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*In the matter of*

**The Renco Group, Inc.**

*Claimant*

v.

**The Republic of Peru**

*Respondent*

*PCA Cases No. 2019-46/47*

# **Peru's Comments on the Non-Disputing Party Submission**

20 March 2020



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**WHITE & CASE**

# Peru's Comments on the Non-Disputing Party Submission

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## **Peru's Comments on the Non-Disputing Party Submission**

1. Pursuant to Procedural Order No. 1, the Republic of Peru ("Peru") hereby submits its comments on the Submission of the Non-Disputing Party the United States of America (the "U.S. Submission") regarding the temporal requirements in Article 10.1.3 and Article 10.18.1 of the Peru-United States Trade Promotion Agreement (the "Treaty").

2. On December 3, 2019, Peru requested that the Tribunal decide certain objections on an expedited basis under the mandatory mechanism set forth in Article 10.20.5 of the Treaty. Peru's request specified that the claims filed by The Renco Group, Inc. ("Renco") under the Treaty are plagued by fatal jurisdictional deficiencies arising from Renco's noncompliance with the Treaty's rigid temporal requirements as to non-retroactivity and prescription. On December 20, 2019, Peru submitted its Memorial on Preliminary Objections further detailing Renco's temporal violations, the necessary consequence of which is that Peru has not consented to this arbitration and the Tribunal has no jurisdiction to hear Renco's claims. On February 21, 2020, Renco filed its Counter-Memorial on Peru's Article 10.20.5 Objections. The United States filed its Submission on March 6, 2020.

3. The U.S. Submission confirms the Contracting Parties' common interpretation of the Treaty across a range of issues, and thus reinforces Peru's preliminary objections. Further to the Treaty's clear language and the Contracting Parties' agreement, Renco's claims must be dismissed:

- *The Framework for Interpreting and Applying the Treaty*
  - Renco has chosen to bring claims under the Treaty between Peru and the United States, the Contracting Parties.
  - Under universally accepted rules of treaty interpretation, the Tribunal must account for the Contracting Parties' subsequent agreement or practice regarding interpretation or application of the Treaty.
  - The Contracting Parties agree on the interpretation of the Treaty's relevant provisions, and the Tribunal must rule accordingly.
- *The Treaty's Non-Retroactivity Requirement*
  - Article 10.1.3 specifies that the Treaty does not bind any Party in relation to any act or fact that took place before the date of entry into force. The Contracting Parties agree that the Treaty does not apply retroactively.
  - The United States further confirms that the non-retroactivity requirement encompasses conduct after the Treaty entered into force that is dependent on pre-Treaty acts and facts, and not independently actionable.
  - The Treaty requires the dismissal of Renco's claims, which violate Article 10.1.3 because they are founded upon significant acts and facts that predate the Treaty's entry into force – notwithstanding Renco's recent, unfounded efforts to shift focus to later alleged measures.

- *The Treaty's Prescription Requirement*
  - Article 10.18.1 provides that no claim may be submitted to arbitration if more than three years have elapsed from the date on which the claimant first acquired, or should have acquired, knowledge of the alleged breach and alleged loss or damage.
  - The Contracting Parties agree that the limitations period is a clear and rigid requirement that is not subject to suspension, prolongation, or other qualification.
  - The Treaty requires dismissal of Renco's claims, which violate Article 10.18.1 because, as Renco largely concedes, it first learned of alleged breaches and damages well over three years before submitting claims in this arbitration.
  - Renco's "abuse" theory is unfounded. Peru diligently raised its waiver objections in *Renco I*, notwithstanding Renco's efforts to defer that and other preliminary objections until the merits phase. Neither the Treaty nor the U.S. Submission lends any support to Renco's reliance on general principles of international law that cannot prevail over the specific requirements of the Treaty
- *The Treaty's Mechanism for Preliminary Objections*
  - The United States also does not address, let alone support, Renco's contention that Peru purportedly did not properly trigger the mandatory expedited review mechanism under Article 10.20.5.
  - Peru filed a request (as the Treaty requires) within 45 days of the constitution of the Tribunal (as the Treaty requires).
  - Renco's attempt to inject additional requirements, and to deny Peru a right to be heard at this juncture, remains unsupported and contrary to the Treaty.

4. Peru appreciates the cooperative relationship that it shares with the United States in matters relating to trade, investment, development, and environmental protection, among others. These shared commitments of Peru and the United States are embodied in the Treaty, which reflects the Contracting Parties' agreement on a broad range of issues negotiated over a period of years. Peru respects its obligations under the Treaty and its rights thereunder, including those related to cooperation in environmental practices and dispute resolution where there is legitimate jurisdiction.

5. The agreement of the Contracting Parties, as reflected in their respective submissions, confirms that Renco's claims fall afoul of both of the Treaty's temporal requirements. Because Renco has violated the Treaty's non-retroactivity requirement and its prescription requirement, Peru has not consented to arbitrate, the Tribunal does not have jurisdiction, and the claims must be dismissed. Peru in any event reserves all rights, including with respect to further objections regarding the legally and factually meritless nature of Renco's claims.

