

**PCA CASE NO. 2019-46**

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

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION  
ON INTERNATIONAL TRADE LAW 2013**

- between -

**THE RENCO GROUP, INC.**

**CLAIMANT**

- and -

**THE REPUBLIC OF PERU**

**RESPONDENT**

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**CLAIMANT'S COUNTER-MEMORIAL ON PERU'S 10.20.5 OBJECTIONS**

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## I. INTRODUCTION AND SUMMARY OVERVIEW

1. Peru's objections under Article 10.20.5 of the U.S.-Peru Trade Promotion Agreement (the "Treaty") are inadmissible. The Tribunal should hold that Peru failed to invoke the expedited review procedure under Article 10.20.5. Alternatively, the Tribunal should deny Peru's objections on the merits.

2. Respondent's Article 10.20.5 objections are inadmissible because Peru failed to trigger the expedited review mechanism under Article 10.20.5 within forty-five days of the Tribunal's constitution. The Tribunal was constituted on October 19, 2019, when the President of the Tribunal, Judge Simma, accepted his appointment. Forty-five days later, on December 3, 2019, Peru sent a communication to the Tribunal, in which it gave notice "regarding certain objections," and purportedly attempted to invoke the Article 10.20.5 mechanism.

3. Peru's December 3, 2019 letter was vague and unclear, and devoid of any factual bases or legal analysis. As explained in **Section III** below, Respondent's December 3, 2019 communication did not satisfy the conditions that are set forth in Article 10.20.5 to benefit from the expedited review procedure under that provision. Article 10.20.5 requires a respondent to make and brief its objections within 45 days of the tribunal's constitution. Because Peru failed to do so by the December 3, 2019 deadline, its objections are inadmissible.

4. Respondent's objections also lack substantive merit. Peru alleges that two of Claimant's three claims contravene the non-retroactivity principle set forth in Article 10.1.3 of the Treaty, which provides that parties are not bound by the obligations under the Treaty until after the Treaty entered into effect, on February 1, 2009. Respondent also alleges that all three of Claimant's claims are time-barred under Article 10.18.1, *i.e.*, that Renco first became aware of Peru's Treaty breaches and that the breaches caused Renco harm more than three years prior to Claimant's initiation of this arbitration on October 23, 2018. For the reasons set forth briefly and immediately below, and developed more fully in this submission, Peru's objections fail on the merits and should be denied.

Peru's non-retroactivity objection:

5. After the Treaty came into effect on February 1, 2009, Respondent (i) unfairly and inequitably refused the requests by Renco's investment, Doe Run Peru S.R.LTDA ("DRP"), for an extension to comply with its environmental obligations, to which DRP was contractually entitled under the governing contract (the Stock Transfer Agreement), and launched a smear campaign against DRP, in breach of Article 10.5 of the Treaty (Renco's FET claim); (ii) barred DRP from restructuring and forced it into liquidation, expropriating Claimant's investment in breach of Article 10.7 (Renco's expropriation claim); and (iii) committed a denial of justice, in breach of Article 10.5, because the Peruvian courts failed to nullify the patently improper US\$ 163 million credit that the Peruvian Ministry of Energy and Mines ("MEM") asserted during DRP's bankruptcy proceedings (Renco's denial of justice claim). All of Respondent's actions that breach the Treaty occurred *after* the Treaty entered into effect on February 1, 2009. Accordingly, none of Claimant's claims violate the non-retroactivity principle, as explained in **Section IV** below.

Peru's limitations objection:

6. It is common ground that Claimant raised its FET and expropriation claims in the *Renco I* arbitration, which Renco initiated in August 2011, well within the three-year limitations period.

7. A good faith interpretation of Article 10.18.1 in accordance with the principles of the Vienna Convention leads to the undeniable conclusion that the three year limitations period under Article 10.18.1 was suspended during the pendency of the *Renco I* arbitration. Thus, Renco's resubmission of its FET and expropriation claims in this arbitration is timely and satisfies the conditions of Article 10.18.1, as explained in **Section V** below.

8. Moreover, Respondent may not rely on Article 10.18.1 to object to Claimant's FET and expropriation claims because Peru's decision to raise that objection in this arbitration constitutes an abuse of rights in light of Peru's conduct during *Renco I*. As the *Renco I* tribunal noted in the strongest of terms, stating twice that it had been "troubled," Peru failed to object to the reservation of rights language included in Renco's waiver at the outset of that proceeding, and only raised its objection to that language (upon which Peru ultimately prevailed) *three and a half years later*.<sup>1</sup>

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<sup>1</sup> **Exhibit R-8, *The Renco Group Inc. v. Republic of Peru***, UNCITRAL, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016 (L. Yves Fortier, Toby T. Landau, Michael J. Moser (President)), ¶ 123.

9. The *Renco I* tribunal emphasized that because of Peru’s troublesome and suspicious three and one half year delay in raising its waiver objection, the tribunal did not “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 time-barred under Article 10.18(1).”<sup>2</sup> The tribunal noted that “Renco would suffer material prejudice if Peru were to claim in any subsequent arbitration that Renco’s claims were now time-barred under Article 10.18(1),” whereas “Peru has suffered no material prejudice as a result of the reservation of rights in Renco’s waiver.”<sup>3</sup> The *Renco I* tribunal concluded that in its unanimous view, “justice would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011.”<sup>4</sup>

10. Peru ignored the *Renco I* tribunal’s admonition and is now raising in this arbitration that very time-bar objection under Article 10.18.1. that the *Renco I* tribunal counseled against, for good reason, as explained below.

11. Finally, Claimant’s denial of justice claim is not-time barred. It is well settled that a denial of justice claim arises when local remedies are exhausted. This occurred on November 3, 2015, the date on which the Peruvian Supreme Court rejected DRP’s appeal on the issue of the Ministry of Energy and Mines’ improper US\$ 163 million credit. Therefore, November 3, 2015 is the date when Peru breached the Treaty. Because Claimant initiated this arbitration on October 23, 2018, less than three years later, Renco’s denial of justice claim complies with Article 10.18.1.

\* \* \*

12. Peru’s 10.20.5 objections are an improper attempt to deprive Renco of the opportunity to have an international tribunal adjudicate Peru’s multiple violations of the Treaty. This Tribunal should deny Respondent’s objections, with full costs to Renco.

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<sup>2</sup> *Id.*, ¶ 187.

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

<sup>4</sup> *Id.*, ¶ 188.

## II. RELEVANT FACTUAL BACKGROUND<sup>5</sup>

### A. THE PERUVIAN GOVERNMENT OPERATED ONE OF THE MOST POLLUTED SMELTER SITES IN THE WORLD—THE LA OROYA COMPLEX

13. The La Oroya Complex (the “Complex”) is comprised of a smelter, a refinery, and related equipment that process polymetallic minerals into copper, lead, zinc, and other metals, including silver and gold. Smelters process metal concentrates to create pure ore by burning off or separating out unwanted impurities. The Complex is located in the town of La Oroya, in the Andean region of Central Peru, 180 kilometers northeast of Lima, at an altitude of approximately 12,300 feet.

14. From its creation in 1922 until the early 1970s, the privately-owned company Cerro de Pasco owned and operated the Complex. In the early 1970s, Peru nationalized the Complex, and the government-owned Centromin assumed ownership and exclusive operations. During this time, Peru’s mining sector operated with little or no regulatory oversight. Mining companies were not required to control their emissions, nor were they required to remediate environmental impacts.

15. Because there was no environmental regulation or oversight, Cerro de Pasco and Centromin caused significant environmental contamination in and around the town of La Oroya for 50 years. The contamination at the Complex was so extensive that it was designated as one of the most polluted areas in the world. An article published in *Newsweek* magazine in 1994 provided the following description of the town of La Oroya and the Complex: “[d]usted with a white powder the barren hills look like bleached skulls, blacken slags laid in heaps on the roadside ... [with] waste cascading into the river below.” In short, “a vision from hell.”<sup>6</sup>

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<sup>5</sup> This section is based on Claimant’s Notice of Arbitration and Statement of Claim of October 23, 2018 and **Exhibit C-4, *Renco I***, Memorial on Liability, February 20, 2014.

<sup>6</sup> **Exhibit C-2**, Corinne Schmidt, *How Brown Was My Valley*, NEWSWEEK, April 18, 1994.

**B. CLAIMANT PURCHASED CENTROMIN, ACQUIRING THE RIGHT TO OPERATE THE COMPLEX**

16. In 1994, Peru attempted to privatize the mining industry, including the La Oroya Complex. No investor submitted a bid because of the potential liability associated with environmental contamination claims, and also because the operations and obsolete infrastructure of the Complex would make it difficult to modernize.

17. Peru recognized that if it wished to sell the Complex, it needed both to remediate the Complex's historical environmental impacts, and to modernize it to reduce its ongoing environmental impacts, while at the same time preserving the economic viability of the Complex's operations for the local workers who relied on the Complex for their livelihood. Thus, Peru agreed to perform environmental remediation in and around La Oroya.

18. In its continued effort to privatize the mining industry, Peru enacted new environmental regulations, requiring mining companies to propose a program of projects intended to reduce pollutants and bring the mining operation into compliance with current standards. That program was referred to as a "PAMA" (*Programa de Adecuación y Manejo Ambiental* or Environmental Adjustment and Management Program). The Peruvian Ministry of Energy and Mines ("MEM") would approve a PAMA, and a company that performed PAMA projects would be deemed in compliance with environmental regulations.

19. In late 1996, Centromin submitted a PAMA to Peru's MEM, which MEM approved on January 14, 1997. The PAMA for the Complex set forth sixteen (16) projects and a ten-year deadline to complete them at an estimated total completion cost of US\$ 129 million. Ten days after MEM approved the PAMA, Peru again called for the privatization of the Complex and issued a Public International Bidding.

20. Peru awarded the bid to Renco and its affiliate, Doe Run Resources Corporation ("Doe Run Resources"). In accordance with the bidding conditions, Renco and Doe Run Resources incorporated a Peruvian acquisition vehicle, DRP, and assigned certain rights to it (but obviously not relinquishing control over their investment). The relevant Peruvian authorities authorized and approved the assignment. On October 23, 1997, Renco, Doe Run Resources, DRP, and Centromin executed the Stock Transfer Agreement, under which DRP acquired 99.98% of the shares of



Empresa Metalúrgica La Oroya S.A. for US\$ 121.4 million. DRP also contributed an additional US\$ 126.5 million.

**C. DRP EXCEEDED ITS ENVIRONMENTAL OBLIGATIONS UNDER THE STOCK TRANSFER AGREEMENT AND ENACTED ADDITIONAL MEASURES TO ASSIST AND PROTECT THE LOCAL POPULATION**

21. Between 1998 and 2002, Doe Run Peru's engineering and design studies showed that Centromin had severely underestimated the cost and complexity of updating the Complex. As a result, DRP made multiple requests to expand the scope of its PAMA obligations, and MEM also repeatedly asked DRP to add new projects. DRP and MEM agreed to these revisions and conducted themselves accordingly, prior to Peru's breach of the Treaty in March 2009.

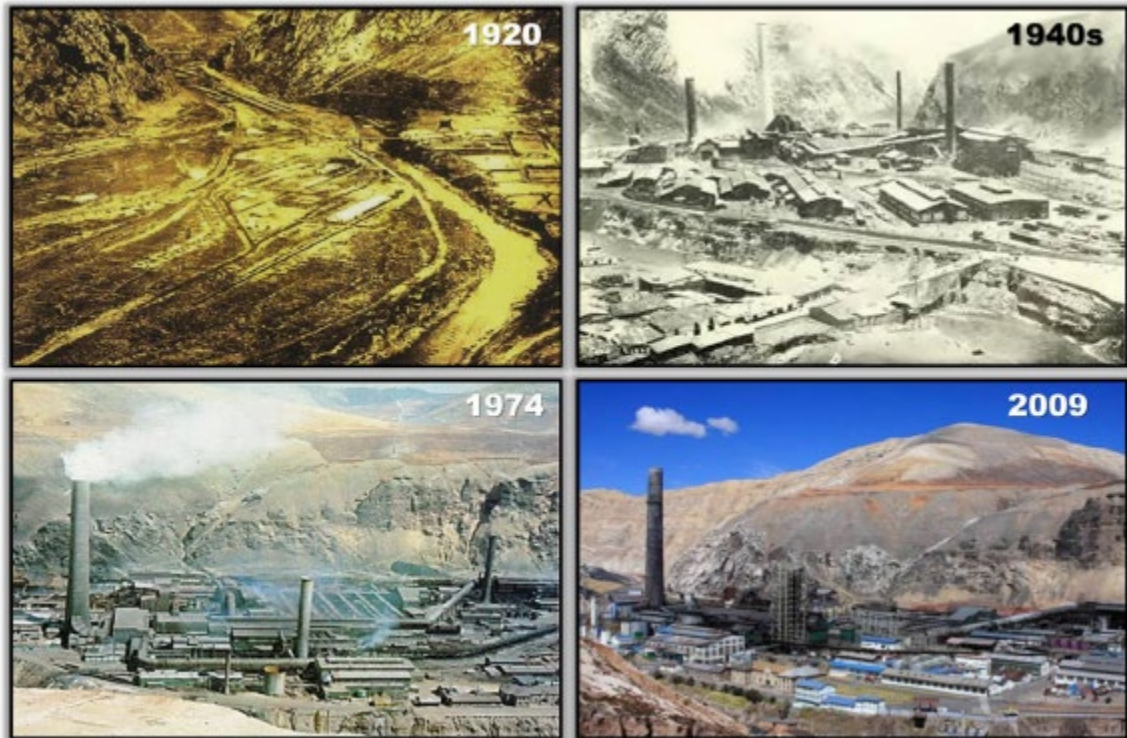
22. DRP also engaged in numerous activities beyond the scope of the PAMA projects to reduce lead and other chemical impacts and to address related public health concerns for both workers and the community. Similarly, these activities did not implicate Treaty violations of Peru.

23. DRP implemented these complementary projects alongside its rapidly expanding PAMA projects, with the twin goals of improving the Complex's environmental performance and reducing blood lead levels in its workers and the community. In addition, in cooperation with Peru, DRP spent more than US\$ 30 million on quality-of-life projects, becoming one of the first companies in Peru to implement this type of voluntary corporate social responsibility program.

**D. BY DECEMBER 2008, DRP HAD COMPLETED 15 OF THE 16 PAMA PROJECTS, DRAMATICALLY REDUCING THE COMPLEX'S ENVIRONMENTAL IMPACTS**

24. In May 2006, MEM granted DRP an extension of two years and ten months, from January 2007 (the original PAMA deadline) to October 2009, to complete the PAMA projects. By the end of 2008, DRP had completed fifteen (15) of the sixteen (16) PAMA projects, investing more than US\$ 300 million in the process—more than double the costs that Centromin and MEM had projected when they privatized the Complex. DRP's diligent completion of the 15 PAMA projects, in addition to the large number of complementary projects that it undertook, yielded remarkable environmental results, dramatically improving water and air quality in and around the Complex.

25. The photographs below demonstrate the significant improvements that DRP had accomplished by 2009:



26. By 2004, less than seven years after Claimant made its investment, an article noted that DRP had invested substantially more money in infrastructure, renovations, and repairs than it had been required to, and that “La Oroya is hell no more.”<sup>7</sup>

27. By December 2008, when DRP had its final PAMA project to complete—the construction of a sulfuric acid plant, the Global Financial Crisis hit the world, preventing DRP from completing that final PAMA project. The crisis caused the price of copper and other metals to collapse, which wiped out the profits that DRP had used to help finance the PAMA projects. In February 2009, DRP lost its US\$ 75 million revolving line of credit that provided day-to-day liquidity for its operations. DRP’s lenders would not extend the credit agreement unless DRP obtained from MEM a formal extension of the October 2009 deadline to complete the final PAMA project.

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<sup>7</sup> **Exhibit C-5**, Michael Fumento, *Green Activists Threaten Peruvian Golden Goose*, SCRIPPS HOWARD NEWS SERVICE, March 18, 2004.

