18(2)(b).
128. Renco submits that investment tribunals have allowed parties to cure "formal" (as opposed to "material") defects in their written waivers. Renco refers to *Ethyl Corporation v Government of Canada*, where the claimant's waiver was filed together with the statement of claim rather than with the notice of arbitration. The tribunal held that Canada suffered no prejudice as a result of the fact that the waiver was provided late. The delay was "not of significance for jurisdiction in this case".<sup>21</sup>
129. Renco also relies on *International Thunderbird Gaming Corp v United Mexican States*, where the facts were the same as in *Ethyl*. The tribunal held that the delay in the provision of the investor's waiver was a mere formal defect, which did not deprive the Tribunal of jurisdiction.<sup>22</sup>

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 [Particularised Statement of Claim]. The Tribunal does not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in 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.

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<sup>21</sup> *Ethyl Corporation v Government of Canada* NAFTA/UNCITRAL Case, Award on Jurisdiction, June 24, 1998 ¶¶ 89, 91.

<sup>22</sup> *International Thunderbird Gaming Corp v United Mexican States*, Ad-hoc UNCTRAL, Award, January 26, 2006 ¶¶ 116-118.

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.

130. Renco observes that these decisions are consistent with numerous holdings of the Permanent Court of International Justice and the International Court of Justice, which routinely allow “formal” jurisdictional defects to be cured during a proceeding. Renco submits that outright dismissal of Renco’s claims would require the Tribunal to construe the waiver requirement in Article 10.18(2)(b) in an excessively technical manner. In Renco’s submission, this would be fundamentally unjust and would not further the object and purpose of the waiver requirement itself.
131. Renco submits that if it were to submit a new claim to arbitration (accompanied by a new waiver without the reservation of rights) Peru may argue that Renco’s claims may be barred by the three-year limitation period in Article 10.18(1) of the Treaty. However, if the Tribunal were to allow Renco to cure the defect by withdrawing the reservation of rights, the Tribunal should treat Renco as having complied with the waiver requirement in Article 10.18(2) from the outset of this arbitration.
132. In response, Peru submits that the Tribunal is not empowered to grant Renco an opportunity to cure its waiver. In support of this submission, Peru relies on *Railroad Development Corp v Republic of Guatemala*. In this case, the tribunal found that the claimant did not comply with the material requirement of the waiver obligation because it continued to litigate overlapping domestic proceedings after commencing the arbitration. The tribunal refused to allow the claimant to cure this defect by withdrawing the domestic proceedings. The tribunal held as follows:<sup>23</sup>

This being a matter pertaining to the consent of the Respondent to this arbitration, the Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied, as the United States did in *Methanex*.

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<sup>23</sup> *Railroad Development Corp v Republic of Guatemala* CAFTA-DR/ICSID Case No ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008 ¶ 61.

133. Peru also relies on the following submission of the United States Government in this arbitration:<sup>24</sup>

The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent as a function of the respondent's general discretion to consent to arbitration.<sup>25</sup> Therefore, while a tribunal may determine whether a waiver complies with the requirements of Article 10.18, a tribunal itself cannot remedy an ineffective waiver. Accordingly, a claim can be submitted, and the arbitration can properly commence, only if a claimant submits an effective waiver. The date of the submission of an effective waiver is the date on which the arbitration commences for purposes of Article 10.18.1.

134. Peru agrees with the submissions of the United States Government cited above. Therefore, Peru contends that there is a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" for the purposes of Article 31(3)(a) of the VCLT. Peru submits that only it may waive Renco's non-compliance with the formal requirement of Article 10.18. In this case, Peru has not agreed to disregard Renco's waiver violation.

135. In evaluating these contentions, the Tribunal recalls its earlier observation that Article 10.18(2)(b) comprises two distinct elements, namely a *formal* and a *material* requirement. Compliance with *both* elements is a precondition to Peru's consent to arbitrate and to the existence of a valid arbitration agreement. Renco failed to comply with the formal requirement of Article 10.18(2)(b) by including the reservation of rights in its waiver. The fact that it has complied with the (different) *material* requirement is beside the point.

136. Equally, given the clear and specific nature of the pre-conditions to consent in Art 10.18(2), *formal* invalidity is as critical as *material* invalidity. There is certainly no clear basis to downgrade *formal* compliance, or discount it as a pre-condition to consent.

137. Indeed, as Peru noted in the course of its submissions,<sup>26</sup> if anything, the text of Art 10.18(2) gives greater importance to *formal* compliance, than it does to *material* compliance:

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<sup>24</sup> Second Submissions of the United States ¶ 16.

<sup>25</sup> In support of this proposition, the United States cites *Railroad Development Corp v Republic of Guatemala*.

<sup>26</sup> Peru's submission of September 30, 2015.