## I. Framework For Interpreting And Applying The Treaty

6. Renco has chosen to bring claims under the Treaty between Peru and the United States. The Contracting Parties agree on the interpretation of the Treaty’s relevant provisions, which the Tribunal must take into account, consistent with the universally accepted principles of treaty interpretation set forth in the Vienna Convention on the Law of Treaties (“Vienna Convention”).

7. Among other relevant provisions, Article 31 of the Vienna Convention requires that the Treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>1</sup> Article 31(3) of the Vienna Convention further specifies as follows:

There *shall* be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.<sup>2</sup>

8. The use of “shall” indicates that recourse to the Contracting Parties’ agreement or practice regarding interpretation or application of the Treaty is mandatory.

9. As Peru has explained, the meaning of the Treaty’s temporal requirements is clear. The Contracting Parties agree on the proper interpretation of Articles 10.1.3 and 10.18.1 of the Treaty. Peru reconfirmed its interpretation in its Memorial on Preliminary Objections, and the United States, in turn, has done so in its Submission.<sup>3</sup> Accordingly, the Tribunal “shall account” for this agreement, further to Article 31(3) of the Vienna Convention, and should disregard Renco’s alternative – and incorrect – interpretations of the Treaty.

10. Renco’s interpretation of the Treaty is different. Rather than applying the terms of Articles 10.1.3 and 10.18.1 in accordance with their clear meaning and the agreement of the Contracting Parties, Renco has put forward different standards and relied on extraneous legal sources. For example, Renco contends that the strict prescription requirement in the Treaty should not apply based on inapplicable principles of international law, which Renco contends suspend the mandatory prescription period or make Peru’s objections abusive.<sup>4</sup> The U.S. Submission gives no support to Renco’s views in this regard. Indeed, it is well established that the Treaty is a *lex specialis*, agreed by Peru and the United States, that supersedes general principles of international law.<sup>5</sup> Accordingly, the specific requirements of the Treaty, and the Contracting Parties’ agreed interpretation of those specific requirements, necessarily prevail over any conflicting position that Renco seeks to advance under general principles of law.

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<sup>1</sup> Vienna Convention, Art. 31(1) (RLA-3); *see also* U.S. Submission n. 13 (confirming that “the Convention is the ‘authoritative guide’ to treaty law and practice”).

<sup>2</sup> Vienna Convention, Art. 31(3) (RLA-3) (emphasis added); *see also Mobil Investments Canada Inc. v. Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, dated 13 July 2018 ¶ 158 (“In accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight.”) (RLA-76).

<sup>3</sup> *See also Gramercy Funds Mgmt. LLC v. Republic of Peru*, Statement of Rejoinder of the Republic of Peru ¶ 8 (quoting the conclusions of public international law expert, Professor Michael Reisman, that “these submissions confirm the Contracting Parties’ agreed interpretation of the Treaty” and that “the Contracting Parties agreed interpretation of the Treaty is an authentic and accurate interpretation”) (RLA-64).

<sup>4</sup> *See, e.g.*, Claimant’s Counter-Memorial on Peru’s 10.20.5 Objections dated 21 Feb. 2020 (“Renco’s Counter-Memorial”) § V.

<sup>5</sup> *See, e.g., Amoco Int’l Fin. Corp. v. Iran*, 15 IRAN-U.S. CL. TRIB. REP. 189, 222, ¶ 112 (1987) (“As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law.”) (RLA-65); *see also infra* Section III.A.2.c.

11. While Renco mischaracterizes certain of the Treaty’s jurisdictional requirements as “technical” or even “hyper-technical” in nature,<sup>6</sup> Renco was required to satisfy *all* of the Treaty’s mandatory requirements – including as to temporal jurisdiction – in order to establish Peru’s consent to arbitrate and the Tribunal’s jurisdiction to adjudicate the dispute.<sup>7</sup> As the U.S. Submission confirms, “the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction,” and the “tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 10.18.1 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) an arbitration claim.”<sup>8</sup> Renco has failed to do so. Consequently, the Tribunal must dismiss all of Renco’s claims.

## II. The Treaty’s Non-Retroactivity Requirement

12. Article 10.1.3 unambiguously provides, and the Contracting Parties agree, that the Treaty does not bind any Party in relation to any act or fact that took place before the date of its entry into force. The Contracting Parties further agree that the non-retroactivity requirement encompasses later measures that are so intertwined with pre-Treaty acts and facts that they cannot be adjudicated independently. As Peru has established, Renco’s claims are founded upon significant acts and facts that predate the Treaty’s entry into force, as well as post-entry into force facts that are not independent from the prior acts. Renco’s efforts to mischaracterize the Treaty standard and reformulate its claims must be rejected, and its claims dismissed.