**E. RESPONDENT REFUSED DRP’S MULTIPLE REQUESTS FOR AN EXTENSION AND LAUNCHED A SMEAR CAMPAIGN AGAINST DRP**

28. On March 5, 2009, after the Treaty came into effect, DRP wrote to MEM requesting an extension to complete the final PAMA project on the basis of the economic *force majeure* provision contained in the Stock Transfer Agreement. That important contractual provision stated that DRP’s PAMA obligations would be deferred if its performance was “delayed, hindered or obstructed by ... extraordinary economic alterations.” Although one might debate whether an economic crisis constitutes a *force majeure* event under general laws concerning *force majeure*, there is *no* such debate here because the parties agreed, and the Stock Transfer Agreement provides expressly, that an “extraordinary economic alteration,” which the Global Financial Crisis most certainly was,<sup>8</sup> constitutes a *force majeure* event.

29. DRP also advised MEM that its concentrate suppliers would freeze shipments if DRP could not obtain an extension for its obligation to complete the final and sixteenth PAMA project. Without concentrate, DRP would need to reduce operations at the Complex, which would only exacerbate DRP’s deteriorating financial situation. However, on March 10, 2009, in breach of the Treaty, Peru denied DRP’s request, to which DRP was contractually entitled under the Stock Transfer Agreement, and Peru never disputed that the Global Financial Crisis was a *force majeure* event under the Stock Transfer Agreement.<sup>9</sup>

30. Thereafter, in March 2009, DRP and the Government of Peru (through MEM) negotiated a mutually acceptable solution. MEM demanded that DRP’s debt of US\$ 156 million to its parent, Doe Run Cayman, be 100% capitalized, and that Doe Run Cayman pledge 100% of its shares to DRP. DRP and Doe Run Cayman agreed to these conditions in a Memorandum of Understanding

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<sup>8</sup> As a result of the Global Financial Crisis, in just the United States, a substantial number of large, previously healthy banks and other financial institutions failed (IndyMac Bank, Lehman Brothers, Washington Mutual); were forced to merge (Bear Stearns into JP Morgan Chase, Merrill Lynch into Bank of America); were placed under conservatorship (Fannie Mae, Freddie Mac); or were forced to borrow billions from the federal government, including Citigroup (US\$ 45 billion), Bank of America (US\$ 15 billion), AIG (US\$ 40 billion), JP Morgan Chase (US\$ 25 billion), Wells Fargo (US\$ 25 billion), GMAC (US\$ 17.3 billion), General Motors (US\$ 13.4 billion), Goldman Sachs (US\$ 10 billion), and Morgan Stanley (US\$ 10 billion). Ben Bernanke, the former head of the U.S. Federal Reserve, stated that the 2008 Global Financial Crisis was the worst in global history, surpassing even the Great Depression.

<sup>9</sup> See **Exhibit C-6**, Letter from J. F. G. Isasi Cayo (Ministry of Energy & Mines) to J. Carlos Huyhua (Doe Run Peru), March 10, 2009; and **Exhibit C-7**, Letter from J. Carlos Huyhua (Doe Run Peru) to P. Sanchez (Ministry of Energy & Mines), March 5, 2009.

(“MOU”), in return for MEM agreeing to grant an adequate extension to DRP for the completion of the final PAMA project.<sup>10</sup> On April 2, 2009, DRP and the Government of Peru held a press conference to publicly announce that a solution had been reached. But Respondent ultimately never signed the MOU.<sup>11</sup>

31. On June 3, 2009, DRP was forced to suspend operations at the Complex. Without an extension of the PAMA deadline to complete the sixteenth and final PAMA project, DRP could not obtain financing. Without financing, DRP could not pay its concentrate suppliers. Without concentrate, the Complex could not operate.

32. Notwithstanding Peru’s initial refusal to grant the extension of time, which occurred on March 10, 2009 (after the Treaty came into effect), and Peru’s subsequent refusal to sign the MOU—despite announcing at a press conference that it would do so—DRP continued to press Peru for an extension of time to complete the final PAMA project. On June 25, 2009, DRP wrote to MEM providing a comprehensive proposal for a 30-month PAMA extension. On July 6, 2009, MEM rejected DRP’s proposal and refused to grant DRP a PAMA extension. On July 8, 2009, DRP once again asked MEM for a PAMA extension. On July 15, 2009, MEM once again, summarily and improperly, rejected DRP’s request.

33. After DRP ceased operations at the Complex, Peru appointed a Technical Commission, which concluded that a minimum 20-month extension was needed to complete the sulfuric acid plant and that additional time on top of that was required to obtain financing.<sup>12</sup> A few months later, in September 2009, presumably based on the conclusions and advice from its own Technical Commission, the Peruvian Congress passed a law granting DRP an extension of 30 months to complete the sixteenth and final PAMA project.

34. However, in late October 2009, MEM passed implementing regulations that completely undermined the new law. For example, the newly passed October 2009 regulations required DRP to, *inter alia*, pay 100% of its gross proceeds into a trust to be used to fund the completion of the

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<sup>10</sup> **Exhibit C-41**, Memorandum of Understanding between Peru, Doe Run Peru, Doe Run Cayman Ltd., and Doe Run Cayman Holdings LLC, March 27, 2009.

<sup>11</sup> **Exhibit C-42**, *Renco I*, Witness Statement of Dennis A. Sadlowski, ¶ 55.

<sup>12</sup> **Exhibit C-43**, La Oroya Technical Commission, Executive Summary, September 12, 2009.

final PAMA project. This made it impossible for DRP to complete the sulfuric acid plant and operate the Complex. Moreover, MEM improperly subdivided the 30-month extension in a manner that made compliance unnecessarily onerous.

35. Peru's unjustified refusals, beginning on March 10, 2009, to accede to DRP's contractually permitted requests for an extension of time to complete the final PAMA project constitute a breach of its obligation under Article 10.5 of the U.S.-Peru Trade Promotion Agreement (the "Treaty") to accord U.S. investments fair and equitable treatment.

36. In addition, Peru engaged in a smear campaign against Claimant and DRP. For example, the then President of Peru, Alan García, told the press that he intended to cancel DRP's license to operate the Complex, stating that "[a] company that abuses the country or plays games like Doe Run should be stopped."<sup>13</sup> He also stated that the Government of Peru would "not allow a firm to blackmail the country."<sup>14</sup> For his part, Peruvian Minister of Energy and Mines Pedro Sánchez stated that "it should be clear that they [Claimant and DRP] will not re-contaminate La Oroya as they have done before." A series of negative articles denouncing DRP and the PAMA extension also appeared in the Peruvian press.

37. Peru's statements were intended to create—and in fact resulted in—an erroneous public opinion that DRP was responsible for the contamination in La Oroya and remiss in remediation obligations. Nothing was further from the truth. Respondent's smear campaign against Claimant and DRP is a further breach of Article 10.5 of the Treaty.

38. Peru's unfair refusal to timely grant a reasonable and contractually authorized PAMA extension to DRP, and Peru's disparaging public campaign against Renco and DRP, created a hostile environment and prevented DRP from securing the financing that it needed, in violation of the fair and equitable treatment standard.

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<sup>13</sup> **Exhibit C-8**, *Peru's García Says Doe Run License Being Canceled*, Reuters, July 28, 2010.

<sup>14</sup> **Exhibit C-9**, *Peru cancels Doe Run's operating license*, Andina, July 28, 2010.

**F. RESPONDENT BARRED DRP FROM RESTRUCTURING AND FORCED IT INTO LIQUIDATION**

39. On February 18, 2010, one of DRP's unpaid concentrate suppliers placed DRP into involuntary bankruptcy. On September 14, 2010, Peru asserted a patently improper claim in the bankruptcy court proceedings for US\$ 163 million. MEM alleged that because DRP had failed to complete the final PAMA project (the construction of the sulfuric acid plant) within the timeframe that Peru and MEM had improperly refused to extend, MEM itself would be required to complete that project (which MEM has not done, or even started to this day, a decade later). MEM further alleged, also improperly, that the amount of money estimated to complete the outstanding PAMA project constituted a "debt" of DRP to MEM and was accordingly a bankruptcy "credit" in the bankruptcy proceeding.

40. The improper credit that MEM asserted gave Peru nearly one third of all voting rights on the bankruptcy's creditors' committee. It also provided Peru with the right to recover a large portion of DRP monies that should have gone to legitimate creditors, severely complicating DRP's efforts to address the obligations that it owed to its legitimate creditors. Throughout the bankruptcy proceedings Peru used its creditor voting rights to DRP's detriment by, among other things, voting against reasonable restructuring plans proposed in April and May 2012. Instead, Respondent supported a vote to liquidate DRP, which occurred in July 2012.

41. Peru's conduct during the bankruptcy, culminating with DRP's liquidation, constitutes an indirect expropriation of Claimant's investment, DRP, in breach of Article 10.7 of the Treaty.

**G. THE PERUVIAN COURTS IMPROPERLY REJECTED DRP'S CHALLENGE TO MEM'S US\$ 163 MILLION CREDIT**

42. In the bankruptcy proceedings, DRP opposed MEM's baseless US\$ 163 million credit. In February 2011, the Bankruptcy Commission of the National Institute for Defense and Competition and Protection of Intellectual Property ("INDECOPI") found in favor of DRP and rejected the credit, holding that MEM's claims were not a "debt" of DRP and, therefore, not a claim that could be recognized in the bankruptcy process. MEM appealed the ruling to INDECOPI's Bankruptcy Chamber. In November 2011, the Bankruptcy Chamber found for MEM, reversing the Bankruptcy Commission's decision.

43. DRP challenged the Bankruptcy Chamber's resolution in an administrative action before the Peruvian courts. In October 2012, the Fourth Transitory Administrative Court of Lima rejected DRP's request, and upheld MEM's US\$ 163 million bankruptcy credit. In July 2014, a special chamber of the Lima Superior Court affirmed this decision in a split 3-2 vote. DRP then appealed that decision to the Supreme Court of Justice. On November 3, 2015, the Supreme Court summarily rejected DRP's appeal.

44. The Peruvian judiciary's failure to nullify MEM's patently absurd US\$ 163 million credit against DRP constitutes a denial of justice, in breach of Article 10.5 of the Treaty.

**H. AS A RESULT OF RESPONDENT'S TREATY BREACHES, CLAIMANT INITIATED AN ARBITRATION AGAINST PERU, WHICH WAS DISMISSED FIVE YEARS LATER FOLLOWING PERU'S BELATED OBJECTION CONCERNING CLAIMANT'S WAIVER**

45. On August 9, 2011, within three years of becoming aware of Respondent's breaches of the Treaty, which first occurred on March 10, 2009 when Respondent rejected the PAMA extension to which Claimant was contractually entitled, Claimant initiated an arbitration against Respondent under the Treaty (*Renco I*). Claimant raised its FET claim and also argued that Peru was taking steps to expropriate DRP (which Respondent ultimately did in 2012). In accordance with the Treaty's requirements, Claimant submitted a written waiver as part of its Amended Notice of Arbitration,<sup>15</sup> which stated:

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. *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.*

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<sup>15</sup> Claimant initially commenced the arbitration on April 4, 2011, together with DRP, against Respondent and Activos Mineros. However, Claimant submitted an Amended Notice of Arbitration on August 9, 2011, in which DRP no longer appeared as a claimant and Activos Mineros no longer appeared as a respondent.

46. The non-highlighted language above comes *verbatim* from the Treaty. Claimant added the final sentence above in yellow highlighting to its written waiver (the highlighting is added for the Tribunal’s convenience; this sentence was not highlighted in the original waiver).

47. Respondent objected to the additional language included in Claimant’s waiver *three and one half years* after Claimant submitted its waiver. The *Renco I* tribunal, composed of Dr. Michael J. Moser (president), the Honorable L. Yves Fortier, CC, QC, and Toby T. Landau, QC, noted that it was “troubled by the manner in which Peru’s waiver objection has arisen in the context of this arbitration,” and that “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.”<sup>16</sup> Nevertheless, on July 15, 2016, a majority of the *Renco I* tribunal surprisingly held that it lacked jurisdiction over Renco’s claims on the ground that the additional (highlighted above) language that Claimant had added to its written waiver caused the written waiver to fail to comply with Article 10.18.2 of the Treaty. One member of the tribunal was “not persuaded that Renco could not unilaterally cure its defective waiver,”<sup>17</sup> which Claimant offered repeatedly to do.

48. On August 12, 2016, Renco sent Peru a Notice of Intent to Commence Arbitration.<sup>18</sup> On November 9, 2016, the tribunal issued its Final Award in *Renco I*, bringing that case to a close.<sup>19</sup> One day later, on November 10, 2016, Renco and Peru agreed to engage in consultations regarding Renco’s Notice of Intent. The consultations ended on October 20, 2018. Three days later, on October 23, 2018, Claimant initiated the present arbitration by submitting its Notice of Arbitration.

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<sup>16</sup> **Exhibit R-8**, *The Renco Group Inc. v. Republic of Peru*, UNCITRAL, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016 (L. Yves Fortier, Toby T. Landau, Michael J. Moser (President)), ¶¶ 123, 180.

<sup>17</sup> *Id.*, ¶ 160.

<sup>18</sup> **Exhibit C-10**, Notice of Intent to Commence Arbitration, August 12, 2016.

<sup>19</sup> **Exhibit C-11**, *The Renco Group Inc. v. Republic of Peru*, UNCITRAL, ICSID Case No. UNCT/13/1, Final Award (L. Yves Fortier, Toby T. Landau, Michael J. Moser (President)), November 9, 2016.



### III. RESPONDENT DID NOT TRIGGER THE EXPEDITED REVIEW MECHANISM UNDER ARTICLE 10.20.5

49. Article 10.20.5 of the Treaty provides that “[i]n the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence.” Respondent failed to satisfy the requirements of this provision and, consequently, may not avail itself of the expedited review mechanism thereunder.

50. Respondent attempted, but failed, to properly invoke the Article 10.20.5 procedure in this arbitration. On December 3, 2019, forty-five days after the Tribunal was constituted on October 19, 2019,<sup>20</sup> Respondent wrote to the Tribunal “to give notice regarding certain objections.”<sup>21</sup> However, as Claimant explained in its letters to the Tribunal dated December 10 and 17, 2019, Respondent’s December 3, 2019 communication was vague and hopelessly unclear, devoid of any factual bases or legal analysis, and, as a result, does not trigger the application of Article 10.20.5.<sup>22</sup> Claimant will not reiterate its arguments here, and respectfully refers the Tribunal to Claimant’s two prior letters on this topic. Nevertheless, Claimant briefly comments on Respondent’s latest allegations in its Memorial on Preliminary Objections.

51. Respondent continues to misrepresent Claimant’s position by alleging that, according to Claimant, “the word ‘request’ under Article 10.20.5 means that a respondent must submit a full brief in the first instance and, accordingly, that Peru did not successfully trigger the expedited mechanism.”<sup>23</sup> This is not an accurate description of Claimant’s position. Claimant argues that the interpretation of Article 10.20.5 in good faith and in accordance with the ordinary meaning of its terms, in the context of the Treaty as a whole, required Respondent to make and brief its objections within forty-five days of the Tribunal’s constitution in order to benefit from the Article 10.20.5 expedited review mechanism. That is because Article 10.20.5 requires a respondent to request expedited review of an “objection” within forty-five days of the constitution of the tribunal. Thus,

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<sup>20</sup> On October 19, 2019, Judge Simma accepted his appointment as President of the Tribunal. See **Exhibit C-12**, Email from Judge Simma, October 19, 2019.

<sup>21</sup> **Exhibit C-13**, Respondent’s Letter to the Tribunal, December 3, 2019.

<sup>22</sup> **Exhibit C-14**, Claimant’s Letter to the Tribunal, December 10, 2019; and **Exhibit C-15**, Claimant’s Letter to the Tribunal, December 17, 2019.

<sup>23</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 97.

Respondent's vague December 3, 2019 notice that it intends to make certain objections does not satisfy the requirements of Article 10.20.5.

52. Claimant's interpretation of Article 10.20.5 is supported by the position of the United States and the tribunal in *Feldman v. Mexico*, according to which the delivery of a notice of intent to submit a claim to arbitration does not satisfy the requirement of having to "make a claim."<sup>24</sup> Respondent attempts to distinguish *Feldman* by alleging that there is a difference between making a claim and making an objection.<sup>25</sup> There is no such difference. In both cases, a party must state the claim or objection and indicate its basis. Respondent failed to do so in its December 3, 2019 communication.