In any event, the existence of a material breach of the waiver requirement is independent of Renco's formal violation, either one of which alone is fatal to Renco's claims. Contrary to Renco's suggestion, the formal requirement is as important, if not more important, than its material counterpart. In fact, it is the formal requirement that is expressed in the language of the Treaty itself: while the Treaty expressly provides in what form a waiver must be submitted, and specifically provides for the sole reservation that may be made by a claimant, the Treaty does not expressly state that the State's consent is conditioned upon the claimant's compliance with the terms of the waiver. Rather, that condition can be discerned from reading the language of the waiver requirement in context and in light of the Treaty's object and purpose and, thus, tribunals consistently have so interpreted the requirement, as reflected in the jurisprudence. Accordingly, there is no basis to construe the so-called "formal" requirement of the waiver any less strictly than the "material" requirement; if a violation of the latter requires dismissal, as tribunals unanimously have found, then a violation of the former does as well, as the Treaty expressly states and as both Parties to the Treaty have confirmed.

138. The inevitable conclusion, therefore, is that no arbitration agreement ever came into existence. In the Tribunal's opinion, given the unequivocal language of Art 10.18(2), this is not a trivial defect which can be easily brushed aside—the defective waiver goes to the heart of the Tribunal's jurisdiction.
139. *Ethyl* and *Thunderbird* were both concerned with the proper interpretation of Article 1121 of NAFTA. The issue in each case was whether the requirement that the waiver "shall be included in the submission of a claim to arbitration" meant that the waiver had to be supplied with the notice of arbitration or with the statement of claim. In *Ethyl*, the tribunal concluded that the investor's compliance with Article 1121 was a prerequisite to the admissibility of its claims and not a precondition to jurisdiction. The tribunal held as follows:<sup>27</sup>

Canada's contention that [the submission of a waiver with the Notice of Arbitration is] a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121, which must govern. Article 1121(3), instead of saying "shall be included in the submission of a claim to arbitration" — in itself a broadly encompassing concept — could have said "shall be included with the Notice of Arbitration" if the drastically preclusive effect for which Canada argues truly were intended. The Tribunal therefore concludes that jurisdiction here is not absent due to Claimant's having provided the consent and waivers necessary under Article 1121 with its Statement of Claim rather than with its Notice of Arbitration.

140. In the present case, Article 10.18(2) of the Treaty provides that "[n]o claim may be submitted to arbitration under this Section unless ... the notice of arbitration is

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<sup>27</sup> *Ethyl Corporation v Government of Canada* NAFTA/UNCITRAL Case, Award on Jurisdiction, June 24, 1998 ¶ 91.

accompanied ... by the claimant's written waiver". It would therefore appear that the text of Article 10.18(2) is much more explicit than the text of Article 1121 of NAFTA.

141. Indeed, Peru observes that, since the publication of the 2004 United States Model BIT, the United States has amended the waiver language in its treaties, including in Article 10.18(2) of the Treaty and in the DR-CAFTA, to expressly state that the waiver must accompany "the notice of arbitration". Moreover, the title of the waiver provision also was amended by including in the title of Article 10.18 of the Treaty (as well as in the equivalent provisions of the DR-CAFTA and the US Model BIT) the word "consent".
142. The Tribunal is constrained to conclude, therefore, that the submission of a formally compliant waiver (and the material obligation to abstain from initiating or continuing proceedings in a domestic court) is a precondition to the State's "consent" to arbitrate and to the Tribunal's jurisdiction. Accordingly, the Tribunal concludes that the *Ethyl* and *Thunderbird* decisions cannot assist Renco in the present case because of the differences between the text of Article 10.18 of the Treaty and Article 1121 of NAFTA.
143. A further comment may be appropriate here as to the concern expressed in *Thunderbird* that "overly formalistic" or "excessively technical" approaches should be avoided. This is obviously of no assistance here, given (a) the non-superfluous nature of Renco's reservation, and (b) the specific requirements of Article 10.18(2) of the Treaty. Further, the tribunal in *Thunderbird* cannot be taken to have laid down a general proposition that *formal* defects in a waiver can never invalidate a submission to arbitration, or can always be remedied at a later stage. The decision in that case seems to have turned upon the highly technical and insignificant nature of the defect that was in issue (the untimely filing of certain waivers on behalf of the claimant's enterprises that had been "inadvertently missing from earlier filings", and were submitted with the Particularised Statement of Claim, well before Mexico raised any objection to jurisdiction and years before the hearing), which was all the more insignificant when set against the different language of NAFTA. Unlike the position in that case, there is no suggestion here that Renco's reservation in its waiver was inadvertent, and as explained earlier it is certainly not insignificant.