### A. The Treaty Standard

13. Article 10.1.3 of the Treaty states that, “[f]or 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 the Treaty.<sup>9</sup>

14. As explained in Peru’s Memorial on Preliminary Objections, Article 10.1.3 embodies the fundamental principle that a State can only be internationally responsible for the breach of a treaty obligation if that obligation is in force at the time of the alleged breach. Peru has not consented to arbitrate any claim predicated on acts or facts that took place before the Treaty entered into force, or later measures that are so intertwined with pre-Treaty acts and facts that they are not independently actionable.<sup>10</sup>

#### 1. The Contracting Parties Agree On The Treaty Standard

15. In its Submission, the United States confirms that the Treaty cannot apply retroactively: “[g]iven the rule against retroactivity . . . there must exist ‘conduct of the State after that date [of the Treaty’s entry into force] which is itself a breach.’”<sup>11</sup> Indeed, as the United States specifies, the non-retroactivity requirement in Article 10.1.3 is fundamental in nature: “[t]he phrase ‘for greater certainty’ signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent.”<sup>12</sup>

16. Like Peru, the United States confirms that the non-retroactivity requirement applies to conduct post-dating the entry into force of the Treaty that is not independently actionable:

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<sup>6</sup> See, e.g., Renco’s Counter-Memorial ¶¶ 82, 91, 94.

<sup>7</sup> Peru’s Memorial on Preliminary Objections dated 20 Dec. 2019 (“Peru’s Memorial”) ¶¶ 21-25.

<sup>8</sup> U.S. Submission ¶ 3.

<sup>9</sup> Peru-United States Trade Promotion Agreement (the “Treaty”), Art. 10.1.3 (RLA-1).

<sup>10</sup> Peru’s Memorial ¶¶ 26-28.

<sup>11</sup> U.S. Submission ¶ 9.

<sup>12</sup> U.S. Submission ¶ 8.

As the *Berkowitz* tribunal observed, “pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot . . . constitute a cause of action.” Further, “[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.”<sup>13</sup>

17. Accordingly, the Contracting Parties’ agreed interpretation of Article 10.1.3 underscores that the Tribunal does not have jurisdiction over a claim that is predicated *either* on acts or facts that took place before the Treaty’s entry into force, *or* on post-entry conduct that is rooted in, and not independently actionable from, earlier acts or facts. Renco’s claims fail in both respects, as detailed in Peru’s Memorial and further addressed below in view of the Contracting Parties’ agreement on Treaty interpretation.

## 2. Renco Mischaracterizes The Treaty Standard

18. Notwithstanding the agreement of the Contracting Parties, Renco seeks to limit the scope of the Treaty’s non-retroactivity requirement. Renco concedes 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,” and states that it “has no quarrel with this language of the Treaty or the fundamental principle of non-retroactivity.”<sup>14</sup> That principle is thus undisputed. Renco, however, goes on to assert that Peru is “wrong on the law” as to the application of the non-retroactivity principle to post-entry into force conduct.<sup>15</sup> In fact, it is Renco – not Peru or the United States – that is wrong in this respect.

19. First, Renco challenges as “inapposite” the decision in *Berkowitz v. Costa Rica*, on which both Peru and the United States rely.<sup>16</sup> Notably, Renco does not dispute the holding in *Berkowitz*. Indeed, Renco *agrees* that the tribunal in that case “properly held that it did not have jurisdiction,” because the alleged post-entry into force conduct “was not ‘separable from the [pre-entry into force] measures’ . . . and did not amount ‘to an independently actionable breach.’”<sup>17</sup> That is the same proposition for which Peru and the United States cite *Berkowitz*.<sup>18</sup>

20. Second, Renco suggests that the “basis for the *Berkowitz* tribunal’s ruling” was a distinction between “completed acts with lingering effects, versus continuing wrongful acts.”<sup>19</sup> In fact, the tribunal stated that it was “not drawn to [the] ‘lingering effects’ characterisation of [the post-treaty] acts, as the notion of lingering effects suggests *de minimis* conduct, which the Tribunal considers understates their importance and consequence,” and, notwithstanding the “importance and consequence” of the post-treaty acts, it emphasized that the conduct “of which the Claimants complain is ‘dependent’ conduct” that was “*not independent of*” the pre-treaty conduct alleged.<sup>20</sup> As the tribunal repeatedly reasoned:

[T]he Tribunal emphasizes . . . that pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. . . . [I]t will be necessary to assess whether the claim that is alleged can be sufficiently detached from pre-entry into force acts and facts so as to be independently

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<sup>13</sup> U.S. Submission ¶ 9 (quoting *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 ¶¶ 217, 222 (RLA-26)).

<sup>14</sup> Renco’s Counter-Memorial ¶ 55.

<sup>15</sup> Renco’s Counter-Memorial ¶ 63.

<sup>16</sup> See Renco’s Counter-Memorial ¶¶ 63-68.

<sup>17</sup> Renco’s Counter-Memorial ¶ 65 (quoting *Berkowitz v. Costa Rica*, Interim Award (Corrected), 30 May 2017 ¶ 270 (RLA-26)).

<sup>18</sup> Peru’s Memorial on Preliminary Objections ¶ 27; U.S. Submission ¶ 9.