53. Claimant's interpretation of Article 10.20.5 is further supported by the fact that respondents in prior cases have invoked expedited review procedures identical to Article 10.20.5 by briefing their objections within the forty-five-day deadline.<sup>26</sup> Peru attempts to undermine Renco's argument by alleging that in *RDC v. Guatemala*, Guatemala only filed a three-page letter within the 45-day period, and that in *Jin Hae Seo v. Republic of Korea*, the respondent filed an initial application that it later amended.<sup>27</sup> But Peru is clutching at straws: it does not deny that the respondents in *RDC* and *Jin Hae Seo* stated and briefed their objections in a sufficiently well-articulated manner within the forty-five-day deadline. Peru did not.

54. Finally, Peru acknowledges that it had more than one year, since Claimant submitted its Notice of Arbitration and Statement of Claim on October 23, 2018, to prepare a submission that would trigger the application of the Article 10.20.5 procedure, but claims that this fact is irrelevant.<sup>28</sup> Peru is incorrect for the obvious reason that Respondent had more than ample time to properly and fairly brief its objections in a clear and unambiguous manner to meet the requirements

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<sup>24</sup> **CLA-1**, *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Submission of the United States of America on Preliminary Issues, October 6, 2000, ¶ 14; **RLA-6**, *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, December 6, 2000 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶ 44.

<sup>25</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 102.

<sup>26</sup> See **Exhibit C-14**, Claimant's Letter to the Tribunal, December 10, 2019.

<sup>27</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 101.

<sup>28</sup> *Id.*, ¶ 99.

of Article 10.20.5. Respondent's failure to do so should prevent it from invoking that provision now. The fact that these objections may "have been in play and subject to prior briefing for years,"<sup>29</sup> which is not the case for the time-bar objection, is immaterial.

#### **IV. RESPONDENT'S TREATY BREACHES ARE BASED ON MISCONDUCT THAT OCCURRED AFTER THE TREATY ENTERED INTO EFFECT**

55. Article 10.1.3 of the Treaty provides that the Treaty's substantive obligations, with which each Party to the Treaty undertakes to comply regarding the investments of nationals of the other Party, are not retroactive.<sup>30</sup> This means that the Parties to the Treaty are not bound by the Treaty's obligations until after the Treaty enters into effect, which occurred on February 1, 2009. Renco and Peru are in agreement that Article 10.1.3 reflects the principle that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."<sup>31</sup>

56. Claimant has no quarrel with this language of the Treaty or the fundamental principle of non-retroactivity. But Respondent's attempt to shoehorn a clearly inapplicable retroactivity objection into this arbitration fails for the reasons set forth immediately below.

##### **1. Respondent's Actions That Constitute a Breach of the Treaty Occurred After the Treaty Entered into Effect on February 1, 2009**

57. Claimant's claims in this arbitration are all grounded in, and based upon, acts of Respondent that occurred *after* the Treaty came into effect on February 1, 2009. Claimant's FET claim (and Peru's corresponding breaches of Article 10.5 of the Treaty) is based on Respondent's refusals, starting on March 10, 2009 (after the Treaty came into effect), to grant contractually required PAMA extensions to DRP, and Peru's actions thereafter; as well as Peru's ensuing disparaging public campaign against Claimant and DRP.<sup>32</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> **Exhibit C-1**, U.S.-Peru Trade Promotion Agreement ("Treaty"), Art. 10.1.3 ("For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.").

<sup>31</sup> **RLA-7**, ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 13; Memorial on Preliminary Objections, December 20, 2019, ¶ 26.

<sup>32</sup> *See supra* ¶¶ 28 *et seq.*

58. Similarly, Claimant’s expropriation claim (and Peru’s corresponding breaches of Article 10.7 of the Treaty) is based on Respondent’s decision, as DRP’s largest creditor during DRP’s bankruptcy proceeding, to defeat DRP’s reasonable restructuring plans and to subsequently support a vote to liquidate DRP. Those events all took place in 2012, after the Treaty entered into effect.<sup>33</sup>

59. Accordingly, Claimant’s FET and expropriation claims comply with the non-retroactivity principle set forth in Article 10.1.3. Respondent does not appear to raise a retroactivity objection regarding Claimant’s contention that it suffered a denial of justice, in breach of Article 10.5. If Respondent were to have raised such an objection, it also would fail. As Peru concedes, Claimant’s denial of justice claim (and Peru’s corresponding breach of Article 10.5 of the Treaty) is based on flawed decisions in separate Peruvian administrative and judicial proceedings, all of which occurred after the Treaty entered into effect, starting in November 2011 and culminating with the Supreme Court’s decision of November 3, 2015.<sup>34</sup>

## 2. Respondent’s “Deep Roots” Allegation is Baseless

60. Respondent concedes that the acts that Claimant describes above as Treaty breaches all occurred after the Treaty entered into effect.<sup>35</sup> Respondent’s objection centers on its argument that Peru’s conduct after the Treaty entered into force—on which Claimant’s FET and expropriation claims are based—is “deeply rooted in” Peru’s conduct that predated the Treaty’s entry into effect. On the basis of this foundational argument, Peru alleges that it cannot be held to have breached any Treaty obligations with respect to its acts that occurred after the Treaty entered into force.<sup>36</sup> Respondent’s contentions are incorrect, both on the facts and the law.

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<sup>33</sup> See *supra* ¶¶ 39 *et seq.*

<sup>34</sup> See *supra* ¶¶ 42 *et seq.*; and Memorial on Preliminary Objections, December 20, 2019, ¶ 80 (“In this case, the dispute arose in 2010 when Renco’s affiliate(s) opposed the recognition of the MEM’s credit before INDECOPI and filed a constitutional claim against the threat of INDECOPI’s recognition of that credit.”).

<sup>35</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 66 (acknowledging that DRP sought the PAMA extension after the Treaty came into effect), ¶ 72 (acknowledging that the bankruptcy-related conduct occurred after the Treaty came into effect).

<sup>36</sup> Memorial on Preliminary Objections, December 20, 2019, ¶¶ 65-66 (“Because the Treaty does not bind Peru in relation to the alleged facts that took place or has deep roots in conduct that took place prior to the Treaty’s entry into force, Renco’s ‘unfair treatment’ claim cannot be heard under this Treaty”), ¶ 73.

61. Peru is wrong on the facts because, as explained above, Claimant’s FET and expropriation claims (and Peru’s corresponding Treaty breaches) are uniquely based on conduct that occurred after the Treaty came into effect on February 1, 2009. Renco does not argue in this arbitration (and has not argued) that any of Peru’s conduct prior to March 10, 2009 constituted a breach of the Treaty. Prior to the Treaty coming into effect, DRP cooperatively took on additional PAMA obligations, which does not implicate misconduct by Peru; nor did MEM’s partial granting of DRP’s extension request in May 2006 constitute a violation of the Treaty.<sup>37</sup> Peru could have been more cooperative during these timeframes, especially considering that it was not fulfilling its own remediation obligations at the time. But Renco has never suggested or stated that Peru’s conduct concerning the Complex prior to March 10, 2009 constitutes a breach of the Treaty.

62. It was only on March 10, 2009, when Peru rejected DRP’s contractually grounded request for an extension of time to complete the final PAMA project, that Peru’s Treaty-breaching conduct began, namely unfairly and inequitably treating Claimant and its investment, expropriating Claimant’s investment, and denying Claimant justice.

63. Respondent also is wrong on the law because the single authority that it cites in support of its “deep roots” argument is inapposite. Peru appears to rely exclusively on the Interim Award in *Berkowitz v. Costa Rica* for its “deep roots” argument,<sup>38</sup> even though that award does not support Peru’s allegation here.

64. In the *Berkowitz* case, the claimants argued that Costa Rica had breached the Dominican Republic-Central America Free Trade Agreement (“DR-CAFTA”) by failing to provide them with prompt and adequate compensation for the expropriation of their properties.<sup>39</sup> The claimants argued that even though the underlying expropriations had taken place before DR-CAFTA entered into effect,<sup>40</sup> the process by which the claimants were to be compensated, and the respondent’s breaches during that process (including, *inter alia*, variations in valuations of the same land and in

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<sup>37</sup> *Id.*, ¶¶ 61-62. *See also supra* ¶¶ 21, 24.

<sup>38</sup> Memorial on Preliminary Objections, December 20, 2019, ¶¶ 27-28, 65.

<sup>39</sup> **RLA-26**, *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), May 30, 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶¶ 229-230.

<sup>40</sup> *Id.*, ¶ 231.

approaches to the judicial phase, and an indefinite delay in the process of payment of adequate compensation), had occurred after the treaty entered into effect.<sup>41</sup>

65. The *Berkowitz* tribunal properly held that it did not have jurisdiction over the claimants' expropriation claims because the alleged post-entry into force conduct of the respondent (*i.e.*, the respondent's alleged breaches of the treaty during the compensation process, as described in the paragraph above) was not "separable from the measures of direct expropriation" and did not amount "to an independently actionable breach."<sup>42</sup>

66. Respondent's attempt to draw a parallel between the pre-treaty expropriation of the claimants' properties in *Berkowitz*, and facts in this case that occurred before the Treaty came into effect on February 1, 2009, is misguided and wrong.<sup>43</sup>

67. As set forth in the subsection above, all of the facts that form the basis of Renco's FET and expropriation claims occurred *after* the Treaty entered into effect on February 1, 2009, making the *Berkowitz* case, and Peru's argument (and sole reliance on *Berkowitz*), irrelevant here.

68. Moreover, the *Berkowitz* tribunal declined jurisdiction over the claimants' claims by drawing on the well-established distinction in public international law between completed acts with lingering effects, versus continuing wrongful acts. The principle of non-retroactivity means that a State is not liable for an act completed before a treaty entered effect, despite such act having lingering effects after the treaty entered into force (this is the basis for the *Berkowitz* tribunal's ruling). But a treaty's substantive obligations apply to—and a State can incur responsibility for—conduct of a continuing character that began before the treaty came into effect but continues after. Thus, even if Renco were claiming that Peru's conduct prior to the Treaty entering into force constituted a breach of the Treaty standing alone (which Claimant does not so claim), the principle

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<sup>41</sup> *Id.*, ¶¶ 229, 232.

<sup>42</sup> *Id.*, ¶ 270. *See also id.*, ¶ 222 ("An alleged breach will not come within the jurisdiction of the Tribunal if the Tribunal's adjudication would necessarily and unavoidably require a finding going to the lawfulness of conduct judged against treaty commitments that were not in force at the time."); and ¶ 217 ("Pre-entry into force conduct cannot be relied upon, however, to found liability in-and-of-itself in circumstances in which liability could not properly rest on the post-entry into force breach that has been alleged and on which the Tribunal's jurisdiction was founded.").

<sup>43</sup> Memorial on Preliminary Objections, December 20, 2019, ¶¶ 66, 73.

of non-retroactivity still could not apply because Peru’s conduct, which continued after the Treaty entered into effect, would constitute a continuing breach over which this Tribunal has jurisdiction.

69. This important qualification to the non-retroactivity principle is reflected in Article 28 of the Vienna Convention on the Law of Treaties, which provides: “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place *or any situation which ceased to exist* before the date of the entry into force of the treaty with respect to that party.”<sup>44</sup> The phrase “or any situation which ceased to exist” reflects the qualification that continuing acts that begin before a treaty enters effect and continue after the treaty enters into effect can breach that treaty and do not violate the non-retroactivity principle (*i.e.*, the conduct continued and has not “ceased to exist”).

70. The ILC Commentary to Article 28 of the Vienna Convention confirms this qualification:

*If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date.*<sup>45</sup>

71. Similarly, Article 14(2) of the ILC Articles on State Responsibility provides that “the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”<sup>46</sup> The principle is further developed in the Commentary to Article 14:

Thus conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility.<sup>47</sup>

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<sup>44</sup> **RLA-3**, Vienna Convention on the Law of Treaties, Art. 28 (emphasis added).

<sup>45</sup> **CLA-2**, *The International Law Commission 1949-1998*, vol. II, at 671, (Watts ed, Oxford 2000), (reproducing the commentary to Draft Article 24 which was incorporated verbatim as Article 28 in the final text of the Vienna Convention) (emphasis added).

<sup>46</sup> **RLA-7**, ILC Articles on State Responsibility, Art. 14(2).

<sup>47</sup> **CLA-3**, James Crawford, *The International Law Commission Articles on State Responsibility* 138 (Cambridge, 2002), reproducing paragraph 12 of the Commentary to Article 14.

72. This distinction in public international law between a continuing breach and a completed breach with lingering effects—which Peru ignores—is in any event irrelevant in this arbitration because there is neither a continuing breach that began before the Treaty entered into effect and continued afterwards, nor a breach that was completed before the Treaty entered into effect but that has lingering effects afterwards. In the present case, Respondent’s acts that violate the Treaty occurred after the Treaty entered into effect on February 1, 2009, as set forth above.

73. Thus, there are no “deep roots” between Respondent’s violations of the Treaty’s FET and expropriation provisions, which occurred after the Treaty entered into effect on February 1, 2009, and events that took place before the Treaty came into effect. The Tribunal should reject Respondent’s groundless allegation. As stated above, even if Renco contended that Respondent’s conduct before the Treaty entered into effect violated the Treaty (which Renco is not contending), there would be no breach of the non-retroactivity principle because Peru’s conduct continued after the Treaty entered into force, constituting a continuing breach over which this Tribunal has jurisdiction.

74. Of course, the foregoing does not prevent the Tribunal from considering facts prior to February 1, 2009. Like many other tribunals, the *Berkowitz* tribunal and others consistently have held “that events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation.”<sup>48</sup>

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<sup>48</sup> **RLA-8**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award, October 11, 2002 (James Crawford, Stephen M. Schwebel, Ninian Stephen (President)), ¶ 70. *See also* **RLA-26**, *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), May 30, 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶ 217 (“the Tribunal considers that CAFTA Article 10.1.3 does not preclude it from having regard to pre-CAFTA entry into force conduct for purposes of determining whether there was a post-entry into force breach of a justiciable obligation.”); and **RLA-10**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 (James Anaya, John R. Crook, Fali S. Nariman (President)), ¶ 86.



## V. CLAIMANT'S CLAIMS ARE NOT TIME-BARRED

75. Under Article 10.18.1 of the Treaty, a claimant may submit a claim within three years of when that claimant becomes aware of a breach of the Treaty and that the breach caused it harm. Claimant did so here.

76. Renco submitted its FET and expropriation claims in *Renco I* within three years of first becoming aware of Respondent's Treaty breaches. Claimant's timely initiation of *Renco I* suspends the three-year limitations period in Article 10.18.1, such that Claimant's resubmission of its FET and expropriation claims in *this* arbitration also is timely—thus, there is no violation of Article 10.18.1.

77. In addition, Respondent's objection on the basis of Article 10.18.1 constitutes an abuse of rights in light of its conduct in *Renco I*—in particular, as explained below, the fact that Peru delayed raising its objection to Claimant's waiver for three and one half years. As a result, Peru is barred from relying on the limitations period in Article 10.18.1 to object to this Tribunal's jurisdiction over Claimant's FET and expropriation claims.

78. Finally, Claimant's denial of justice claim also is timely. The Peruvian Supreme Court rejected DRP's appeal on November 3, 2015, which is the date on which the denial of justice, and Peru's corresponding violation of the Treaty, occurred. Renco initiated this arbitration less than three years later, on October 23, 2018.

### A. CLAIMANT SUBMITTED ITS FET AND EXPROPRIATION CLAIMS IN *RENCO I* WITHIN THREE YEARS OF FIRST BECOMING AWARE OF RESPONDENT'S TREATY BREACHES

79. As explained above, DRP wrote to MEM on March 5, 2009, requesting an extension to complete the final and sixteenth PAMA project on the basis of the economic *force majeure* provision contained in the Stock Transfer Agreement.<sup>49</sup> On March 10, 2009, in breach of the Treaty's fair and equitable treatment provision (Article 10.5), Peru denied DRP's request, despite never disputing that the Global Financial Crisis was a *force majeure* event under the Stock Transfer Agreement.<sup>50</sup> Thereafter, MEM continued to deny DRP's requests for an extension to complete

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<sup>49</sup> See *supra* ¶ 28.