144. The Tribunal turns now to consider the decisions of the Permanent Court of International Justice and the International Court of Justice cited by Renco. Article 10.22(1) of the Treaty provides that “the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”. Furthermore, when interpreting the Treaty, the Tribunal must take into account “any relevant rules of international law applicable in the relations between the parties” under Article 31(3)(c) of the VCLT. The relevant rules of international law include general principles of law recognised by civilised nations. Furthermore, decisions of the International Court and the Permanent Court are “a subsidiary means for the determination of rules of law” (see Articles 38(1)(c) and (d) of the Statute of the International Court of Justice).
145. Renco places reliance upon the decision of the Permanent Court of International Justice in the *Case of the Mavrommatis Palestine Concessions*. In this case, Greece had commenced proceedings against the United Kingdom under the Treaty of Lausanne before the Treaty had been ratified by the States Parties. The Treaty was subsequently ratified shortly after proceedings were commenced. However, the United Kingdom contended that the Permanent Court lacked jurisdiction at the time when proceedings were commenced.
146. The Court rejected the submission of the United Kingdom and held as follows:<sup>28</sup>

Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. 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.

147. The *Mavrommatis* doctrine has been applied by the International Court of Justice on several occasions, in particular in the *Case Concerning the Application of the*

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<sup>28</sup> *Case of the Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Judgment, August 30, 1924 PCIJ Series A, No. 2 at 34.

*Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>29</sup> Serbia's first preliminary objection in this case was based upon Article 35(1) of the Statute of the Court, which provides as follows: "The Court shall be open to the states parties to the present Statute".

148. Serbia contended that it was not a Member of the United Nations (and thus not a party to the Statute of the Court) when Croatia commenced its proceedings on 2 July 1999. The Court was therefore not "open" to Serbia within the meaning of Article 35(1). The fact that Serbia later became a party to the Statute of the Court on 1 November 2000, as a result of its admission to the United Nations, was said by Serbia to be irrelevant.
149. The International Court rejected Serbia's submission. The Court accepted that, in general, fulfilment of the conditions in Article 35(1) had to be assessed when the application was filed. However, the Court explained that it had "shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction". The Court referred to the *Mavrommatis* case and held that the decisive question was as follows:<sup>30</sup>

What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.

150. The Court found there was no reason why the initial defect in Croatia's application could not be "cured by a subsequent event in the course of the proceedings, for example when that party acquires the status of party to the Statute of the Court which it initially lacked". The Court found that it would not be in the interests of the

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<sup>29</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, Judgment, November 18, 2008 [2008] ICJ Reports 412.

<sup>30</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, Judgment, November 18, 2008 [2008] ICJ Reports 412 at 441. The Court also observed that "it is concern for judicial economy, an element of the requirements of the sound administration of justice, which justifies application of the jurisprudence deriving from the *Mavrommatis* Judgment in appropriate cases. The purpose of this jurisprudence is to prevent the needless proliferation of proceedings" (at 443).

sound administration of justice to require Croatia to initiate fresh proceedings.<sup>31</sup> Accordingly, the Court dismissed Serbia's objection to jurisdiction.

151. The question which arises for determination is whether the *Mavrommatis* doctrine can be applied to the facts of the present case. The Tribunal observes that in the *Mavrommatis* and *Genocide* cases the jurisdictional defect was cured as a result of a subsequent event occurring during the proceedings, namely the ratification of the Treaty of Lausanne on which the Court's jurisdiction was based (in the *Mavrommatis* case) and the admission of Serbia to the United Nations resulting in its accession to the Statute of the International Court of Justice (in the *Genocide* case).
152. In the present case, however, the jurisdictional defect (Renco's non-compliance with Article 10.18(2)(b)) remains uncured. This jurisdictional defect could only be cured (a) if Renco took the positive step of withdrawing the reservation of rights, or submitting a new waiver without the reservation of rights, and Peru consented to this by way of a variation of Article 10.18(2)(b) of the Treaty, or (b) if Renco commenced a new arbitration together with a waiver without any reservation of rights.
153. Option (a) here does not arise, in the absence of consent by Peru.
154. Option (b) remains a possible course (putting aside any limitation issue under Article 10.18(1) of the Treaty). Given that, on this basis, Renco would be entitled to cure the defect itself, and unilaterally, by the commencement of a new arbitration, the question arises as to whether, applying the *Mavrommatis* doctrine, it might be said that it would not be in the interests of the sound administration of justice to compel Renco to begin a new proceeding.
155. The United States and Peru contend that there is a "subsequent agreement" regarding the interpretation of Article 10.18 to the effect that neither Renco nor the Tribunal can remedy a defective waiver and that the date for submitting an effective waiver is the date on which the arbitration commences. On this basis, Peru would appear to contend that the *Mavrommatis* doctrine is inapplicable to the facts of the present case.

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<sup>31</sup> Ibid at 442.