<sup>19</sup> Renco’s Counter-Memorial ¶ 68.

<sup>20</sup> *Berkowitz v. Costa Rica*, Interim Award (Corrected), ¶ 269 (emphasis added) (RLA-26).

justiciable. . . . To be justiciable, a breach that is alleged to have taken place within the permissible period, from a limitation perspective, must, if it has deep roots in pre-entry into force or pre-critical limitation date conduct, be independently actionable.<sup>21</sup>

21. Thus, the relevant standard, as confirmed by Peru and the United States, concerns whether conduct alleged by Renco to have taken place after the Treaty entered into force can constitute an actionable breach in its own right, separate and apart from pre-Treaty acts or facts. Renco’s attempt to reframe the issue as a question of “lingering effects” or “continuing breach” is misguided. Indeed, Renco itself contends that any such distinction “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.”<sup>22</sup>

22. Third, Renco suggests that *Berkowitz* is Peru’s “sole” authority on the application of non-retroactivity to post-Treaty conduct.<sup>23</sup> In fact, Peru and the United States identified a number of authorities confirming this well-established principle.<sup>24</sup> In *Mondev v. United States*, for example, the tribunal underscored that, notwithstanding any alleged conduct before a treaty’s entry into force, “it must still be possible to point to conduct of the State after that date which is itself a breach.”<sup>25</sup> Similarly, in *EuroGas v. Slovak Republic*, the tribunal held that “[t]he State Parties . . . cannot have intended that [the treaty] be read and applied in a way that exposes them to claims from investors that could date from . . . before the entry into force of the treaty, just because a certain dispute was not settled and/or might give rise to a follow-up action” – and accordingly, that the tribunal “does not accept that an investor may invoke the last event in a series of related or similar actions by the State to claim the benefit of the treaty.”<sup>26</sup>

23. Renco’s unfounded efforts to distinguish *Berkowitz* contradict the Contracting Parties’ agreement that the decision reinforces the scope of the Treaty’s non-retroactivity requirement. Indeed, that ruling – and other similar authorities which Renco chose not to address –

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<sup>21</sup> *Berkowitz v. Costa Rica*, Interim Award (Corrected), ¶¶ 217, 222 (emphasis added) (RLA-26); see also *id.* ¶ 222 (“Such [pre-treaty] acts and facts cannot . . . form the foundation of a finding of liability even in respect of a post-entry into force, or a post-critical limitation date, actionable breach.”); *id.* ¶ 246 (“Claimants have failed to show, again manifestly, in the face of this pre-entry in force, pre-limitation period conduct, that the breaches that they allege are independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted. The Tribunal further considers that the Claimants have failed to show that, even were the Tribunal to accept the existence of an actionable breach post-[entry into force], that that breach could properly be evaluated on the merits without requiring a finding going to the lawfulness of pre-[entry into force] conduct.”) (emphasis in original).

<sup>22</sup> Renco’s Counter-Memorial ¶ 72.

<sup>23</sup> See, e.g., Renco’s Counter-Memorial ¶ 63 (“Peru appears to rely exclusively on the Interim Award in *Berkowitz v. Costa Rica* for its ‘deep roots’ argument . . . .”); *id.* ¶ 67 (contending that “Peru’s argument (and sole reliance on *Berkowitz*) [is] irrelevant here”).

<sup>24</sup> See, e.g., Peru’s Memorial on Preliminary Objections ¶¶ 26-28 (citing, *inter alia*, *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002 ¶ 70 (RLA-8)); *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017 ¶ 459 (RLA-27)); U.S. Submission ¶ 9 (citing, *inter alia*, *Mondev v. United States* ¶¶ 58, 70; *Berkowitz v. Costa Rica* ¶¶ 217, 222; *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 129 (Dec. 2) (Separate Opinion of Judge Fitzmaurice).

<sup>25</sup> *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002 ¶ 70 (RLA-8) (emphasis added).

<sup>26</sup> *EuroGas v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017 ¶¶ 459-460 (RLA-27); see also, e.g., *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 Feb. 2005 (“[A] pre-BIT dispute can relate to the same subject matter as a post-BIT dispute and, by that very fact, run afoul of [the treaty’s non-retroactivity provision].”) (RLA-9); *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008 ¶ 116 (“[E]ven if the events took place before a date and continued or were expressed differently after that date, the decision to be taken is that of knowing whether there is a continuum between the two events or sets of events or whether the nature of one and the other is different and reflects a modification of these facts or of its legal basis. If there is only a simple continuation, competence must be declined. If the events are different, competence is maintained.”) (translation by counsel) (RLA-77).

underscore that jurisdiction does not exist where allegations as to post-entry into force conduct cannot be adjudicated independently of pre-Treaty acts or facts. That is precisely the case here.