<sup>50</sup> See *supra* ¶ 29.

the final and sixteenth PAMA project;<sup>51</sup> undermined a law that the Peruvian Congress had passed which granted DRP a 30-month extension to complete the final PAMA project;<sup>52</sup> and launched a smear campaign against Claimant and DRP which damaged the companies' public image.<sup>53</sup>

80. As also explained above, MEM asserted a patently improper credit for US\$ 163 million against DRP on September 14, 2010, which gave MEM nearly one third of all voting rights on the creditors' committee of DRP's bankruptcy.<sup>54</sup> Throughout the bankruptcy proceedings, Respondent used its creditor voting rights to DRP's detriment by, among other things, voting against reasonable restructuring plans and, instead, supporting a vote to liquidate DRP.<sup>55</sup> The liquidation of DRP occurred in July 2012.<sup>56</sup>

81. In the arbitration that Claimant commenced against Peru on August 9, 2011,<sup>57</sup> well within three years of when Peru first breached the Treaty, on March 10, 2009, Claimant raised, among other claims, Respondent's unfair and inequitable conduct in breach of Article 10.5 of the Treaty,<sup>58</sup> as well as Respondent's expropriation of DRP, in breach of Article 10.7.<sup>59</sup> Thus, in *Renco I*, Claimant's FET and expropriation claims were not time-barred, as they complied with the three-year time limitation under Article 10.18.1. There is no dispute between the parties on this point.<sup>60</sup>

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<sup>51</sup> See *supra* ¶¶ 30-32.

<sup>52</sup> See *supra* ¶¶ 33-34.

<sup>53</sup> *Id.*

<sup>54</sup> See *supra* ¶¶ 39-40.

<sup>55</sup> See *supra* ¶ 40.

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

<sup>57</sup> See *supra* ¶ 45. Claimant initially commenced the arbitration on April 4, 2011, together with DRP, against Respondent and Activos Mineros. However, Claimant submitted an Amended Notice of Arbitration on August 9, 2011, in which DRP no longer appeared as a claimant and Activos Mineros no longer appeared as a respondent.

<sup>58</sup> **Exhibit C-16**, *Renco I*, Amended Notice of Arbitration and Statement of Claim, August 9, 2011, ¶¶ 46 *et seq.*

<sup>59</sup> When Claimant initiated the *Renco I* arbitration on August 9, 2011, Renco indicated that Peru's misconduct "has the potential to culminate in an expropriation of Renco's investment, in violation of Article 10.7 of the Treaty." As noted above, Peru's expropriation of Renco's investment, DRP, occurred in July 2012. In Renco's Memorial on Liability in *Renco I*, Claimant contended that Peru had violated Article 10.7 of the Treaty. See **Exhibit C-16**, *Renco I*, Amended Notice of Arbitration and Statement of Claim, August 9, 2011, ¶¶ 58 *et seq.*; and **Exhibit C-4**, *Renco I*, Memorial on Liability, February 20, 2014, ¶¶ 380 *et seq.*

<sup>60</sup> Memorial on Preliminary Objections, December 20, 2019, ¶¶ 67, 74.

82. Five years later, on July 15, 2016, a majority of the *Renco I* tribunal held that it lacked jurisdiction over Claimant’s claims because Renco had submitted a written waiver with its Amended Notice of Arbitration that the majority found technically did not comply with Article 10.18.2 of the Treaty. As the *Renco I* tribunal noted, and as Claimant describes in detail below, Respondent did not clearly and coherently raise its waiver objection at the outset of the proceedings, which would have enabled Claimant to cure the technical defect well within the three-year limitations period. Instead, Peru waited *three and one half years* to do so.<sup>61</sup>

83. Under settled international law, which includes the laws of civilized nations, a limitations period is suspended when a claimant puts a government on notice of a claim. That is when the government is in a position to preserve its evidence and defend itself against its allegedly wrongful conduct. There is, therefore, no prejudice in suspending the limitations period, whereas serious prejudice would befall on Claimant if this were not the rule under international law and in civilized nations. By advancing its limitations objection under Article 10.18.1, Peru is opposing and violating international law, as set forth below.

#### **B. PERU DELAYED RAISING ITS WAIVER OBJECTION IN *RENCO I***

84. On April 4, 2011, Claimant and DRP initiated an arbitration against Respondent and Activos Mineros for breaches of the Treaty, the Stock Transfer Agreement, and the Guaranty (*Renco I*).<sup>62</sup> In accordance with Article 10.18.2 of the Treaty, the Notice of Arbitration contained a written waiver, which included the following additional language: “[t]o the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimants reserve the right to bring such claims in another forum for resolution on the merits.”<sup>63</sup>

85. On May 6, 2011, Respondent and Activos Mineros filed their response to the Notice of Arbitration.<sup>64</sup> The response was unclear and (potentially intentionally) ambiguous, because it referred to several “jurisdictional matters” arising from the Notice of Arbitration. Yet Peru and Activos Mineros did not remotely state or suggest that, in their opinion, the additional reservation

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<sup>61</sup> See *supra* ¶ 46.

<sup>62</sup> Exhibit C-17, *Renco I*, Notice of Arbitration and Statement of Claim, April 4, 2011, ¶¶ 83-84.

<sup>63</sup> *Id.*, ¶ 78.

<sup>64</sup> Exhibit C-18, Letter from W&C to K&S, May 6, 2011.

of rights language above did not comply with Article 10.18.2 of the Treaty. Respondent does not deny this fact in its Memorial on Preliminary Objections.<sup>65</sup> Because it cannot.

86. Despite prior communications, on August 5, 2011, Respondent wrote that Claimant’s approach of consolidating the treaty and contract claims “could lead to procedural complications and conflicts” with (*inter alia*) the waiver requirement in the Treaty.<sup>66</sup> Respondent stated that it understood that Claimant would submit an amended Notice of Arbitration that excluded the contract claims in order “to facilitate procedural steps.” Respondent did not raise then the argument that the reservation of rights language that Claimant added to its waiver did not comply with the Treaty. Instead, Peru waited three and one half years to do so.

87. On August 9, 2011, still approximately two years within the three-year limitations period, Renco filed its Amended Notice of Arbitration, removing DRP and Activos Mineros as parties. Claimant’s amended pleading included the same waiver, with the same reservation of rights language, as the original Notice of Arbitration.<sup>67</sup> Claimant proceeded in this way because, despite submissions, correspondence, and discussions, Respondent had not objected to the inclusion of Claimant’s reservation of rights in its original waiver. Contrary to what Respondent now seems to imply,<sup>68</sup> if Respondent had raised the objection timely, Claimant could have removed the reservation of rights language from the waiver submitted with its amended pleading, just as it excluded DRP’s contract claims. But Respondent did not object, and so Claimant did not revise the waiver language to address any potential, unknown concerns of Peru.

88. On September 9, 2011, Respondent filed its response to Claimant’s Amended Notice of Arbitration.<sup>69</sup> Respondent ambiguously noted that Claimant’s original pleading consolidating treaty and contract claims had “presented procedural and jurisdictional issues under the [Treaty]”

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<sup>65</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 88.

<sup>66</sup> **Exhibit C-19**, Letter from W&C to K&S, August 5, 2011.

<sup>67</sup> **Exhibit C-16**, Amended Notice of Arbitration and Statement of Claim, August 9, 2011, ¶ 67. Claimant enclosed with its filing a letter from DRP withdrawing its waiver and explaining that it no longer needed to provide a separate waiver because Claimant was not asserting any claims on its behalf under Article 10.16(1)(b) of the Treaty (*see Exhibit C-20*, Letter from K&S to W&C and Peru, August 9, 2011).

<sup>68</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 89.

<sup>69</sup> **Exhibit C-21**, Letter from W&C to K&S, September 9, 2011.

with respect to (*inter alia*) “the scope of the mandatory waiver of other proceedings with respect to the same alleged measures.” Respondent also suggested that Claimant was violating the waiver contained in its amended pleading because it “appear[ed] to be directly or indirectly involved in other allegedly related processes such as engaging lobbyists in the United States and Peru, and seeking to stay, pending the arbitration, litigation brought in U.S. courts by third parties.” However, once again, Respondent did not raise then an objection relating to Claimant’s reservation of rights and Claimant’s formal compliance with the Treaty’s waiver requirement.

89. On September 30, 2011, Respondent indicated that it “continues to seek consultations with [Claimant] on procedural matters,” and it specifically “invite[d] communication, consultation, and coordination” between the parties.<sup>70</sup> Respondent constantly advances these platitudes in its written submissions and discussions, but “communication, consultation, and coordination” with Peru almost always is unfruitful because Peru does not state its positions clearly and in a constructive manner. Rather, it normally provides ambiguous and general statements without making its true and actual intent known—as it did in *Renco I*. Respondent continued to remain silent concerning the argument that it ultimately would raise three and one half years later, namely its contention that Claimant’s reservation of rights language in its written waiver did not comply with the Treaty’s waiver requirement.

90. On September 12, 2012, Respondent appointed Toby T. Landau, QC as arbitrator (Renco had appointed the Honorable L. Yves Fortier, CC, QC as arbitrator), and on April 8, 2013, the president of the tribunal, Dr. Michael J. Moser, was appointed by agreement of the parties.<sup>71</sup> The constitution of the *Renco I* tribunal triggered the running of the 45-day period under Article 10.20.5 of the Treaty for Respondent to request that the tribunal “decide on an expedited basis ... any objection that the dispute is not within the tribunal’s competence.” Thus, Respondent had until May 23, 2013 to invoke the expedited procedure for any objection to the tribunal’s competence. Respondent did not invoke that procedure in *Renco I*.

91. Respondent characterizes the expedited review mechanism under Article 10.20.5 as a way to “efficiently and cost-effectively address preliminary objections that may narrow the scope of

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<sup>70</sup> **Exhibit C-22**, Letter from W&C to K&S, September 30, 2011.

<sup>71</sup> **Exhibit C-23**, Letter from W&C to K&S, September 12, 2012; **Exhibit C-24**, *The Renco Group Inc. v. Republic of Peru*, UNCITRAL, ICSID Case No. UNCT/13/1, Case Details.

claims or result in dismissal of all claims.”<sup>72</sup> Yet, to justify the fact that it did not invoke the expedited review procedure under Article 10.20.5 of the Treaty in *Renco I* in connection with Claimant’s written waiver, Respondent now alleges that it “was not required to raise an objection to Renco’s violation of the waiver requirement until its Counter-Memorial on Liability.”<sup>73</sup> A conclusion that one might reasonably draw from this is that Peru purposefully decided to delay raising its waiver objection in a bad faith effort to allow the three-year limitations period to expire, and if it prevailed on its belated waiver objection, to raise a limitations objection in a refiled arbitration that cured the technical defect—which is exactly what Peru is doing here.

92. On July 18, 2013, the *Renco I* tribunal held its first procedural hearing in London, prior to the time that Peru advanced its objection to Claimant’s written waiver. At the hearing, Respondent made clear that it was not seeking bifurcation of the arbitration into separate jurisdictional and liability phases.<sup>74</sup> Instead, Respondent proposed to raise its jurisdictional objections in its Counter-Memorial on Liability, which the parties had agreed would be due six months after Claimant’s Memorial on Liability.<sup>75</sup> However, Respondent argued that it should also be allowed to bring jurisdictional objections pursuant to Article 10.20.4, which would follow Claimant’s filing of its Memorial on Liability.<sup>76</sup> Respondent remained silent with respect to Claimant’s formal compliance with the Treaty’s waiver requirement, both at the hearing and in its post-hearing written comments.<sup>77</sup>

93. On August 23, 2013, the *Renco I* tribunal issued Procedural Order No. 1.<sup>78</sup> The schedule provided that if Respondent wished to raise any objections under Article 10.20.4, it was required to file a notice of intent four weeks after Claimant’s filing of its Memorial on Liability (due on February 20, 2014).

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<sup>72</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 103.

<sup>73</sup> *Id.*, ¶ 89.

<sup>74</sup> **Exhibit C-25**, Transcript of First Procedural Hearing, July 18, 2013, at 144:9-20.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*, at 142:1-17, 143:24-144:7.

<sup>77</sup> See **Exhibit C-26**, Letter from W&C to the Arbitral Tribunal, July 29, 2013.

<sup>78</sup> **Exhibit C-27**, *Renco I*, Procedural Order No. 1, August 23, 2013.

94. On March 21, 2014, Respondent filed its notice of intent to make objections under Article 10.20.4. In this notice, filed *three years* after Claimant first submitted its claims to arbitration and its waiver, Respondent alleged for the first time that Claimant’s waiver was “invalid.”<sup>79</sup> However, even then, Respondent did not mention or object to the reservation of rights language included in Claimant’s waiver. Peru does not deny this in its Memorial on Preliminary Objections.<sup>80</sup> Rather, the factual basis of Respondent’s waiver objection at the time appeared to be (1) the absence of a separate written waiver by DRP and (2) the alleged conduct by Renco and its affiliates of other proceedings in alleged violation of Renco’s waiver. Neither of these issues goes to the matter of Renco’s technical compliance with the Treaty’s written waiver requirement and the reservation of rights language that ultimately caused the *Renco I* tribunal to decline jurisdiction.

95. In a submission dated April 23, 2014, Respondent again indicated that the factual basis of its waiver objection was (1) the absence of a separate written waiver by DRP and (2) the alleged conduct by DRP in pursuing its rights in other Peruvian judicial proceedings allegedly in violation of the waiver. Peru stated:

Renco’s violation of the Treaty’s waiver provision is a purely legal issue, and warrants dismissal as a matter of law. Moreover, it turns on a narrow set of facts involving a single paragraph in Claimant’s original April 2011 Notice of Arbitration, a single paragraph in Claimant’s Amended Notice of Arbitration, a one-page August 2011 letter from [DRP] purporting to withdraw a prior waiver, and certain limited undisputed facts. Renco’s waiver violation is a preliminary – indeed, a threshold – issue that goes to the heart of Peru’s consent, with significant consequences for this proceeding and potentially others.<sup>81</sup>

96. Incredibly, and perhaps disingenuously, Respondent stayed silent regarding the additional reservation of rights language that Claimant had included with its waiver. Moreover, Respondent’s claim that Claimant’s alleged waiver violation presented a “threshold” and “purely legal” issue that “warrants dismissal as a matter of law” raises the question as to why Respondent had waited three years to raise these objections to Claimant’s written waiver.

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<sup>79</sup> **Exhibit C-28**, Letter from W&C to the Arbitral Tribunal, March 21, 2014.

<sup>80</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 88.

<sup>81</sup> **Exhibit C-29**, *Renco I*, Peru’s Submission on the Scope of Preliminary Objections, April 23, 2014.

97. In a May 7, 2014 submission to the *Renco I* tribunal, Claimant expressed frustration that “Peru fails to provide any clue as to the basis for either of its two waiver objections.”<sup>82</sup> Ironically, neither of these objections touched upon the technical written waiver objection that Peru ultimately would advance.

98. On October 3, 2014, both parties submitted written comments on the United States’ non-disputing party submission concerning the interpretation of Article 10.20.4 of the Treaty. In its comments, Respondent indicated *for the very first time* that it considered the waiver contained in both Claimant’s original and amended Notice of Arbitration to be invalid *because the waiver included additional reservation of rights language*. Respondent alleged that Claimant and DRP had “filed waivers that impermissibly reserved the right to bring claims in other fora” and that “Renco later filed a separate waiver that contained the same reservation.”<sup>83</sup> Peru described these issues as “fundamental flaws ... which have not been cured.”<sup>84</sup> In light of these characterizations, it is surprising, to say the least, that Respondent waited *three and one half years* to specifically object to the reservation of rights language that Claimant included in its written waiver.

99. On July 10, 2015, Respondent submitted its Memorial on Waiver. As the *Renco I* tribunal held, this was when Peru clearly and coherently objected to Renco’s inclusion of reservation of rights language in its waiver, *over four years after the fact*.<sup>85</sup>

100. Although a majority of the *Renco I* tribunal ultimately decided to dismiss Renco’s claims for lack of jurisdiction due to Claimant’s addition of the reservation of rights language in its waiver, the *Renco I* tribunal unanimously condemned Peru for the manner in which it had raised its waiver objection:

*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

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<sup>82</sup> **Exhibit C-30**, *Renco I*, Renco’s Reply on Scope of Respondent’s Article 10.20(4) Objections, May 7, 2014, at 28.