156. In its Decision on Scope, the Tribunal observed that it credits the views of both State Parties with the highest respect. However, the Tribunal is not bound by the views of either State Party. Although the Tribunal must “take into account” any subsequent agreement between the State Parties pursuant to Article 31(3)(a) of the VCLT, the proper interpretation of Article 10.18 and how it should be applied to the facts of this case are tasks which reside exclusively with this Tribunal.<sup>32</sup>
157. The Tribunal is faced with an apparent conflict between the interpretation of Article 10.18 adopted by the United States and Peru and the jurisprudence of the International Court of Justice as evidenced in the *Mavrommatis* doctrine. Having given careful consideration to the matter, the Tribunal has felt constrained to conclude that the clear and express language of Article 10.18 of the Treaty, as well as its object and purpose, establishes a *lex specialis* which must prevail over, or in any event precludes, the *Mavrommatis* doctrine. (This conclusion is made by a majority of the Tribunal as one member is not persuaded that Renco could not unilaterally cure its defective waiver.)
158. Under Article 10.18, the submission of a valid waiver is a condition and limitation on Peru’s consent to arbitrate. This is a precondition to the initial existence of a valid arbitration agreement, and as such leads to a clear timing issue: if no compliant waiver is served with the notice of arbitration, Peru’s offer to arbitrate has not been accepted; there is no arbitration agreement; and the Tribunal is without any authority whatsoever. If the Tribunal applied the *Mavrommatis* doctrine, the Tribunal would be exercising powers it simply does not have (because there is no arbitration agreement, and so the Tribunal is not a tribunal). In effect, it would be creating, retrospectively, an arbitration agreement for the Parties when no agreement had ever come into existence. To put it colloquially, the Tribunal would be “pulling itself up by its own bootstraps” in order to create jurisdiction when none existed. In the Tribunal’s considered opinion, this would be entirely unprincipled and obviously impermissible.
159. The Tribunal observes that the conclusion it has reached is consistent with the decision in *Detroit International Bridge Company v Canada*. In this case, the claimant’s waiver expressly carved out claims pending between the parties in the

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<sup>32</sup> Scope Decision ¶¶ 172-174.

so-called “Washington Litigation”. The tribunal found that the claims in the Washington Litigation covered the same grounds as the measures challenged in the NAFTA arbitration. The claimant’s waiver was therefore held to be defective. The claimant then withdrew its claim for damages in the Washington Litigation and filed a second waiver but still purported to carve out the Washington Litigation from the scope of its waiver. The tribunal found that the submission of the new waiver could not:<sup>33</sup>

... retroactively validate several months of proceedings during which the Tribunal wholly lacked jurisdiction but had some kind of potential existence that might have been realized if it had acquired jurisdiction at some subsequent date. The lack of a valid waiver precluded the existence of a valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprived the Tribunal of the very basis of its existence.

160. For all of the reasons set out above, therefore, the Tribunal has concluded that Renco cannot unilaterally cure its defective waiver by withdrawing the reservation of rights. (This conclusion is made by a majority of the Tribunal as one member is not persuaded that Renco could not unilaterally cure its defective waiver.)

### (3) Severance

161. On September 27, 2015, after the Tribunal had commenced its deliberations, the Tribunal wrote to the Parties to observe that neither Party had addressed the relevance, if any, of the principle of severability in connection with the question of the legal effect of the reservation contained in Renco’s waiver. The Tribunal invited the Parties to comment on whether this principle could be applied so as to allow the reservation of rights to be severed from the remainder of Renco’s waiver.

162. The Tribunal received extensive submissions from the Parties, as well as the United States, in relation to the principle of severability. The Tribunal observes that the principle that non-essential invalid conditions can be severed from the instruments in which they are contained was endorsed by Judge Lauterpacht in his Separate Opinion in the *Norwegian Loans* case. Judge Lauterpacht held that:<sup>34</sup>

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<sup>33</sup> *Detroit International Bridge Company v Canada* NAFTA/PCA Case No 2012-25, Award on Jurisdiction, April 2, 2015 ¶ 321.

<sup>34</sup> *Case Concerning Certain Norwegian Loans (France v Norway)* [1957] ICJ Reports 9 at 56–57. See also *Interhandel (Switzerland v United States of America)* [1959] ICJ Rep 6 at 116-117 (Separate Opinion of Judge Lauterpacht).

... it is legitimate—and perhaps obligatory—to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument. *Utile non debet per inutile vitiari*. The same applies also to provisions and reservations relating to the jurisdiction of the Court. It would be consistent with the previous practice of the Court that it should, if only possible, uphold its jurisdiction when such a course is compatible with the intention of the parties and that it should not allow its jurisdiction to be defeated as the result of remediable defects of expression which are not of an essential character.