## **B. Implications And Application**

24. The U.S. Submission gives no support to Renco’s argument that its claims comply with the Treaty’s non-retroactivity requirement. As Peru has demonstrated, the claims are founded on acts and facts which Renco alleges to have occurred prior to the Treaty’s entry into force, including the alleged measures by the Ministry of Energy and Mines (“MEM”) in granting the Environmental Remediation and Management Program (“PAMA”) extension in 2006, as well as enforcing compliance of Doe Run Peru S.R.LTDA’s (“DRP”) investment and environmental obligations under the PAMA by 2007. Applying the terms of Article 10.1.3 of the Treaty as agreed by the Contracting Parties, Renco’s unfair treatment and expropriation claims must be dismissed.

25. In its Counter-Memorial, Renco attempts to reformulate its claims, asserting that they “are all grounded in, and based upon, acts of Respondent that occurred after the Treaty came into effect.”<sup>27</sup> Renco’s efforts are fatally flawed. As Peru previously demonstrated, the events allegedly relevant to Renco’s claims took place before the Treaty entered into force on February 1, 2009, and the few post-entry into force events are founded upon and inextricably intertwined with the pre-Treaty acts and facts.<sup>28</sup> Renco’s efforts to emphasize allegations post-dating February 2009 are belied by its prior articulation of its claims, both in the initial Treaty case (*Renco I*) and in its Notice of Arbitration and Statement of Claim in this case (*Renco II*).<sup>29</sup> Peru previously provided a comprehensive timeline of Renco’s allegations, illustrating Renco’s failure to submit claims that comply with the Treaty. As the updated timeline in Figure D shows, Renco’s revised articulation is immaterial.

### **1. The Unfair Treatment Claim Arises From Alleged Conduct That Predates The Treaty’s Entry Into Force**

26. Peru previously demonstrated that Renco’s unfair treatment claim violates the Treaty’s non-retroactivity requirement. As Peru has explained, Renco argued in its Notice of Arbitration and Statement of Claim in both *Renco I* and *Renco II* that Peru allegedly “engaged in a pattern of unfair and inequitable treatment” in breach of the Treaty because it “mandated [additional environmental projects] through resolutions,” “granted only a limited extension and imposed additional and onerous obligations upon” DRP, “unreasonably refused . . . a second extension in 2009,” and “engaged in a smear campaign in the press.”<sup>30</sup> As the timelines submitted by Peru underscore – relying on Renco’s own statements – the “pattern” of unfair treatment alleged by Renco predates the Treaty’s entry into force.<sup>31</sup> The few paragraphs devoted to the unfair treatment claim in the Notice of Arbitration and Statement of Claim are predicated upon an alleged “pattern” of conduct firmly rooted in pre-Treaty acts and facts:<sup>32</sup>

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<sup>27</sup> Renco’s Counter-Memorial ¶ 56.

<sup>28</sup> Peru’s Memorial ¶¶ 43-50; Figures A-B.

<sup>29</sup> See, e.g., Peru’s Memorial ¶ 13.

<sup>30</sup> Peru’s Memorial ¶¶ 58-66; *Renco I*, Notice of Arbitration and Statement of Claim ¶¶ 46-51; *Renco II*, Notice of Arbitration and Statement of Claim ¶¶ 62-66.

<sup>31</sup> Peru’s Memorial ¶¶ 58-66; Figures A-B.

<sup>32</sup> Renco’s Notice of Arbitration and Statement of Claim dated 23 Oct. 2018 (“Statement Claim”) ¶¶ 62-66.

- Allegations that “the Peruvian Government Operated One of the Most Polluted Smelter Sites in the World.” Renco alleges that these events took place from “1992 through the 1990s,”<sup>33</sup> and “from the Early 1970s to the Early 1990s.”<sup>34</sup>
- Allegations that “No One was Interested [in the Facility] Because of the Environmental Liabilities.” Renco alleges that these events took place from the “Early 1990s,”<sup>35</sup> and “[i]n 1994.”<sup>36</sup>
- Allegations that Peru agreed “to Assume Substantial Environmental Obligations” and the development of the PAMA for the Facility. Renco alleges that these events took place “[i]n 1995,”<sup>37</sup> “[i]n 1996,”<sup>38</sup> and “[i]n 1997.”<sup>39</sup>
- Allegations related to DRP’s efforts to comply with environmental obligations following its acquisition of the Facility. Renco alleges that these events took place in “1999 and 2000,”<sup>40</sup> “the end of 2001,”<sup>41</sup> and “2003,” including that “MEM also repeatedly asked DRP to add new PAMA projects. For instance, in October 1999, MEM approved DRP’s request to add more PAMA tasks, which increased the originally anticipated PAMA investment amount by US\$ 60,767,000 to total of US\$ 168,342,000,”<sup>42</sup> and “[i]n 2002, MEM asked DRP to engage in eight new emissions reduction projects.”<sup>43</sup>
- Allegations related to DRP’s need for a PAMA extension in 2005 and that “MEM Granted an Unreasonably Short Extension and Imposed New Obligations.”<sup>44</sup>
- Allegations that “DRP realized *as early as 2005* that the La Oroya Complex would not meet the current regulatory standards for lead without significantly more work.”<sup>45</sup>
- Allegations that DRP had an obligation to construct two sulfuric acid plants “beginning in 2003 and ending in 2006,” and discovered three separate plants were needed.<sup>46</sup>
- Allegations that “[u]nder these circumstances, DRP requested a five-year extension to complete the PAMA. [In 2006,] MEM granted DRP only two years and ten months,” and “MEM imposed on DRP 14 new projects.”<sup>47</sup>
- Allegations of DRP having “Completed All PAMA Projects Except for One.” Renco dates these events to as occurring “[b]y January 2007,”<sup>48</sup> “[b]y January 2008”<sup>49</sup> and “[b]y December 2008.”<sup>50</sup>

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<sup>33</sup> Statement Claim ¶ 11 (emphasis added)

<sup>34</sup> *Id.* § IIIA (emphasis added).