<sup>83</sup> **Exhibit C-31**, *Renco I*, Peru’s Comments on the Non-Disputing Party Submission, October 3, 2014, ¶ 30.

<sup>84</sup> *Id.*, ¶ 29.

<sup>85</sup> **Exhibit R-8**, *The Renco Group Inc. v. Republic of Peru*, UNCITRAL, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016 (L. Yves Fortier, Toby T. Landau, Michael J. Moser (President)), ¶ 183.



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.*<sup>86</sup>

101. The *Renco I* tribunal went on to state that if Peru objected to Claimant's claims in a subsequent arbitration on the basis of Article 10.18.1, then that could constitute an abuse of rights, and that "justice would be served" if Respondent accepted that time stopped running for purposes of Article 10.18.1 on August 9, 2011, when Claimant filed its Amended Notice of Arbitration:

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

While this Tribunal cannot prevent Peru from exercising in the future what it then considers to be its legal rights, the Tribunal can, and it does, admonish Peru to bear in mind, if that scenario should arise, Renco's submission that Peru's conduct with respect to its late raising of the waiver objection constitutes an abuse of rights. *In the unanimous view of the Tribunal, justice would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011.*<sup>87</sup>

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<sup>86</sup> *Id.*, ¶ 123 (emphasis added).

<sup>87</sup> *Id.*, ¶¶ 187-188 (emphasis added).

**C. CLAIMANT’S TIMELY INITIATION OF *RENCO I* SUSPENDS THE THREE-YEAR LIMITATIONS PERIOD IN ARTICLE 10.18.1 OF THE TREATY**

102. On August 12, 2016, after a majority of the *Renco I* tribunal declined jurisdiction over Claimant’s claims, Claimant sent Respondent a Notice of Intent to Commence Arbitration, specifying that Claimant would initiate a second arbitration against Respondent in which it would resubmit its FET and expropriation claims.<sup>88</sup> On November 9, 2016, the tribunal issued its Final Award in *Renco I*, bringing that case to a close.

103. The next day, on November 10, 2016, and for a period of approximately two years, until October 20, 2018, the parties entered into several agreements under which they agreed to enter into consultations regarding Claimant’s Notice of Intent.<sup>89</sup> The parties agree that the time when these agreements were in effect does not count towards the three-year limitations period in Article 10.18.1, as both agreements expressly provide that such time cannot be used against Claimant for purposes of any temporal objections under the Treaty.<sup>90</sup>

104. On October 23, 2018, Claimant initiated this arbitration. Claimant claims, as it did in *Renco I*, that Respondent *inter alia* unfairly and inequitably treated DRP in breach of Article 10.5 of the Treaty,<sup>91</sup> and that Respondent indirectly expropriated Claimant’s investment, DRP, in breach of Article 10.7.<sup>92</sup> The question for this Tribunal, then, is whether Claimant’s resubmission of these two claims in this arbitration complies with the three year limitations period under Article 10.18.1.

105. The answer to that question must be yes. In accordance with the object and purpose of Article 10.18.1, as well as general principles of international law, the limitations period was suspended during the five years and three months that *Renco I* lasted, from August 9, 2011 to November 9, 2016. Moreover, the parties agree that the consultation period between November 10, 2016 and October 20, 2018 does not count towards the limitations period. Therefore, the only

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<sup>88</sup> See *supra* ¶ 48.

<sup>89</sup> See **Exhibit R-9**, Consultation Agreement, November 10, 2016; **Exhibit C-32**, Amendment to Consultation Agreement, February 27, 2017; **Exhibit R-10**, Framework Agreement, March 14, 2017; **Exhibit C-33**, Framework Agreement Addendum, March 15, 2018; and **Exhibit C-34**, Second Framework Agreement Addendum, May 31, 2018, countersigned by Respondent on September 5, 2018.

<sup>90</sup> Memorial on Preliminary Objections, December 20, 2019, ¶¶ 35-36.

<sup>91</sup> Notice of Arbitration and Statement of Claim, October 23, 2018, ¶¶ 62 *et seq.*

<sup>92</sup> *Id.*, ¶¶ 68 *et seq.*

added time between Claimant’s submission of its claims in *Renco I* and the submission of its claims in this arbitration is three days, from October 20, 2018 (when the consultation agreements between the parties expired), to October 23, 2018 (when Claimant filed this arbitration), making this arbitration timely under Article 10.18.1.

106. As noted above, Claimant first became aware of Peru’s breaches of Article 10.5 of the Treaty on March 10, 2009,<sup>93</sup> and first became aware of Peru’s breaches of Article 10.7 of the Treaty in July 2012.<sup>94</sup> Claimant initiated *Renco I* on August 9, 2011, well within three years of first becoming aware of Respondent’s breaches. Therefore, Claimant’s FET and expropriation claims comply with the requirements of Article 10.18.1 (the addition of the three extra days does not change that conclusion), and are not time-barred.<sup>95</sup>

### 1. The Text of Article 10.18.1 is Silent as to Whether the Initiation of an Arbitration Suspends the Limitations Period

107. Article 10.18 of the Treaty is entitled “Conditions and Limitations on Consent of Each Party.” The first paragraph provides as follows:

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.<sup>96</sup>

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<sup>93</sup> See *supra* ¶¶ 79 *et seq.*

<sup>94</sup> See *supra* ¶ 80.

<sup>95</sup> Put differently, if one takes Claimant’s submission of its Notice of Arbitration on October 23, 2018 as the starting point, and subtracts three years, the time that *Renco I* lasted, and the time that the various agreements between the parties were in effect between November 2016 and October 2018 (which is 710 days, not 709 days as Respondent contends), then the cut-off date for purposes of the limitations period in Article 10.18.1 is **August 12, 2008**. This means that to comply with the requirements of Article 10.18.1, Claimant must have first become aware of Respondent’s breaches and that the breaches caused it harm, **no earlier** than by that date. Since Claimant first became aware of Respondent’s breaches of Article 10.5 in March 2009 and of Respondent’s breaches of Article 10.7 in July 2012, Claimant’s FET and expropriation claims comply with the requirements of Article 10.18.1 and are not time-barred.

<sup>96</sup> **Exhibit C-1**, U.S.-Peru Trade Promotion Agreement (“Treaty”), Art. 10.18.1. This provision is identical to the time bar provisions contained in the North American Free Trade Agreement (“NAFTA”) (Arts. 1116(2) and 1117(2)), the Dominican Republic-Central America-United States of America Free Trade Agreement (“DR-CAFTA”) (Art. 10.18.1), and the United States-Korea Free Trade Agreement (“KORUS FTA”) (Art. 11.18.1).

108. Article 31(1) of the Vienna Convention on the Law of Treaties provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>97</sup> The Vienna Convention also provides that when interpreting a treaty, “[a]ny relevant rules of international law applicable in the relations between the parties” shall be taken into account, together with the context.<sup>98</sup> Rules of international law include “general principles of law recognized by civilized nations.”<sup>99</sup>

109. Article 10.18.1 of the Treaty, interpreted in good faith and in accordance with the ordinary meaning of its terms, establishes that a respondent consents to arbitration if a claimant submits a dispute to arbitration no more than three years after that claimant first acquired (or should have first acquired) knowledge of the alleged breach and knowledge that it incurred loss or damage. Stated differently, from the moment when a claimant knows (or should have known) about a breach and that it incurred loss or damage as a result, it has three years to initiate an arbitration against the respondent. Claimant did this.

110. The text of Article 10.18.1 is silent concerning the applicability of the three-year limitations period in the event that a claimant timely submits its claim to arbitration, but then is forced to initiate arbitration proceedings a second time, more than three years after first becoming aware of the respondent’s breach. As explained below, under international law, which includes the laws of civilized nations that uphold the rule of law, the timely submission of a claim suspends the applicable limitations period.

111. To Claimant’s knowledge, this issue has not been litigated in investor-state arbitration. But the question poses itself here, given that the *Renco I* arbitration was dismissed, without prejudice to refile, on the basis of Peru’s belated waiver objection, and Claimant subsequently resubmitted its claims to arbitration in the present proceeding.

112. Because the language of Article 10.18.1 by itself is insufficient, the Tribunal, applying Article 31(1) of the Vienna Convention, must first examine the provision’s object and purpose,

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<sup>97</sup> **RLA-3**, Vienna Convention on the Law of Treaties, Art. 31(1).

<sup>98</sup> *Id.*, Art. 31(3)(c). *See also Exhibit C-1*, Treaty, Art. 10.22.1 (“Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”).

<sup>99</sup> **CLA-4**, Statute of the International Court of Justice, Art. 38(1).

and then look to relevant rules of international law. By doing so, this Tribunal will conclude that the limitations period was suspended during the pendency of the *Renco I* arbitration, and as a result, Claimant’s FET and expropriation claims in this arbitration are timely.

## 2. The Object and Purpose of Article 10.18.1 Confirm that Claimant’s Timely Initiation of *Renco I* Suspends the Limitations Period

113. The object and purpose of the limitations period contained in Article 10.18.1 of the U.S.-Peru Trade Promotion Agreement is to “promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties.”<sup>100</sup>

114. Commenting on a substantively identical provision in the Canada-Venezuela bilateral investment treaty,<sup>101</sup> the tribunal in *Vannessa Ventures v. Venezuela* agreed, holding that “the purpose of such a statute of limitation provision is to require diligent prosecution of known claims and insuring that claims will be resolved when evidence is reasonably available and fresh, therefore to protect the potential debtor from late actions.”<sup>102</sup> On that basis, the *Vannessa Ventures* tribunal rejected Venezuela’s allegation that a specific claim concerning copper concessions was time-barred because the claimant had not raised it in its request for arbitration.<sup>103</sup> The tribunal concluded that the claim was not time-barred because *Vannessa Ventures* had discussed the copper concessions in its request for arbitration.<sup>104</sup>

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<sup>100</sup> See **RLA-22**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, March 11, 2016, ¶ 5; and **CLA-5**, *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015, ¶ 7. Article 10.18.1 of the Dominican Republic-Central America-United States Free Trade Agreement, to which the United States referred in its non-disputing party submissions, is identical to Article 10.18.1 of the Treaty.

<sup>101</sup> **CLA-6**, Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, July 1, 1996, Art. XII.3(d) (“An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”).

<sup>102</sup> **CLA-7**, *Vannessa Ventures v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, August 22, 2008 (Charles Brower, Brigitte Stern, Robert Briner (President)), ¶ 3.5.4.

<sup>103</sup> *Id.*, ¶ 3.5.2.

<sup>104</sup> *Id.*, ¶ 3.5.4.

115. Bin Cheng notes that “[a] review of the various international decisions dealing with the subject will show that the *raison d’être* of prescription may be found in the concurrence of two circumstances:— 1. Delay in the presentation of a claim; 2. Imputability of the delay to the negligence of the claimant.”<sup>105</sup>

116. It is clear that the object and purpose of Article 10.18.1 of the Treaty is to prevent claimants from unreasonably delaying the submission of their claims to arbitration, and to ensure that respondents have access to sufficient and reliable evidence to defend themselves, if claims are brought to arbitration. Here, the object and purpose of Article 10.18.1 was satisfied when Claimant timely submitted its FET and expropriation claims to arbitration in August 2011 in *Renco I*, two years and five months after Respondent breached the Treaty for the first time. Claimant did not delay the submission of its claims to arbitration, nor was Renco negligent. By the same token, Peru quickly was put on notice of the need to secure sufficient and reliable evidence to defense itself, which it did.

### **3. General Principles of Law Further Confirm that Claimant’s Timely Initiation of *Renco I* Suspends the Limitations Period**

117. Claimant’s analysis of Article 10.18.1 of the Treaty is well supported by the general principle of law that the timely presentation of a claim to the competent authority suspends limitations periods. International tribunals have endorsed this principle, as have many jurisdictions around the world. It follows that this rule, which stems “from the convergence of national legal orders” and/or is “generally accepted by municipal legal systems,”<sup>106</sup> qualifies as a “general principle of law recognized by civilized nations.” It is a relevant rule of international law that the Tribunal must take into consideration when interpreting Article 10.18.1 pursuant to the Vienna Convention.<sup>107</sup>

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<sup>105</sup> **CLA-8**, Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge Grotius Publications Limited, 1987), 378-379.

<sup>106</sup> **CLA-9**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy’s Request for Immediate Termination and Italy’s Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to intra-EU Disputes, May 7, 2019 (Guido S. Tawil, Brigitte Stern, Jean E. Kalicki (President)), ¶ 119.

<sup>107</sup> *See supra* ¶ 108.

118. Umpire Ralston held in the *Gentini Case*, that “the presentation of a claim to competent authority within proper time will interrupt the running of prescription.”<sup>108</sup> Some jurisdictions go further and state that the limitations period is suspended even if the claim is *procedurally* defective. Importantly, for purposes of this case, the Peruvian Civil Code provides that the notification of a complaint to a debtor interrupts prescription, even if the creditor has gone to an incompetent judge or authority.<sup>109</sup> Peru is raising an objection in this case that is inconsistent with the law that would apply to its own citizens. The Argentinian Civil Code adopts an identical position, and, furthermore, notes that prescription is interrupted even if the complaint is defective.<sup>110</sup>

119. Continental European countries apply the same general principle. The French Civil Code provides that a complaint, even for interim relief, suspends prescription, including in circumstances in which the action was brought before an incompetent jurisdiction or the complaint is annulled because of a *procedural* defect.<sup>111</sup> Notably, Paris is the seat of this arbitration.

120. The German Civil Code provides that prescription is suspended upon institution of a suit and notification of same to the defendant.<sup>112</sup> Similarly, the Spanish Civil Code provides that the initiation of an action before a court suspends the prescription period.<sup>113</sup> And the Portuguese Civil Code provides that prescription is suspended by a summons or any other judicial notification that

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<sup>108</sup> **CLA-10**, *Gentini Case*, Reports of International Arbitral Awards, Vol. X, pp. 551-561, at 561.

<sup>109</sup> **CLA-11**, Civil Code of Peru, Art. 1996 (“*Se interrumpe la prescripción por ... Citación con la demanda o por otro acto con el que se notifique al deudor, aun cuando se haya acudido a un juez o autoridad incompetente.*”).

<sup>110</sup> **CLA-12**, Civil Code of Argentina, Art. 2546 (“*El curso de la prescripción se interrumpe por toda petición del titular del derecho ante autoridad judicial que traduce la intención de no abandonarlo, contra el poseedor, su representante en la posesión, o el deudor, aunque sea defectuosa, realizada por persona incapaz, ante tribunal incompetente, o en el plazo de gracia previsto en el ordenamiento procesal aplicable.*”).

<sup>111</sup> **CLA-13**, Civil Code of France, Art. 2241 (“*La demande en justice, même en référé, interrompt le délai de prescription ainsi que le délai de forclusion. Il en est de même lorsqu’elle est portée devant une juridiction incompétente ou lorsque l’acte de saisine de la juridiction est annulé par l’effet d’un vice de procédure.*”).

<sup>112</sup> **CLA-14**, Civil Code of Germany, Art. 204(1) (“The statute of limitations is tolled upon: the institution of a complaint for ordinary or declaratory civil relief, recognition of an execution clause, or issuance of an execution judgment.”); and **CLA-15**, Code of Civil Procedure of Germany, Art. 167 (“If service is made in order to comply with a deadline, or to have the period of limitations begin anew, or to have it extended pursuant to Article 204 of the Civil Code, the receipt of the corresponding application or declaration by the court shall already have this effect provided service is made in the near future.”).