163. As Renco points out, several investment tribunals have cited the severability principle when discussing the separability of an arbitration agreement from the contract in which it is contained such that a finding that the main contract is invalid does not necessarily entail the invalidity of the arbitration agreement.<sup>35</sup> This is a well-established concept in the domestic arbitration laws of a large number of States which have adopted the UNCITRAL Model Law on International Commercial Arbitration.<sup>36</sup>
164. The severability principle has also been applied by several international courts and tribunals in the context of State reservations to the jurisdiction of the European Court of Human Rights.<sup>37</sup> Furthermore, the International Law Commission, in its 2011 study on treaty reservations, surveyed a wide range of state practice and endorsed a “rebuttable presumption, according to which the treaty would apply to a State or international organization that is the author of an invalid reservation, notwithstanding that reservation, in the absence of a contrary intention on the part of the author”.<sup>38</sup> However, the Commission observed that its recommendation “form[ed] part of the cautious progressive development of international law”.
165. Peru submits that the severability principle does not apply in the investor-state context. Peru submits that, unlike claimants seeking to accept a State’s offer to arbitrate under an investment treaty, States entering into treaties are entitled to

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<sup>35</sup> *Daimler Financial Services AG v Argentina* ICSID Case No. ARB/05/1, Award, August 22, 2012 ¶ 221; *Impregilo S.p.A. v Argentina*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Prof. Brigitte Stern, June 21, 2011 ¶ 31; *ICS Inspection and Control Services Ltd v Argentina*, PCA Case No. 2010-09, Award on Jurisdiction, February 10, 2012 ¶ 290; *CCL v Kazakhstan*, SCC Case No. 122/2001, Jurisdictional Award, January 1, 2003 ¶ 29. See also *The Government of Sudan v The Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, Final Award, July 22, 2009 ¶¶ 416-424.

<sup>36</sup> See UNCITRAL Model Law on International Commercial Arbitration (1985), Article 16(1).

<sup>37</sup> *Loizidou v Turkey* Application No. 15318/89, Judgment of March 23, 1995, Series A, No. 310; *Belilos v Switzerland* Application No. 10323/83, Judgment of April 29, 1988. See also *Hilaire v Trinidad and Tobago*, Inter-American Court of Human Rights, Judgment of September 1, 2001, Series C, No. 80 ¶ 98.

<sup>38</sup> Report of the International Law Commission, 63<sup>rd</sup> Session *Guide to Practice on Reservations to Treaties*, UN Doc A/66/10/Add.1 at 525–542 (guideline 4.5.3).

make reservations provided that they comply with Article 19 of the VCLT. Peru also submits that the severability principle is not universally accepted. Peru points out that an alternative approach is to find that a reservation contrary to the object and purpose of a treaty may result in the “total invalidity” of the treaty for the State making the reservation. Peru argues that this approach is most similar to the practice of international investment tribunals, which have determined that a claimant’s failure to abide by the terms of State’s offer to arbitrate in a treaty results in the invalidity of the arbitration agreement.

166. Peru submits that, even if Renco’s reservation of rights were deemed to be a non-essential part of its waiver, severance of the reservation of rights would infringe upon Peru’s sovereignty because Peru was not obligated to extend an offer to arbitrate to claimants and did so only on condition that the offer be accepted, without reservation, at the time of the filing of the Notice of Arbitration. Furthermore, Peru argues that—unlike the European Convention of Human Rights, which may have the objective of exercising jurisdiction over as many States as possible in order to uphold human rights and fundamental freedoms—investment tribunals have no mandate to expand the scope of a State’s offer to arbitrate.
167. Finally, Peru submits that the application of the severability principle in the present context would have radically different consequences. In the context of State reservations to treaties, the severability principle operates against the interests of the State making the reservation by preventing the State from escaping jurisdiction as a result of its reservation of rights. In the present context, the application of the severability principle would operate to the benefit of an investor and against the interests of the respondent State whose consent is conditioned upon the submission of a valid waiver at the time of the submission of the Notice of Arbitration.
168. For its part, the United States submits that the principle of severability is not a generally accepted rule of international law or custom. The United States points out that it has consistently maintained that a reserving State cannot be bound without its consent to a treaty without the benefit of its reservation. The United States submits as follows:

To apply the proposed “principle of severability” in order to sever an invalid reservation of rights in a claimant’s waiver would defeat the purpose of the Agreement’s arbitration

provisions. It would alter the conditions of the respondent's offer to arbitrate and deprive the waiver provision of its intended purpose, thereby exposing the respondent to the risk of having to litigate, even temporarily, concurrently in multiple fora.