<sup>35</sup> Statement of Claim § IIIB (emphasis added).

<sup>36</sup> *Id.* ¶ 14 (emphasis added).

<sup>37</sup> *Id.* ¶ 18 (emphasis added).

<sup>38</sup> *Id.* ¶ 19 (emphasis added).

<sup>39</sup> *Id.* ¶ 19 (emphasis added).

<sup>40</sup> *Id.* ¶ 26 (emphasis added).

<sup>41</sup> *Id.* ¶ 25 (emphasis added).

<sup>42</sup> *Id.* ¶ 21 (emphasis added).

<sup>43</sup> *Id.* ¶ 22 (emphasis added).

<sup>44</sup> *Id.* § IIIE (emphasis added).

<sup>45</sup> *Id.* ¶ 32 (emphasis added).

<sup>46</sup> Statement of Claim ¶ 34 (emphasis added).

<sup>47</sup> *Id.* ¶ 34 (emphasis added).

<sup>48</sup> *Id.* ¶ 36.

<sup>49</sup> *Id.* ¶ 37.

<sup>50</sup> *Id.* § IIIG.

27. In an attempt to circumvent the evident temporal implications, Renco seeks in its Counter-Memorial to reformulate its unfair treatment claim to reduce the scope and focus on a limited set of facts that postdate the Treaty's entry into force, and excise the pre-entry into force set of facts from Renco's claim.<sup>51</sup> Peru notes that this reduction in scope in itself reduces Renco's claim significantly, should the claim ever proceed to the merits – though it should not.

28. Indeed, despite Renco's efforts, the claim still violates the non-retroactivity requirement because the acts alleged to have occurred *after* the Treaty entered into force are inextricably intertwined with, and have deep roots in, the measures and actions that occurred *prior* to the Treaty. The later alleged acts are not separable from the earlier acts, and cannot be independently adjudicated, as the chronology and Renco's own statements again underscore. This is particularly evident from Renco's changing assertions regarding the PAMA. Whereas Renco tied the initial claim to a pattern of acts prior to the Treaty's entry into force, its reformulated claim ties it to a limited set of post-entry into force acts:

- *Initial Claim:* Peru's "pattern" involving "mandated [additional environmental projects] through resolutions," "a limited extension" and "additional and onerous obligations upon DRP," occurred during the decade prior to the Treaty's entry into force. Renco complains that "Peru granted only a limited extension," and as a result, "DRP was understandably unable to complete the final PAMA project and reasonably sought a second extension in 2009," which demonstrates that Renco's unfair treatment claim was necessarily relying on the 2006 extension.<sup>52</sup> Describing the same extension in its 2016 Memorial in *Renco I*, Renco asserted that "[t]he Ministry issued its final report and regulation in May 2006, granting a draconian extension," because, Renco alleged, "the extension provided for only two years and ten months and included numerous conditions."<sup>53</sup> Renco has been complaining all along about Peru's refusal to grant the extensions that DRP wanted.
- *Reformulated Claim:* "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."<sup>54</sup> "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>55</sup>

29. As part of its efforts to reformulate the claim with a post-February 2009 focus, Renco places considerable – and newfound – reliance on a letter from the MEM to DRP dated March 10, 2009, only five weeks after the Treaty entered into force. According to Renco, the MEM letter, denying DRP's request for a PAMA extension, constitutes the first alleged act in breach of Article 10.5 of the Treaty.<sup>56</sup> Renco's reliance on this letter is misplaced.

30. The MEM's letter is a response to an earlier DRP letter requesting an additional extension for DRP's unfulfilled investment and environmental obligations under the PAMA, which DRP had undertaken to complete by 2007.<sup>57</sup> The MEM advised that the request could

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<sup>51</sup> See Renco's Counter-Memorial ¶¶ 57-59.

<sup>52</sup> Statement of Claim ¶¶ 63-64.

<sup>53</sup> *Renco I*, Claimant's Memorial on Liability 20 Feb. 2016 ¶ 151 (R-12-8).

<sup>54</sup> Renco's Counter-Memorial ¶ 57 (emphasis added).

<sup>55</sup> Renco's Counter-Memorial ¶ 61.

<sup>56</sup> See, e.g., Renco's Counter-Memorial ¶ 57.