<sup>113</sup> **CLA-16**, Civil Code of Spain, Art. 1973 (“*La prescripción de las acciones se interrumpe por su ejercicio ante los Tribunales, por reclamación extrajudicial del acreedor y por cualquier acto de reconocimiento de la deuda por el deudor.*”).

expresses the complainant's intention to exercise a right, even if the court lacks jurisdiction, and even if the summons or notification is subsequently annulled.<sup>114</sup>

121. Common law jurisdictions uphold this notion as well. In the United Kingdom, time ceases to run against a claimant when he or she commences proceedings.<sup>115</sup> And in the United States, the Supreme Court in *Henderson v. United States* held that “[i]n a suit on a right created by federal law, filing a complaint suffices to satisfy the statute of limitations.”<sup>116</sup>

122. In addition, international tribunals long have held that a limitations period is suspended when a government is put on notice of a claim. For example, Commissioner Little in *Williams v. Venezuela* held that a prescription period is suspended when the debtor government is duly notified of the claimant's claim.<sup>117</sup> He reasoned that such notification “puts that government on notice, and enables it to collect and preserve its evidence and prepare its defense.”<sup>118</sup>

123. In the 1903 *Giacopini Case*, the Italian government requested compensation on behalf of Domenico and Giuseppe Giacopini, who had suffered harm in Venezuela in 1871. The Venezuela Commissioner argued that the claim was untimely because 32 years had elapsed since its origin. Umpire Ralston rejected the prescription argument, noting that the facts of the case established that Venezuela had been put on notice of the incidents involving the Giacopinis in 1872. Umpire Ralston concluded that “full notice having been given to the defendant, no danger of injustice exists, and the rule of prescription fails.”<sup>119</sup> Umpire Ralston came to the same conclusion on the basis of similar facts in the *Tagliaferro Case*. Although 31 years had elapsed between the incidents complained of and the presentation of the claim to the Mixed Claims Commission (Italy-

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<sup>114</sup> **CLA-17**, Civil Code of Portugal, Art. 323(1) (“*A prescrição interrompe-se pela citação ou notificação judicial de qualquer acto que exprima, directa ou indirectamente, a intenção de exercer o direito, seja qual for o processo a que o acto pertence e ainda que o tribunal seja incompetente.*”) and Art. 323(3) (“*A anulação da citação ou notificação não impede o efeito interruptivo previsto nos números anteriores.*”)

<sup>115</sup> **CLA-18**, The Law Commission (Law Com No. 270), Limitation of Actions, Item 2 of the Seventh Programme of Law Reform: Limitation of Actions, ¶ 2.94.

<sup>116</sup> **CLA-19**, *Henderson v. United States*, 517 U.S. 654 (1996), 657 n. 2.

<sup>117</sup> **CLA-20**, *Case of John H. Williams v. Venezuela*, Reports of International Arbitral Awards, Vol. XXIX, pp. 279-293, at 291.

<sup>118</sup> *Id.*

<sup>119</sup> **CLA-21**, *Giacopini Case*, Reports of International Arbitral Awards, Vol. X, pp. 594-596, at 595.



Venezuela), Umpire Ralston found that the responsible authorities had known of the wrongdoing “at all times.” As a result, he concluded that “[w]hen the reason for the rule of prescription ceases, the rule ceases, and such is the case now.”<sup>120</sup>

124. In light of the above, the Tribunal’s interpretation of Article 10.18.1 of the Treaty should take into account the rule of international law, based on a general principle of law recognized by civilized nations, that a limitations period is suspended if the claimant timely submits its claim to the proper authority and/or if the government is put on notice of the claim. This is the case even if the submission contains a procedural defect that the claimant cures in a subsequent filing, as outlined above.

125. Here, there is no dispute that Renco timely submitted its FET and expropriation claims in *Renco I* to the competent authority, within the three-year period provided under Article 10.18.1, and that Peru was put on notice of Claimant’s claims. Thus, the limitations period in this case was suspended during the five years and three months of the pendency of the *Renco I* arbitration.

#### **4. Respondent’s Interpretation of Article 10.18.1 is Contrary to its Object and Purpose and General Principles of Law**

126. Contrary to the object and purpose of Article 10.18.1 and the well-established principles of international law described above, Respondent alleges that the three-year limitations period under Article 10.18.1 is “clear and rigid” and “not subject to any suspension, tolling, prolongation or other qualification.”<sup>121</sup> In support of its allegation, Respondent relies on a non-disputing party submission that the United States filed in the *Gramercy v. Peru* case, which itself cites to tribunals that addressed the identical limitations provisions contained in Articles 1116(2) and 1117(2) of the North American Free Trade Agreement.<sup>122</sup>

127. Peru’s reliance on the United States’ submission in *Gramercy* and the decisions cited therein is misplaced because the claimants in those cases failed to begin any arbitration proceeding

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<sup>120</sup> **CLA-22**, *Tagliaferro Case*, Reports of International Arbitral Awards, Vol. X, pp. 592-594, at 593.

<sup>121</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 23.

<sup>122</sup> *Id.*, ¶ 23, n. 20; **Exhibit R-13**, *Gramercy Funds Management LLC et al. v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, ¶ 6.

within the three-year window, which is not the case here.<sup>123</sup> For example, in *Grand River v. United States of America*, the claimants submitted their notice of arbitration on March 12, 2004. The tribunal held that the claimants should have known about some of the respondent's alleged treaty breaches and of the resulting loss or damage that the claimants had incurred prior to March 12, 2001, the date of the three-year cutoff for purposes of the limitations provision under NAFTA Articles 1116(2) and 1117(2).<sup>124</sup> The *Grand River* tribunal concluded that those claims were time-barred.<sup>125</sup>

128. Renco's circumstances obviously are materially different. Claimant initiated an arbitration within three years of becoming aware of Respondent's Treaty breaches, in compliance with Article 10.18.1. The *Renco I* arbitration lasted more than five years because Respondent waited for three and one half years to raise its technical waiver objection.<sup>126</sup> Claimant promptly initiated this second arbitration after a majority of the *Renco I* tribunal declined jurisdiction over Claimant's claims on the basis of Respondent's belated waiver objection, and after Peru ended the consultation in which the parties were engaged.<sup>127</sup> Therefore, the Tribunal should not place any weight on the manner in which the United States and other tribunals, faced with very different facts, characterized the language of Article 10.18.1 and other identical provisions.

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<sup>123</sup> See, e.g., **CLA-23**, *Gramercy Funds Management LLC et al. v. Republic of Peru*, ICSID Case No. UNCT/18/2, Statement of Defense of the Republic of Peru, December 14, 2018, ¶¶ 182 *et seq.*; **CLA-24**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 (Ronald A. Cass, Céline Lévesque, James R. Crawford (President)), ¶ 155; and **CLA-25**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶¶ 55-58.

<sup>124</sup> **RLA-10**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 (James Anaya, John R. Crook, Fali S. Nariman (President)), ¶ 83.

<sup>125</sup> *Id.* See also **CLA-26**, *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility, June 14, 2013 (Fern M. Smith, Clifford M. Davidson, Toby T. Landau (President)), ¶¶ 315, 318, 324; **RLA-23**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶¶ 237-238; **RLA-21**, *William Ralph Clayton et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Admissibility, March 17, 2015 (Donald McRae, Bryan Schwartz, Bruno Simma (President)), ¶ 281; and **RLA-26**, *Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected), May 30, 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)), ¶¶ 228 *et seq.*

<sup>126</sup> See *supra* ¶¶ 84 *et seq.*

<sup>127</sup> See *supra* ¶¶ 102-104.

129. Moreover, some of the cases upon which Peru relies actually support Claimant’s position that its timely initiation of *Renco I* suspended the three-year limitations period in Article 10.18.1. For example, the *Feldman v. Mexico* tribunal conceded that “an acknowledgment of the claim under dispute by the organ competent to that effect and in the form prescribed by law would probably *interrupt the running of the period of limitation.*”<sup>128</sup>

130. Here, Respondent acknowledged Claimant’s claims by participating in *Renco I*; never questioning that it was aware of the dispute and of its obligations to retain documents and defend itself (among other things); and, after *Renco I* concluded, by negotiating and entering into several agreements with Renco between 2016 and 2018 to attempt to settle the dispute.<sup>129</sup> Having delayed advancing its waiver objection in *Renco I* for years, Respondent now is acting in bad faith by raising an Article 10.18.1 objection, exactly as Claimant predicted in *Renco I*,<sup>130</sup> notwithstanding the fact that Peru has been aware of Claimant’s claims since 2011 and is suffering no limitations prejudice as a result of Claimant’s resubmission of its claims in this arbitration.

131. In conclusion, under applicable international law as discussed above, the Tribunal should find that the three-year limitations period under Article 10.18.1 of the Treaty was suspended when Claimant timely submitted its FET and expropriation claims to arbitration on August 9, 2011 (the date on which *Renco I* was initiated). Because the passage of time during *Renco I* does not count towards the three-year limitations period in Article 10.18.1, and the parties agree that the time between November 10, 2016 and October 20, 2018 does not count either, Claimant’s FET and expropriation claims in this arbitration comply with the requirements of Article 10.18.1, and are not time-barred.

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<sup>128</sup> **CLA-25**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶ 63 (emphasis added). The United States cited this very paragraph in support of its characterization of Article 10.18.1 of the Treaty in its non-disputing party submission in *Gramercy Funds Management LLC et al. v. Republic of Peru*.

<sup>129</sup> *See supra* ¶ 103.

<sup>130</sup> *See infra* ¶¶ 137 *et seq.*

**D. GIVEN PERU’S CONDUCT IN *RENCO I*, PERU’S OBJECTIONS TO CLAIMANT’S FET AND EXPROPRIATION CLAIMS ON THE BASIS OF ARTICLE 10.18.1 ARE AN ABUSE OF RIGHTS, WHICH THE TRIBUNAL SHOULD NOT ALLOW**

132. On April 4, 2011, Claimant (with DRP) submitted a Notice of Arbitration with a waiver that included reservation of rights language.<sup>131</sup> Three and one half years later, on October 3, 2014, Peru argued for the very first time that Claimant’s waiver did not comply with the Article 10.18.2 of the Treaty because the waiver included the additional reservation of rights language.<sup>132</sup> During those three and a half years, Respondent had countless opportunities to raise its objection relating to Claimant’s waiver. But Peru did not do so. Therefore, for three and a half years, Peru concealed its objection that Claimant’s reservation of rights language in its waiver did not comply with the Treaty (or ignored that this language could be viewed as not complying with the Treaty).

133. Regardless of whether it was intentional gamesmanship or an oversight, Peru cannot be permitted to delay the first arbitration by running the clock on its waiver objection, and then turn around in the second arbitration and object that Claimant’s claims are time-barred under Article 10.18.1. This Tribunal should not countenance Respondent’s tactics.

134. The *Renco I* tribunal unanimously emphasized that it had been “troubled” by Respondent’s conduct.<sup>133</sup> It made clear that because of Peru’s troublesome and suspicious three and one half year delay in raising its waiver objection, the tribunal did not “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).*”<sup>134</sup> The *Renco I* tribunal also noted that “Peru has suffered no material prejudice as a result of the reservation of rights in Renco’s waiver,” whereas “Renco would suffer material prejudice if Peru were to claim in any subsequent arbitration that Renco’s claims were now time-barred under Article 10.18(1).”<sup>135</sup>

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<sup>131</sup> See *supra* ¶ 84.

<sup>132</sup> See *supra* ¶ 98.

<sup>133</sup> **Exhibit R-8**, *The Renco Group Inc. v. Republic of Peru*, UNCITRAL, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016 (L. Yves Fortier, Toby T. Landau, Michael J. Moser (President)), ¶ 123.

<sup>134</sup> *Id.*, ¶ 187 (emphasis added).

<sup>135</sup> *Id.*

135. It is well-settled that a right may be refused recognition on the ground that it is being abused. The test is whether a party exercising its right is doing so in furtherance of the interests which the right is intended to protect, or instead for purposes of prejudicing the interests of the other party. Importantly, bad faith is not necessary to prove that a right is being abused. Here, the abuse of rights doctrine prevents Peru from improperly benefiting from its own delay in order to deny Claimant's right to have its FET and expropriation claims heard by this Tribunal. Therefore, in addition to the international law principles set forth above which uniformly support Claimant's position that its claims are timely, because the prescription period was suspended during the pendency of *Renco I*, Respondent's Article 10.18.1 objection also amounts to an abuse of rights which precludes Peru from invoking Article 10.18.1 in relation to Renco's FET and expropriation claims. As the *Renco I* tribunal noted, in this way, justice would be served.<sup>136</sup>

**1. Respondent Delayed Raising its Waiver Objection in *Renco I* for Three and one Half Years, and Then Refused to Address Claimant's Concerns Regarding the Limitations Period**

136. The procedural history of *Renco I* demonstrates that Peru's raising of an Article 10.18.1 objection in the present arbitration, in relation to Claimant's FET and expropriation claims, is contrary to justice and constitutes an abuse of rights. From the outset of *Renco I*, as explained above, Peru had countless opportunities to object to Claimant's inclusion of reservation of rights language in its written waiver. But, for three and a half years, Respondent repeatedly chose not to do so, even as it raised other objections to the tribunal's jurisdiction.<sup>137</sup>

137. Alarmed by Peru's tactics when, four years after the fact, Peru clearly and coherently objected to the reservation of rights language in Claimant's waiver, Claimant voiced its fears regarding a future Article 10.18.1 objection by Peru in a subsequent arbitration. The parties and the *Renco I* tribunal engaged meaningfully on this issue, in both written and oral submissions, as described in detail below.

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<sup>136</sup> *Id.*, ¶ 188.

<sup>137</sup> *See supra* ¶¶ 84 *et seq.*

138. On September 2, 2015, during oral submissions on Peru’s waiver objection in *Renco I*, Renco explained that it was not prepared to strike the reservation of rights language from its waiver until Peru assured Claimant that it would not raise an Article 10.18.1 objection:

I will respond very briefly to a point that I heard this morning, which was, if it didn't reserve more than what the Treaty already provides, why isn't Renco just striking it? The answer to that question lies in the fact that Peru has not raised this formal defect issue until long after the Procedural Order No. 1 and we got their 10.24 submissions. We had no idea that they objected to this formal defect until then, which was just recently... So if we could with assurance strike the language now, with assurance that Peru would not then bring another claim such that we--we're now in breach of the statute of limitations, we would strike it.

[...]

The only reason I said that was in response to a statement this morning by Peru that because we have not released and erased that language and stricken it already, it must have an important surreptitious meaning; otherwise, why wouldn't we have just given it up? Why are we all debating this? And it seems as though our instinct was correct, that if we were to do that now, Peru would then turn round and say, You've now violated the statute of limitations. You've submitted a defective waiver. You can't cure it now. So that is the reason that I raise the statute of limitations issue and the fact that we have cured. It's not that we think, as I have said ad nauseam, that the reservation does anything more than the Treaty already allows. But if there were not a potential statute of limitations issue, then this--then this issue would have gone away long ago. They just can't have their cake and eat it too.<sup>138</sup>

139. Peru deflected Renco’s concerns. Respondent refused to take any responsibility for its own role in the creation of the limitations issue, and proceeded to classify the predicament that Renco faced as merely a normal “aspect of judicial systems:”

In nearly, I think, every judicial system, there are certain statutes of limitations. So if you are unsatisfied with any type of a measure, even if it's a contract claim or whatever it is, you are only going to have a certain amount of time when you are able to challenge that, and then it will become final. That's just a--an aspect of judicial systems. And that cannot be a reason to permit an exception to the waiver requirement.<sup>139</sup>

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<sup>138</sup> **Exhibit C-35**, Transcript on the Waiver Requirement of Article 10.18 of the United States-Peru Trade Promotion Agreement, September 2, 2015, at 122:15-22 - 124:1-6; 269:3-21 (emphasis added).

<sup>139</sup> *Id.*, at 239:2-13, 250:20-22 - 251:1-6.