169. Renco contends that the severability principle is a general principle of international law, as demonstrated by the authorities set out above. Renco submits that it does not consider its reservation as important or essential to its consent. Renco submits that the Tribunal should therefore sever the non-essential reservation of rights from its waiver. On this basis, Renco submits that it should be treated as if it had complied with the Treaty's waiver requirements from the outset of this arbitration even though any defect will have been eliminated at a point in time after Peru received Renco's Amended Notice of Arbitration.
170. The Tribunal observes that the severability principle has been applied by international courts and tribunals in the context of State reservations to treaties or reservations contained in declarations by States accepting the compulsory jurisdiction of an international court. The principle has also been cited by investment tribunals in the context of the severability of an arbitration agreement from the main contract in which such an agreement is contained. However, the principle has not been applied by an investor-state tribunal in order to sever invalid language from a claimant's written waiver.
171. The Tribunal also observes that States are entitled, by virtue of their sovereignty, to apply such reservations to treaties as are permitted by Article 19 of the VCLT. Investors have no equivalent power to insert reservations into their acceptances of a State's standing offer to arbitrate under an investment treaty. In a system of arbitration without privity, a State is entitled to "shape its consent as it sees fit by providing the conditions under which it is given—in other words, the conditions subject to which an 'offer to arbitrate' is made to the foreign investors".<sup>39</sup>
172. Even if the Tribunal were to conclude that severability was a general principle of international law and that Renco's reservation of rights was a non-essential component of the waiver, the Tribunal is not persuaded that the severability principle could be applied in the particular context of this case. This is because of the same timing issue set out above. The Tribunal has concluded that no arbitration

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<sup>39</sup> *ST-AD GmbH v Bulgaria* PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, July 18, 2013 ¶ 337.

agreement ever came into existence as a result of Renco's non-compliance with Article 10.18(2)(b). If the severability principle were applied to sever the reservation of rights from Renco's waiver, the Tribunal would be assuming (incorrectly) that it is a valid tribunal with authority, and in effect creating an arbitration agreement for the Parties. The Tribunal would face the same "bootstraps" obstacle which it encountered in relation to the application of the *Mavrommatis* doctrine.

173. Accordingly, the Tribunal concludes that it has no power to sever the reservation of rights from Renco's waiver and remedy Renco's non-compliance with the formal requirement of Article 10.18(2)(b).

(4) *Abuse of rights*

174. Renco's final argument, raised briefly in its final written submission to the Tribunal, is that Peru's arguments and conduct in relation to its waiver objection constitute an abuse of rights. Renco submits that the abuse of rights doctrine proscribes the exercise of a legitimate legal right for improper or abusive purposes or to evade an obligation. As stated by Bin Cheng:<sup>40</sup>

The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law.

175. The abuse of rights doctrine is an aspect of the principle of good faith and is a well-established general principle of international law. The doctrine has been cited and applied on numerous occasions by international courts and tribunals.<sup>41</sup> The development of the abuse of rights doctrine in international law is discussed in detail in *Venezuela Holdings BV v Bolivarian Republic of Venezuela*.<sup>42</sup> The tribunal observed that many ICSID tribunals have considered whether the conduct of an

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<sup>40</sup> Bin Cheng *General Principles of Law as applied by International Courts and Tribunals* (CUP, 1987) at 131-132.

<sup>41</sup> For example, Peru invoked the abuse of rights doctrine in the *Tacna-Arica* arbitration: *The Tacna-Arica Question (Chile v Peru)* (1925) II RIAA 921. The arbitrator, President Calvin Coolidge, found that Chile had committed an abuse of authority in the disputed provinces of Tacna and Arica, which were subject to Chilean authority under the Treaty of Ancón. President Coolidge found that "in a considerable number of cases, particularly in the year 1923, the Chilean conscription laws have been used not so much for the obtaining of recruits ... but with the result, if not the purpose, of driving young Peruvians from the provinces. So far as this has been done, the Arbitrator holds it to be an abuse of Chilean authority" (at 941).

<sup>42</sup> *Venezuela Holdings BV v Bolivarian Republic of Venezuela* ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 ¶¶ 169-185.

investor who engages in a corporate restructuring to obtain the benefit of investment treaty protection commits “an abuse of the convention purposes”, “an abuse of legal personality”, an “abuse of corporate form” or an “abuse of the system of international investment protection”.<sup>43</sup>

176. The abuse of rights doctrine is not restricted to the exercise of treaty rights by investors. In *Saipem SpA v The People’s Republic of Bangladesh*, the tribunal observed that “[i]t is generally acknowledged in international law that a State exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights”.<sup>44</sup> The tribunal concluded that the Bangladeshi courts had abused their supervisory jurisdiction over the arbitration process by revoking the authority of an ICC tribunal despite any showing of misconduct.
177. It is clear that the threshold for establishing an abuse of rights is high. As the arbitral tribunal put it in *Chevron Corp v Republic of Ecuador*.<sup>45</sup>

[I]n all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the *Oil Platforms* case, there is “a general agreement that the graver the charge the more confidence must there be in the evidence relied on.”