<sup>57</sup> See, e.g., Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A. "Metaloroya S.A." (the "Contract"), 23 Oct. 1997, Fifth Clause (R-1); Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy dated 28 Apr. 1993, Art. 2 (defining

not move forward because the MEM had already granted the maximum legal extension to DRP. The letter reads in its entirety as follows:

This letter is in regard to the above-referenced document where you state the financial situation of your company and the requirements on the part of the financing entities to obtain a new PAMA extension.

Regarding this matter, I hereby formally inform you that your petition is inadmissible because – as you know – ***Supreme Decree 046-2004-EM set forth the possibility of requesting an exceptional extension of one or more PAMA projects, and only up to December 31, 2005.***

In this sense, it is not possible to grant a new extension within the legal framework in force, so the potential breach of contract on the part of your company is subject to Article 11 of the above-mentioned Supreme Decree 046-2004-EM.

Let me use this opportunity to remind you about your obligation of contributing to the trust in accordance with Article 7.4 of the Supreme Decree 046-2004, if left without financing.<sup>58</sup>

31. As is apparent on its face, this letter was rooted in Peru’s longstanding efforts to enforce applicable environmental and investment obligations for over a decade prior to the Treaty’s entry into force. Far from constituting a new measure (let alone a new breach) by Peru, the letter merely confirmed what was apparent from the terms of the referenced 2004 Supreme Decree. Indeed, the first provision of Supreme Decree 046-2004-EM states:

***Up until December 31, 2005***, entities entitled to engage in mining activity may apply to the . . . Ministry of Energy and Mines, for an extension of the term of execution of one or more specific projects contemplated in the approved . . . PAMA, based on exceptional reasons duly demonstrated in accordance with the procedures established in this Supreme Decree.<sup>59</sup>

32. Thus, Renco’s newfound focus on the March 2009 MEM letter cannot change the fact that the letter is deeply rooted in alleged measures that predate the Treaty’s entry into force. The letter is not an actionable breach in its own right, and could not be adjudicated independently from those pre-Treaty acts and facts with which it is intertwined.

33. Moreover, it was DRP that asked the MEM to act in March 2009, by requesting in a March 5 letter that the MEM “[c]onsider the likelihood of granting a term extension for the fulfillment of our investment obligations derived from PAMA.”<sup>60</sup> Allowing Renco’s claims to proceed on this basis would render the non-retroactivity requirement meaningless by enabling potential claimants to resuscitate claims predating the Treaty by requesting that the State reconsider its prior action, which itself is alleged to be a breach.

34. In any case, Peru notes that, even if the Tribunal finds that Renco’s claim is premised on the MEM’s March 2009 letter (which it is not), and concludes that it does not violate the Treaty’s non-retroactivity requirement (which it does), Renco’s claim should nonetheless be dismissed because March 2009 is far outside the relevant prescription period under Treaty Article 10.18.1, as detailed below.

35. The same is true with respect to Renco’s allegation that, after the Treaty entered into force, Peru “launched a smear campaign against Claimant and DRP which damaged the

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MEM as the competent authority) (R-25); Directorial Resolution No. 017-97-EM/DGM dated 13 Jan. 1997 (R-26). The PAMA was subsequently modified. *See, e.g.*, Directorial Resolution No. 325-97-EM/DGM dated 6 Oct. 1997 (R-27); Directorial Resolution No. 334-97-EM/DGM concerning the split of PAMA for the La Oroya Metallurgical Complex dated 16 Oct. 1997 (R-28).

<sup>58</sup> Letter from the Ministry of Energy and Mines to Doe Run Peru dated 10 Mar. 2009 (emphasis added) (C-6).

<sup>59</sup> Supreme Decree No. 046-2004-EM dated 29 Dec. 2004 (emphasis added) (R-29).

<sup>60</sup> Letter from Doe Run Peru to the Ministry of Energy and Mines dated 5 Mar. 2009 (C-7).

companies' public image."<sup>61</sup> This claim is allegedly supported by "[a] series of negative articles denouncing DRP and the PAMA extension [which] also appeared in the Peruvian press," including statements that "[a] company that abuses the country or plays games like Doe Run should be stopped," and "it should be clear that they [Renco and DRP] will not re-contaminate La Oroya as they have done before."<sup>62</sup> However, what Renco calls a "smear campaign" is simply a series of public statements by Peruvian officials discussing DRP's non-compliance, which was a pattern predating the Treaty's entry into force. For instance, the MEM publicly highlighted in 2004 that "with a view to solving the problem of the Doe Run Company . . . the MEM will pre-publish a draft of a supreme decree that establishes that in case of exceptional reasons a [PAMA] extension or modification would be requested," and "the extension that [DRP] requested (of five additional years) might not be granted," taking into account that DRP "has reported very serious financial problems that could lead to a suspension of its activities and subsequent closure."<sup>63</sup> Thus, Renco is cherry picking post-Treaty incidents inextricably linked to pre-entry into force acts, which is impermissible under the Treaty.