140. The *Renco I* tribunal was clearly interested in Claimant’s Catch-22 dilemma. After the hearing, on September 16, 2015, the tribunal asked Renco to provide written submissions on what Renco meant when it asked Peru to commit to a “no harm/foul, no statute of limitations issue.” The Tribunal wrote:

At the Hearing, counsel for Renco maintained that the additional language contained in Renco’s waiver was “superfluous” [] and “doesn’t do anything more than the Treaty allows” []. Counsel for Renco went on to state:

“...[I]f Peru were [to] commit that no harm/foul, no statute of limitations issue, we would—we would quite gladly strike it, because, as I say, it is superfluous and it does nothing more than what the Treaty allows us to do in the first instance...and we would, of course, subject to statute of limitations, we would raise issues. But, you know, that’s the reason we’re not striking it and have not already stricken it.” []

The Tribunal invites Renco to clarify the above. In particular, what was intended by the references to the “no harm/foul, no statute of limitations issue”?<sup>140</sup>

141. Claimant responded to the *Renco I* tribunal’s inquiry as follows:

Renco filed its Notice of Arbitration and Amended Notice of Arbitration well within the three-year statute of limitations under the Treaty. Renco is concerned (and that concern was validated by Peru’s counsel at the hearing) that if Renco were to manually strike the last sentence from its existing waiver now, Peru would argue that the arbitration was not even commenced until that ministerial act takes place, thus implicating the statute of limitations.

What counsel meant by “no harm/no foul/no statute of limitations” was that if Peru truly were concerned about the potential future effect of this language in a proceeding that may never take place, Peru would invite Renco to simply strike the additional language. The fact that Peru has not done so further evidences that Peru is not really concerned with defending against the additional language in a future proceeding—nor could it be in light of the numerous binding statements by Renco that the additional language does not expand the scope of the Treaty, but rather it is an effort by Peru to attempt to avoid the merits of this dispute by advancing hyper-technical waiver objections through hypothetical scenarios that have no real or practical relevance to the circumstances of this case or to potential future proceedings.<sup>141</sup>

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<sup>140</sup> **Exhibit C-36**, Tribunal questions dated September 16, 2015, Question 3.

<sup>141</sup> **Exhibit C-37**, Letter from King & Spalding to Members of Tribunal, September 23, 2015, at 9.

142. In response to the *Renco I* tribunal’s question, Peru blatantly refused to acknowledge its role as the instigator of Claimant’s predicament, stating as follows:

*Request for Undertaking by Respondent* (Question 3). The second question concerns the request by Renco for an undertaking by Peru with reference to the “no harm/foul, no statute of limitations issue” raised by Renco [...] [t]he Treaty imposes the waiver requirement on claimants such as Renco, as both parties to the Treaty, Peru and the United States, agree. The Treaty does not impose an obligation on a respondent State to make undertakings related to a claimant’s failure to comply with the waiver requirement under the Treaty.<sup>142</sup>

143. The parties addressed the statute of limitations issue again in their responses to the *Renco I* tribunal’s questions dated September 27, 2015. Renco raised Peru’s decision not to accept Renco’s offer to cure, and specifically asked the tribunal to issue a Partial Award holding that “all of Renco’s claims shall be deemed submitted to arbitration on the date when Peru received Renco’s Amended Notice of Arbitration.”<sup>143</sup> As it had done previously, Peru attempted to evade the consequences of its actions,<sup>144</sup> asserting rather that it had raised its waiver objection in a timely manner (an assertion which the *Renco I* tribunal later unanimously rejected).<sup>145</sup>

144. Despite the fact that a majority of the *Renco I* tribunal declined jurisdiction over the dispute because of Claimant’s waiver, the *Renco I* tribunal unanimously emphasized *twice* that it was “troubled by the manner in which Peru’s waiver objection arose in this arbitration.”<sup>146</sup> The tribunal noted that even though Claimant had submitted its waiver with its Notice of Arbitration on April

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<sup>142</sup> **Exhibit C-38**, Peru’s Submissions on Matters Arising from the Hearing on Waiver, September 23, 2015, at 3 (emphasis added).

<sup>143</sup> **Exhibit C-39**, Letter from King & Spalding to Members of Tribunal, September 30, 2015, at 7.

<sup>144</sup> **Exhibit C-40**, Peru’s Post-Hearing Reply Submission on Waiver, September 30, 2015, at 8 (“Any effect on any future claim filed by Renco as a result of the dismissal of this claim for lack of jurisdiction as a result of Renco’s failure to file a compliant waiver has no bearing on the decision before this Tribunal, namely, whether Renco has complied with the Treaty and the result of that non-compliance. Renco is neither entitled to presume nor to demand that a sovereign State modify the terms of the Treaty or waive potential defenses that it may have to any future claim in exchange for receiving a waiver that complies with the Treaty and, thus, a valid acceptance to Peru’s offer to arbitrate.”).

<sup>145</sup> *Id.* (“In any event, it is undisputed that Peru raised its objection in a timely manner, well within the time allotted by the Treaty and Arbitration Rules. Peru thus cannot be sanctioned for having acted accordingly.”).

<sup>146</sup> **Exhibit R-8**, *The Renco Group Inc. v. Republic of Peru*, UNCITRAL, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016 (L. Yves Fortier, Toby T. Landau, Michael J. Moser (President)), ¶ 180.



4, 2011, Respondent had not objected to Claimant’s waiver until March 21, 2014, and even then, Respondent’s objection did not focus on the reservation of rights language.<sup>147</sup>

145. The tribunal added that “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 October 6, 2014],”<sup>148</sup> and also that “[t]his 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.”<sup>149</sup> In short, the *Renco I* tribunal disagreed with Peru that its waiver objection had been “timely.”

146. The full text of paragraphs 180 to 183 of the *Renco I* Partial Award states as follows:

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) 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 hearing “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

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<sup>147</sup> *Id.*, ¶¶ 180-181.

<sup>148</sup> *Id.*, ¶ 182.

<sup>149</sup> *Id.*, ¶ 183.

Run Peru, which are lacking here. This objection thus clearly falls within the scope of Article 10.20.4.

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.

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 ...

The 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.<sup>150</sup>

147. The *Renco I* tribunal made clear that because of Respondent's troublesome and suspicious four-year delay in raising its waiver objection, the tribunal did not "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).*"<sup>151</sup> The *Renco I* tribunal noted that "Renco would suffer material prejudice if Peru were to claim in any subsequent arbitration that Renco's claims were now time-barred under Article 10.18(1)," whereas "Peru has suffered no material prejudice as a result of the reservation of rights in Renco's waiver."<sup>152</sup>

148. Furthermore, as Renco had requested, the *Renco I* tribunal concluded that in its unanimous view, "justice would be served if Peru accepted that time stopped running for the purposes of

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<sup>150</sup> *Id.*, ¶¶ 180-183.

<sup>151</sup> *Id.*, ¶ 187 (emphasis added).

<sup>152</sup> *Id.*

Article 10.18.1 when Renco filed its Amended Notice of Arbitration on August 9, 2011.”<sup>153</sup> The tribunal’s unanimity on this point is important, as it stands in stark contrast to the fact that only a majority of the tribunal declined jurisdiction over Claimant’s claims on the basis of Respondent’s waiver objection.

149. The full text of paragraphs 187 and 188 of the *Renco I* Partial Award states as follow:

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

While this Tribunal cannot prevent Peru from exercising in the future what it then considers to be its legal rights, the Tribunal can, and it does, admonish Peru to bear in mind, if that scenario should arise, Renco’s submission that Peru’s conduct with respect to its late raising of the waiver objection constitutes an abuse of rights. In the unanimous view of the Tribunal, justice would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011.<sup>154</sup>

150. In sum, through Respondent’s actions of hiding in the weeds its objection to the reservation of rights language in Claimant’s waiver until many years had passed (whether deliberately, which is a reasonable conclusion, or not), Peru instigated a scenario by which if its waiver objection were successful (which it ultimately turned out to be), it could argue in a refiled arbitration that the three-year limitations period under Article 10.18.1 of the Treaty had expired—exactly as Peru is doing here. In blatant disregard of the *Renco I* tribunal’s admonition, Respondent now is objecting to Claimant’s FET and expropriation claims on the ground that the limitations period for bringing the claims has expired, despite the fact that Peru’s conduct which so troubled the *Renco I* tribunal is the cause of the delay.

151. Respondent’s decision to advance a limitations objection under Article 10.18.1. in this arbitration amounts to an abuse of rights, which this Tribunal should not permit. Accordingly, the

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<sup>153</sup> *Id.*, ¶ 188.

<sup>154</sup> *Id.*, ¶¶ 187-188.

Tribunal should reject Respondent’s Article 10.18.1 objections in relation to Claimant’s FET and expropriation claims.<sup>155</sup>

**2. An Abuse of Rights Occurs When a Party Exercises its Right Unreasonably Without Due Regard to the Interests of Others—This is Precisely What Peru is Doing Here With its Article 10.18.1 Objections**

152. Sir Hersch Lauterpacht wrote that “there is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused.”<sup>156</sup> This observation is based on the principle of good faith, which the International Court of Justice recognized as “one of the basic principles governing the creation and performance of legal obligations.”<sup>157</sup> In that regard, Article 26 of the Vienna Convention on the Law of Treaties provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>158</sup>

153. A State’s good faith exercise of a treaty right means that a State must act reasonably, in a manner that “is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect).”<sup>159</sup> In addition, the State should conduct itself fairly and equitably, and not exercise its right in a way that “is calculated to procure ... an unfair advantage...”<sup>160</sup> In other words, “the exercise of the right in such a manner as to prejudice the

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<sup>155</sup> Respondent alleges, on the basis of the clean hands principle, that Claimant’s submission of a non-compliant waiver in *Renco I* means that Claimant cannot in this arbitration “justify or excuse its ongoing violation of still other Treaty requirements (*e.g.*, the temporal provisions)” (*see* Memorial on Preliminary Objections, December 20, 2019, ¶ 92). That allegation is nonsensical. First, the submission of a non-compliant waiver is not an internationally wrongful act, such as slavery or piracy, that would give rise to the application of the clean hands principle. But assuming for the sake of argument that it was, this principle “only applies in so far as the claim itself is based upon an unlawful act. It does not apply to cases where, though the claimant may be guilty of an unlawful act, such act is juridically extraneous to the cause of the action” (*see* CLA-8, Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge Grotius Publications Limited, 1987), 157-158). Here, it is clear that Claimant’s submission of a non-compliant waiver is “juridically extraneous” to its claims that Respondent breached Articles 10.5 and 10.7 of the Treaty. Accordingly, the Tribunal should reject Respondent’s baseless allegation.

<sup>156</sup> CLA-27, Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge Grotius Publications Limited, 1982), 164.

<sup>157</sup> *See* CLA-28, *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, 268 (¶ 46).

<sup>158</sup> RLA-3, Vienna Convention on the Law of Treaties, Art. 26.

<sup>159</sup> CLA-8, Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge Grotius Publications Limited, 1987), 125.

<sup>160</sup> *Id.*

interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation...”<sup>161</sup> Peru’s conduct here in raising a limitations objection under Article 10.18.1 falls well short of this standard.

154. According to Bin Cheng, the principle of good faith that governs a State’s exercise of its treaty rights imposes a “fair balance” between “the legitimate interests of the owner of the right” and “the legitimate interests of the other contracting party.”<sup>162</sup> Therefore, in order to decide whether or not a State exercised a right in good faith, “an international tribunal must examine whether the exercise of the right was in pursuit of the legitimate interests protected by it and whether, in the light of the obligations assumed by the State, the exercise of the right was calculated to prejudice the rights and legitimate interests of the other party under the Treaty.”<sup>163</sup>

155. The Appellate Body of the World Trade Organization echoed Bin Cheng’s position by confirming that international law prohibits the abusive exercise by a State of its rights:

This principle [the principle of good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by States. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights...<sup>164</sup>

156. Investment treaty tribunals also uniformly endorse the abuse of rights theory as a fundamental principle of international law, as well as investment law. For example, the tribunal in *Abaclat v. Argentina* found that this theory was “an expression of the more general principle of good faith,” which itself is “a fundamental principle of international law, as well as investment

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*, at 129.

<sup>163</sup> *Id.*, at 128-129.

<sup>164</sup> **CLA-29**, WTO Appellate Body, Decision WT/DS58/AB/R, United States – Import Prohibition of Certain Shrimp and Shrimp Products, October 12, 1998, ¶ 158.

law.”<sup>165</sup> Tribunals have held that to determine whether an abuse of rights has occurred, all of the case’s circumstances should be considered.<sup>166</sup>

157. Importantly, as noted above, it is not necessary to prove (or even allege) bad faith to establish that a State has exercised its rights abusively.<sup>167</sup> Even if Peru did not purposefully conceal its objection to the additional reservation of rights language that Renco added to its waiver for three and one half years, but was simply unaware of the issue (which only Peru knows), Peru’s current conduct in raising its limitations objection under Article 10.18.1 in *this* arbitration still constitutes an abuse of rights.

158. At least one international tribunal found that the State could not invoke a defense of prescription because it was responsible for the claimant’s delay in bringing the claim. In the 1903 *Stevenson Case*, the Commissioner for Venezuela objected to the presentation of the claim due to the passage of time.<sup>168</sup> Umpire Plumley, who adjudicated the *Stevenson Case*, noted that the claim had been presented to the British Mixed Commission in 1869, and that the Venezuelan Commissioner had refused to consider the case. The British government subsequently had attempted to settle the claim with Venezuela on several occasions, to no avail.<sup>169</sup> As a result, Umpire Plumley rejected Venezuela’s objection, finding that “it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent Government.”<sup>170</sup>

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<sup>165</sup> **CLA-30**, *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011 (Albert Jan van den Berg, Georges Abi-Saab, Pierre Tercier (President)), ¶ 646. See also **CLA-31**, *Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010 (Gabrielle Kaufmann-Kohler, Ahmed Sadek El-Kosheri, Gilbert Guillaume (President)), ¶¶ 167 *et seq.*

<sup>166</sup> **CLA-32**, *Transglobal Green Energy LLC et al. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, June 2, 2016 (Jan Paulsson, Christoph Schreuer, Andrés Rigo Sureda (President)), ¶ 103; **CLA-33**, *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, February 8, 2013 (Andrés Rigo Sureda, Brigitte Stern, Campbell McLachlan (President)), ¶ 147.

<sup>167</sup> **CLA-34**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015 (Gabrielle Kaufmann-Kohler, Donald M. McRae, Karl-Heinz Böckstiegel (President)), ¶ 539.

<sup>168</sup> **CLA-35**, *Stevenson Case*, Reports of International Arbitral Awards, Vol. IX, pp. 385-387, at 385.

<sup>169</sup> *Id.*, at 385-386.

<sup>170</sup> *Id.*, at 387. See also **CLA-36**, *Irene Roberts Case*, Reports of International Arbitral Award, Vol. IX, pp. 204-208, at 207 (“The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan

159. Similarly, as the *Renco I* tribunal correctly noted, it is one thing for Respondent to insist upon a clear and clean waiver with no reservation of rights (which Renco offered but for tactical reasons Peru rejected). It is quite another for Peru to then object to a refiled arbitration, one that cures the technical defect, on the baseless and bad faith ground that the new filing is untimely. If ever there were an abuse of rights, this is it. As noted above, but it bears repeating, the *Renco I* tribunal—which lived through Peru’s antics—recorded its view on the possibility of an abuse of rights occurring in *this* arbitration as follows:

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

While this Tribunal cannot prevent Peru from exercising in the future what it then considers to be its legal rights, the Tribunal can, and it does, admonish Peru to bear in mind, if that scenario should arise, Renco’s submission that Peru’s conduct with respect to its late raising of the waiver objection constitutes an abuse of rights. *In the unanimous view of the Tribunal, justice would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011.*<sup>171</sup>

160. Thus, in addition to the fact that the limitations period was suspended during the pendency of *Renco I* under settled international law (as addressed in **Section V(C)** above), making Renco’s filing of this arbitration timely, Peru’s abuse of rights in bringing a limitations objection under Article 10.18.1 of the Treaty in this arbitration provides a second, independent ground to deny Peru’s objection.

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Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose.”).

<sup>171</sup> **Exhibit R-8**, *The Renco Group Inc. v. Republic of Peru*, UNCITRAL, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016 (L. Yves Fortier, Toby T. Landau, Michael J. Moser (President)), ¶¶ 187-188 (emphasis added).