178. Renco submits that Peru’s abuse of rights in the present case is clear: Peru suffers no prejudice as a result of the reservation of rights in Renco’s waiver. At the hearing, the Tribunal asked Peru whether it would suffer any prejudice in this case if the Tribunal were to “write [the additional language] out, in effect, make it disappear”.<sup>46</sup> Peru responded that the Tribunal lacked the power to do so, but it did not articulate any prejudice that it would suffer.<sup>47</sup>
179. Renco submits that there is no scenario in which the additional language prevents the waiver provision in the Treaty from having its full force and effect. In these

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<sup>43</sup> Ibid ¶ 176.

<sup>44</sup> *Saipem SpA v The People’s Republic of Bangladesh* ICSID Case No. ARB/05/07, Award, 30 June 2009 ¶ 160.

<sup>45</sup> *Chevron Corp v Republic of Ecuador* PCA Case No. AA 277, Interim Award, 1 December 2008 ¶ 143, citing *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* Judgment, November 6, 2006 [2006] ICJ Rep 225, Separate Opinion of Judge Higgins ¶ 33.

<sup>46</sup> Hearing Transcript, p. 63.

<sup>47</sup> Hearing Transcript, pp. 63-66.

circumstances, Renco submits that Peru's motive is not to ensure that its waiver rights are respected or that the waiver provision's objectives are served. Rather, Renco submits that Peru's true motive is to evade its duty to arbitrate Renco's claims under the Treaty. Because that it is an improper motive, Renco submits that Peru's objections are an abuse of rights.

180. The Tribunal has already referred to the fact that it has been troubled by the manner in which Peru's waiver objection arose in this arbitration. Renco's Notice of Arbitration was filed on April 4, 2011 and its Amended Notice of Arbitration was filed on August 9, 2011. Both documents contained Renco's waiver, including the reservation of rights. Yet Renco's compliance with the formal and material requirements of Article 10.18(2)(b) was not put in issue until Peru filed its Notification of Preliminary Objections on March 21, 2014, nearly three years after Renco had submitted its claims to arbitration. Under the heading "Renco's violation of the Treaty's waiver provision", Peru made the following submissions:

As Peru will discuss and amplify in its submissions, Renco has presented an invalid waiver in this proceeding because it does not conform with the language required by the Treaty, and that Doe Run Peru S.R.Ltda. ("Doe Run Peru") was required to submit a waiver and improperly purported to withdraw its waiver submitted with Claimants' Notice of Arbitration and Statement of Claim of April 4, 2011. In addition, through the initiation and continuation of certain proceedings with respect to measures alleged to constitute a breach by Renco, both Renco and Doe Run Peru also have violated the waiver requirement.

Pursuant to the Treaty, Peru's consent, and therefore the Tribunal's jurisdiction, is subject to the submission of valid waivers by Renco and Doe Run Peru, which are lacking here. This objection thus clearly falls within the scope of Article 10.20.4.

181. Although Peru submitted in this document that Renco's waiver "does not conform with the language required by the Treaty", the focus of Peru's waiver objections appeared to have been the absence of a written waiver by DRP and the conduct of the Peruvian bankruptcy proceedings, rather than the inclusion of the reservation of rights in Renco's waiver.
182. Indeed, while Peru had complained to Renco many years ago that it considered the domestic Peruvian bankruptcy proceedings involving DRP violated Article 10.18(2), Peru did not raise any clear and specific objection in relation to Renco's reservation of rights until Peru filed its Comments on the submission of the United States of

America on September 10, 2014. At paragraph 30, Peru submitted that Renco had violated the Treaty's waiver requirements because:

(i) Renco and its affiliate, Doe Run Peru, filed waivers that impermissibly reserved the right to bring claims in other fora; (ii) Renco later filed a separate waiver that contained the same reservation ...

183. This submission was not developed in any depth until Peru filed its Memorial on Waiver in July 2015, where Renco's compliance with the formal requirement of Article 10.18(2)(b), by reason of the reservation of rights, was placed squarely in issue.
184. The Tribunal has concluded that Renco failed to comply with the formal requirement of Article 10.18(2) and that it has no power to allow Renco to cure this defect (as noted above, one member of the Tribunal did not join in this conclusion) or to sever the reservation of rights. However, the consequences for Renco may be extreme in the following scenario. If Renco should decide to file a new Notice of Arbitration accompanied by a "clean" waiver, Peru may be minded to argue that Renco's claims have become time-barred because more than three years have elapsed since Renco first acquired knowledge of the breaches alleged under Article 10.16(1) of the Treaty.
185. In these circumstances, while the possible operation of a 3 year time bar on the facts of this case cannot change the analysis of Article 10.18(2)(b) (i.e. the analysis must be the same, even if the objection had been raised at the outset of the arbitration), the question which arises is whether Peru's conduct with regard to the late raising of its waiver objection rises to the level of an abuse of rights. The test to be applied is whether Peru has sought to raise this objection for an improper motive or — as Renco puts it, whether Peru is seeking to evade its duty to arbitrate Renco's claims under the Treaty rather than ensure that its waiver rights are respected or that the waiver provision's objectives are served.
186. Having considered the issue with great care, the Tribunal has concluded that, in raising its waiver objection, Peru has sought to vindicate its right to receive a waiver which complies with the formal requirement of Article 10.18(2)(b) and a waiver which does not undermine the object and purpose of that Article. In so finding, the Tribunal does not accept the contention that Peru's waiver objection is tainted by an ulterior