**E. CLAIMANT’S DENIAL OF JUSTICE CLAIM IS NOT TIME-BARRED BECAUSE RESPONDENT’S TREATY BREACH OCCURRED IN NOVEMBER 2015, WHEN THE PERUVIAN SUPREME COURT REJECTED DRP’S APPEAL**

161. Claimant’s claim that the Peruvian judiciary’s failure to nullify a patently improper credit by the Peruvian Ministry of Energy and Mines constitutes a denial of justice, in breach of Article 10.5, also satisfies the requirements of Article 10.18.1. It is well settled that a denial of justice claim only arises once local remedies are exhausted. This occurred on November 3, 2015, when the Peruvian Supreme Court rejected DRP’s appeal on the issue of MEM’s credit. That is the date when Claimant first became aware of Peru’s Treaty breach, and that the breach caused it harm. Because Claimant initiated this arbitration on October 23, 2018, within three years of the Supreme Court’s decision, Claimant’s denial of justice claim is not time-barred.

162. Peru does not dispute the facts underlying Claimant’s denial of justice claim,<sup>172</sup> which are briefly reiterated here. After DRP entered bankruptcy in February 2010, MEM asserted a claim for US\$ 163 million.<sup>173</sup> DRP opposed MEM’s alleged credit and in February 2011, the Bankruptcy Commission of INDECOPI found in favor of DRP and rejected MEM’s credit, holding that MEM’s claims were not a “debt” of DRP and, therefore, not a claim that could be recognized in the bankruptcy process.<sup>174</sup> MEM appealed that ruling. In November 2011, the Bankruptcy Chamber found for MEM, reversing the Bankruptcy Commission’s decision.<sup>175</sup>

163. DRP challenged the Bankruptcy Chamber’s resolution in an administrative action before the Peruvian courts. However, in October 2012, the Fourth Transitory Administrative Court of Lima rejected DRP’s request, and upheld MEM’s US\$ 163 million bankruptcy credit.<sup>176</sup> In July 2014, a special chamber of the Lima Superior Court affirmed this decision in a split 3-2 vote.<sup>177</sup>

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<sup>172</sup> Memorial on Preliminary Objections, December 20, 2019, ¶¶ 76 *et seq.*

<sup>173</sup> *See supra* ¶ 39.

<sup>174</sup> *See supra* ¶ 42.

<sup>175</sup> *Id.*

<sup>176</sup> *See supra* ¶ 43.

<sup>177</sup> *Id.*



DRP then appealed that decision to the Supreme Court of Justice. On November 3, 2015, the Supreme Court rejected DRP's appeal.<sup>178</sup>

164. Despite agreeing with Renco on the facts, Peru alleges that Claimant's denial of justice claim "did not materialize" with the Supreme Court's decision, which it characterizes, without explanation, as an "outlier event."<sup>179</sup> According to Respondent, Claimant "first knew of any alleged breach and loss or damage before the relevant prescription date in 2013."<sup>180</sup> Specifically, Respondent claims that Claimant "should have known, and indeed knew" that it had a denial of justice claim "since 2010," and in any event no later than 2012, when "Renco's affiliate(s) initiated and pursued the contentious administrative challenge."<sup>181</sup>

165. Respondent's allegation that Claimant's denial of justice claim does not comply with Article 10.18.1 and is time-barred is predicated on a fundamental misunderstanding of denial of justice under international law. The Tribunal should accordingly reject Respondent's objection. As set forth in more detail below, a denial of justice—and therefore a Treaty breach—occurs only if and when local remedies are exhausted. For Renco, that occurred on November 3, 2015, when the Peruvian Supreme Court summarily rejected DRP's appeal.

### **1. A Denial of Justice, and Therefore a Breach of the Treaty, Occurs Only If and When Local Remedies are Exhausted**

166. It is axiomatic that when a court decision is not final and binding, and can be corrected by internal appellate mechanisms, a denial of justice cannot have arisen.<sup>182</sup> In his seminal treatise, Jan Paulsson refers to this well-settled principle as the "finality" requirement.<sup>183</sup> The *Chevron v.*

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<sup>178</sup> *Id.*

<sup>179</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 76.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*, ¶ 80. Respondent also alleges that the breach of the Treaty "would have materialized and been known by the time of the first decision" (*id.*).

<sup>182</sup> **CLA-37**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 28, 2009 (Jan Paulsson (Sole Arbitrator)), ¶ 96.

<sup>183</sup> See **CLA-38**, Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005), p. 100 ("International law attaches state responsibility for judicial action only if it is shown that there was no reasonably available national mechanism to correct the challenged action. In the case of denial of justice, finality is thus a substantive element of the international delict.").

*Ecuador* tribunal, among many that preceded it, observed that the “finality” requirement in a denial of justice case is a “well settled” rule: “In the Tribunal’s view, it is well settled that a claimant asserting a claim for denial of justice committed by a State’s judicial system must satisfy, whether as a matter of jurisdiction or admissibility, a requirement as to the exhaustion of local remedies, or as now better expressed, a substantive rule of finality.”<sup>184</sup>

167. As mentioned above, many tribunals have endorsed the “finality” requirement in denial of justice cases.<sup>185</sup> In *Loewen v. United States*, the tribunal confirmed the requirement of finality, holding that “the State has not spoken until all appeals have been exhausted” and that, therefore, “the State is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort.”<sup>186</sup> The *Loewen* tribunal noted also that it was not aware of any instance where “an international tribunal has held a State responsible for a breach of international law

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<sup>184</sup> **CLA-39**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018 (Horacio A. Grigera Naón, Vaughan Lowe, V.V. Veeder (President)), ¶ 7.117 (citing **CLA-3**, James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002) (“a claim is inadmissible if any available and effective local remedy has not been exhausted ‘when the claim is one to which the rule of exhaustion of local remedies applies’ (Article 44). The rule does not, of course, apply where an initial defect in a lower court is corrected by an appellate court because there can then be no claim for denial of justice.”). See also **CLA-40**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 34877, Interim Award, December 1, 2008 (Charles N. Brower, Albert Jan van den Berg, Karl-Heinz Böckstiegel (President)), ¶ 235 (“exhaustion of local remedies is a required *substantive* element of a claim for denial of justice.”).

<sup>185</sup> See, e.g., **CLA-41**, *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Admissibility, August 24, 2015 (Jan Paulsson, Toby Landau, Pierre Mayer (President)), ¶ 150 (finding a denial of justice where no further appeals were possible under Hungarian law); **CLA-42**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, March 10, 2015 (Francisco Orrego Vicuña, Alexis Mourre, Juan Fernández-Armesto (President)), ¶ 533 (“it is a commonly accepted requirement for the existence of denial of justice that the wronged party has exhausted or demonstrated the futility of pursuing domestic remedies”); **CLA-26**, *Apotex Inc. v. The Government of the United States of America*, Award on Jurisdiction and Admissibility, June 14, 2013 (Fern M. Smith, Clifford M. Davidson, Toby T. Landau (President)), ¶ 282 (“claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself”); **CLA-43**, *Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013 (Bernard Hanotiau, Rolf Knieper, Bernardo M. Cremades (President)), ¶ 443 (“as long as the judicial system is not tested as a whole, ... [there is no denial of justice]. The State does not mistreat a foreign investor unfairly and inequitably by a denial of justice through an appealable decision of a first instance court, but only through the final product of its administration of justice which the investor cannot escape”); **CLA-44**, *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008 (Pierre Mayer, Brigitte Stern, Gabrielle Kaufmann-Kohler (President)), ¶ 260 (declining to find a denial of justice where claimants lodged an appeal and thus claimants “do not complain of the failure of the [entire] legal system as such”).

<sup>186</sup> **CLA-45**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003 (Michael Mustill, Abner J. Mikva, Anthony Mason (President)), ¶ 143.

constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system.”<sup>187</sup>

168. In sum, there can be no denial of justice under well-settled principles of international law, and therefore no breach of the Treaty in this case, without the exhaustion of all local remedies. The parties do not dispute that Renco exhausted all local remedies in respect of its challenge to MEM's improper credit on November 3, 2015, when the Peruvian Supreme Court rejected DRP's appeal, and that Renco initiated this arbitration within three years of November 3, 2015. This should be sufficient for the Tribunal to reject Respondent's objection.

## **2. Respondent Did Not Breach Article 10.5 of the Treaty Until the Peruvian Supreme Court Summarily Rejected DRP's Appeal**

169. The substantive analysis is straightforward. On November 3, 2015, the Peruvian Supreme Court rejected DRP's appeal of the Lima Superior Court's decision upholding MEM's alleged US\$ 163 million bankruptcy credit. That decision was final and binding, and marked the moment at which Claimant exhausted all local remedies concerning the issue of MEM's improper credit. That is when Claimant's denial of justice claim arose.

170. Accordingly, under settled law, the same date of November 3, 2015 is when Respondent breached Article 10.5 of the Treaty. November 3, 2015 also is the date when Claimant first became aware of this Treaty breach and that the breach caused it harm. Claimant initiated this arbitration on October 23, 2018, within three years of the November 3, 2015 date. Thus, Claimant's denial of justice claim complies with the requirements of Article 10.18.1 and is not time-barred.

171. Respondent unsuccessfully attempts to muddy the waters by relying on the decisions in *Mondev v. United States* and *ATA v. Jordan* to allege that “the moment in time that is relevant to the prescription analysis for a denial of justice claim is when the dispute arose, not when remedies were exhausted.”<sup>188</sup> Respondent also relies on *Corona Materials v. Dominican Republic* to allege that Claimant's denial of justice claim is not distinct from its contention that MEM asserted an

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<sup>187</sup> *Id.*, ¶ 154.

<sup>188</sup> Memorial on Preliminary Objections, December 20, 2019, ¶ 80.

improper US\$ 163 million credit, and that as a result, Claimant’s denial of justice claim is time-barred.<sup>189</sup> But Respondent misunderstands and misapplies these decisions.

172. Contrary to Respondent’s allegation, the *Mondev* and *ATA* tribunals never addressed the issue of *prescription* in relation to a denial of justice claim. In fact, the tribunals in both cases addressed instances in which the underlying dispute had arisen *prior to the entry into force of the underlying investment treaty*: “[i]n this case, the Claimant attempts to present a denial of justice as an independent violation of the BIT and to invite the Tribunal to treat it as if it were unconnected to the dispute in order to shift the moment of its occurrence forward and to locate it in time *after* the entry into force of the BIT. But the attempt must fail if, as in this case, the occurrence is part of a dispute which originated before the entry into force of the BIT. For this reason, the Tribunal has concluded that the claim of denial of justice is also inadmissible for lack of jurisdiction *ratione temporis*.”<sup>190</sup>

173. Here, however, the parties agree that the dispute underlying Claimant’s denial of justice claim arose after the Treaty entered into force on February 1, 2009, when MEM asserted a US\$ 163 million credit against DRP after DRP went into bankruptcy in February 2010.<sup>191</sup> Therefore, the decisions in *Mondev* and *ATA* regarding the admissibility of denial of justice claims do not remotely apply to the present case.

174. Moreover, the key element of the time bar analysis under Article 10.18.1 is the moment when the claimant first becomes aware (or first should have become aware) that the respondent *breached the Treaty*. It is not the moment when the dispute arose. As noted above, a denial of justice takes place only when a claimant exhausts all local remedies, not when the claimant first

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<sup>189</sup> *Id.*, ¶ 81.

<sup>190</sup> **RLA-17**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010 (W. Michael Reisman, Ahmed Sadek El-Koshi, L. Yves Fortier (President)), ¶ 108 (emphasis in original). The *ATA* tribunal referred to the *Mondev* case and described it as follows (¶ 109): “The *Mondev* tribunal refused to find jurisdiction *ratione temporis* where the entirety of the events in dispute occurred prior to the entry into force of the treaty at issue in that case and all that was left was the final decision of the Massachusetts Courts.” See also **RLA-8**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award, October 11, 2002 (James Crawford, Stephen M. Schwebel, Ninian Stephen (President)), ¶ 70.

<sup>191</sup> See *supra* ¶ 162; and Memorial on Preliminary Objections, December 20, 2019, ¶ 80 (“In this case, the dispute arose in 2010, when Renco’s affiliate(s) opposed the recognition of the MEM’s credit before INDECOPI and filed a constitutional claim against the threat of INDECOPI’s recognition of that credit.”).

contests a particular measure. That is black letter law, for good reason. Consequently, it is when Claimant exhausted all local remedies—and not before—that Peru’s breach of the Treaty occurred.

175. Respondent’s reliance on *Corona Materials* is also misguided. The *Corona Materials* tribunal’s decision is irrelevant because it was based on facts that are very different to those in the present case, as explained below. In addition, Respondent is wrong about the basis of Claimant’s denial of justice claim, as also explained below.

176. The facts of *Corona Materials* are briefly summarized here. On August 18, 2010, the Dominican Republic refused to grant a final environmental license to Corona Materials for the construction and operation of a mine.<sup>192</sup> On October 5, 2010, the claimant wrote to the State requesting it to reconsider its decision; the State never responded.<sup>193</sup> The cut-off date for purposes of Article 10.18.1 of the DR-CAFTA was June 10, 2011.<sup>194</sup> In the arbitration, the claimant alleged that the Dominican Republic’s denial of the license was a breach of the treaty, and that its failure to respond to the claimant’s request to reconsider its decision constituted “a further, separate breach in the form of a denial of justice, of which the Claimant only gained knowledge *after* the [cut-off] date.”<sup>195</sup>

177. The *Corona Materials* tribunal rejected the claimant’s position that the State’s failure to respond was a separate treaty breach. It held instead that “the Respondent’s failure to reconsider the refusal to grant the license is nothing but an implicit confirmation of its previous decision.”<sup>196</sup> The tribunal found also that the claimant’s denial of justice claim was not, in fact, a denial of

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<sup>192</sup> **CLA-23**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶ 43.

<sup>193</sup> *Id.*, ¶ 45.

<sup>194</sup> *Id.*, ¶ 199

<sup>195</sup> *Id.*, ¶¶ 203-204 (emphasis in original).

<sup>196</sup> *Id.*, ¶¶ 210-212 (“Under the circumstances, the State’s inaction following the Claimant’s efforts to have that very same measure reconsidered cannot be considered a separate breach of the Treaty.”).

justice.<sup>197</sup> It ultimately concluded that the claimant had first known of the alleged treaty breach and of the fact that the breach had caused it harm prior to the June 10, 2011 cut-off date.<sup>198</sup>

178. Because the facts of *Corona Materials* are so different, the tribunal's decision in that case is not material. First, Claimant is not alleging that MEM's improper assertion of a US\$ 163 million credit against DRP constitutes a breach of the Treaty. Second, Claimant's denial of justice claim is not predicated on Respondent's failure to answer a letter (which the *Corona Materials* tribunal found not to be a proper denial of justice claim in any event). Rather, it is based on the final and binding decision of the Peruvian Supreme Court, which put an end to a series of separate administrative and judicial proceedings that all reviewed, and had differing opinions on, the legality of MEM's credit.

179. Thus, Claimant's denial of justice claim truly is about the failure of Respondent's justice system to accord Claimant justice;<sup>199</sup> it is separate and distinct from MEM's improper assertion of a credit against DRP. As such, Claimant's denial of justice claim complies with Article 10.18.1 and is not time-barred. The Tribunal should dismiss Respondent's unsubstantiated objection.

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<sup>197</sup> *Id.*, ¶ 262 (“Having regard to the clear position at international law, as pleaded, the Claimant’s case on denial of justice must fail because it can point to no act or any administrative adjudicatory proceeding before any court or administrative adjudicatory body in the Dominican Republic beyond the unanswered Motion for Reconsideration which, as noted above, did not itself amount to an administrative adjudicatory proceeding.”).

<sup>198</sup> *Id.*, ¶ 237.

<sup>199</sup> *See id.*, ¶ 254 (“The international delict of denial of justice rests upon a specific predicate, namely, the *systemic failure* of the State’s justice system. When a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent’s legal system as a whole has failed to accord justice to the claimant.”) (emphasis in original).

**VI. RELIEF SOUGHT**

180. For the foregoing reasons, Claimant respectfully requests that the Tribunal issue an interim award ordering the following relief:

- 180.1. Declare that Peru's 10.20.5 objections are not admissible, and permit Renco to submit its full Memorial in this case.
- 180.2. In the alternative, deny Peru's 10.20.5 objections, and permit Renco to submit its full Memorial in this case.
- 180.3. In all cases, order Peru to pay for Renco's costs in connection with this phase of the proceeding, including legal fees.

February 21, 2020

Respectfully submitted,



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