motive to evade its duty to arbitrate Renco's claims. Indeed, Peru has no duty to arbitrate Renco's claims under the Treaty unless Renco submits a waiver which complies with Article 10.18(2)(b).

187. In reaching this conclusion, the Tribunal does not wish to rule out the possibility that an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco's claims were now time-barred under Article 10.18(1). To date, Peru has suffered no material prejudice as a result of the reservation of rights in Renco's waiver. However, Renco would suffer material prejudice if Peru were to claim in any subsequent arbitration that Renco's claims were now time-barred under Article 10.18(1).
188. While this Tribunal cannot prevent Peru from exercising in the future what it then considers to be its legal rights, the Tribunal can, and it does, admonish Peru to bear in mind, if that scenario should arise, Renco's submission that Peru's conduct with respect to its late raising of the waiver objection constitutes an abuse of rights. In the unanimous view of the Tribunal, justice would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011.

(5) *Conclusion*

189. It follows from the Tribunal's findings in this section of the Partial Award that Renco has failed to establish the requirements for Peru's consent to arbitrate under the Treaty. Renco's claims must therefore be dismissed for lack of jurisdiction.

**F. Other Objections**

190. In the light of the Tribunal's conclusion that Renco has failed to comply with the formal requirement of Article 10.18(2)(b) of the Treaty, the Tribunal concludes that it is unnecessary to consider Peru's second contention, namely that Renco has failed to comply with the formal requirement of Article 10.18(2) because DRP has not provided a waiver in Renco's Amended Notice of Arbitration. It is also unnecessary to consider Peru's further contentions regarding DRP's conduct in the Peruvian bankruptcy proceedings. The Tribunal therefore expresses no view on these matters.

## **V. COSTS**

191. The Tribunal defers the question of costs and invites the Parties to present written submissions on costs within 30 days of the date of this Partial Award.

## **VI. CONCLUDING REMARKS**

192. The Tribunal is conscious that these proceedings have been on foot for some years. In reaching the decision to now dismiss Renco's claims, the Tribunal has not done so lightly. Careful consideration over a number of months has been given to each of the many helpful and challenging submissions provided by counsel for both sides. The Tribunal wishes to express its sincere gratitude to counsel for their high degree of professionalism throughout this period.

## VII. FORMAL AWARD

193. For all of the foregoing reasons, and rejecting all submissions, claims and counterclaims to the contrary, the Tribunal **HEREBY FINDS DECLARES AND AWARDS** as follows. But for the view of one Member of the Tribunal that Renco should have been permitted to cure its defective waiver by withdrawing the reservation of rights (paragraph (b) below), all other conclusions of the Tribunal are unanimous.

- (a) Renco has failed to comply with the formal requirement of Article 10.18(2)(b) by including the reservation of rights in the waiver accompanying its Amended Notice of Arbitration because:
  - (i) The reservation of rights is not permitted by the express terms of Article 10.18(2)(b);
  - (ii) The reservation of rights undermines the object and purpose of Article 10.18(2)(b);
  - (iii) The reservation of rights is incompatible with the “no U-turn” structure of Article 10.18(2)(b); and
  - (iv) The reservation of rights is not superfluous.
- (b) Renco cannot unilaterally cure its defective waiver by withdrawing the reservation of rights.
- (c) The Tribunal has no power to sever the reservation of rights from Renco’s waiver and remedy Renco’s non-compliance with Article 10.18(2)(b).
- (d) Peru’s waiver objection is not tainted by any ulterior motive to evade its duty to arbitrate Renco’s claims.
- (e) It follows that Renco has failed to establish the requirements for Peru’s consent to arbitrate under the Treaty.
- (f) Renco’s claims must therefore be dismissed for lack of jurisdiction.

194. The Tribunal hereby reserves the question of costs pending receipt of submissions from the Parties after which the Tribunal will render a Final Award.

Made in Paris, France

Place of Arbitration: Paris, France

Dated: July 15, 2016

*[Signature]*

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The Honorable L. Yves Fortier, CC, QC  
Arbitrator

*[Signature]*

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Mr. Toby T. Landau, QC  
Arbitrator

*[Signature]*

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Dr. Michael J. Moser  
Presiding Arbitrator