36. In sum, Renco's mischaracterizations of the law and its attempts to reformulate the unfair treatment claim do not cure Renco's failure to comply with the Treaty's non-retroactivity requirement. As Renco's own submissions make clear, its Article 10.5 claim arises *both* from alleged acts or facts that occurred before the Treaty's entry into force *and* from post-entry into force alleged acts or facts that are rooted in, and not independently actionable from, the earlier alleged acts or facts. Accordingly, Renco's claim must be dismissed for lack of jurisdiction pursuant to Article 10.1.3 of the Treaty.

## 2. The Indirect Expropriation Claim Arises From Alleged Conduct That Predates The Treaty's Entry Into Force

37. Peru previously established that the factual basis for Renco's expropriation claim, as articulated in Renco's Notice of Arbitration, is the same as the alleged basis for Renco's unfair treatment claim: *i.e.*, that extensions, new environmental obligations, and public comments contributed to DRP's insolvency and resulted in an indirect expropriation of Renco's alleged investment.<sup>64</sup> Accordingly, and for the same reasons, the expropriation claim also violates the Treaty's non-retroactivity requirement.

38. As with the unfair treatment claim, Renco attempts to reformulate the indirect expropriation claim in its Counter-Memorial to reduce the scope of the claim and focus on a limited set of facts that postdate the Treaty's entry into force. Thus, for example:

- *Initial Claims:* Peru allegedly breached the Treaty because "Peru repeatedly imposed new and expensive environmental obligations on DRP at the same time that it refused to grant DRP reasonable extensions to complete those environmental projects and undermined the few extensions that Peru belatedly granted. At the same time, Peru publically disparaged DRP's reputation and frustrated its ability to obtain needed financing. All of these acts placed DRP in a precarious, unnecessary, and unwarranted

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<sup>61</sup> Renco's Counter-Memorial ¶ 79.

<sup>62</sup> Renco's Counter-Memorial ¶ 36.

<sup>63</sup> La Oroya Marcha A Lima, 2004 ("El ministro de Energía y Minas, Glodomiro Sanchez, adelanto que en el caso de Doe Run no se otorgaría el plazo solicitado por la compañía (de cinco años adicionales) sino que este podría ser menor...el titular de MEM indico que la citada compañía ha informado de problemas financieros muy serios que podrían derivar en una suspensión de sus actividades y un posterior cierre...el ministro de Energía y Minas indico que están pidiendo una garantía financiera que asegure que se va a cumplir con el PAMA en lo referido fundamentalmente a la construcción de una planta de ácido sulfúrico.") (R-31); MEM cuestiona ahora a empresarios por oponerse a regalías mineras, Gestión, MEM cuestiona ahora a empresarios por oponerse a regalías mineras, Gestión (R-35).

<sup>64</sup> Peru's Memorial ¶¶ 69-73.

financial condition, which put it at risk of bankruptcy.”<sup>65</sup> As is the case with the extensions at the heart of the unfair treatment claim, in its 2016 Memorial in *Renco I*, Renco asserted that “[t]he Ministry issued its final report and regulation in May 2006, granting a draconian extension,” because, Renco alleged, “the extension provided for only two years and ten months and included numerous conditions.”<sup>66</sup>

- *Reformulated Claims*: “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,” and “[t]hose events all took place in 2012, after the Treaty entered into effect.”<sup>67</sup>

39. Renco’s focus on 2012 is belied by the fact that Renco first filed its expropriation claim in *Renco I* in 2011 with respect to many of the same alleged measures. Indeed, elsewhere in its Counter-Memorial, Renco suggests that its attempted submission of the expropriation claim in 2011 should suspend the running of the prescription period in this case under Article 10.18.1.<sup>68</sup> Those arguments are meritless, as addressed further below.

40. In any event, even the alleged 2012 measures on which Renco now focuses are inextricably intertwined with, and have deep roots in, measures and actions that occurred prior to the Treaty’s entry into force. The later alleged acts are not separable from earlier acts, cannot be independently adjudicated, and thus fall afoul of the Treaty’s non-retroactivity requirement. This is apparent even on the face of Renco’s claim, and attempted reformulation of the claim, and can be decided on that basis.

41. Moreover, even if one were to look to additional documents, they further underscore Peru’s objections and further undermine Renco’s contentions. Peru notes, for example, that contemporaneous internal Renco documents recently unsealed and made public in the Missouri Litigation reinforce that Renco’s expropriation claim fundamentally turns on acts and facts that predate the Treaty.<sup>69</sup> Some of these documents reveal that, in the months preceding the Treaty’s entry into force, DRP’s management knew that DRP remained in violation of its longstanding investment and environmental obligations, and understood that there were financial and operational consequences for these violations.

42. For example, in 2008, DRP’s management considered that “PAMA non-compliance would force us to stop operations in La Oroya,” that “[u]nder the circumstances, the amount to conclude PAMA is higher than the amount the business generates,” and therefore, “financing is required.”<sup>70</sup> The company, however, decided to “[i]mplement PAMA projects without financing,” and to seek a PAMA extension.<sup>71</sup> DRP’s management also considered that its “revolving loan . . . could be pulled if DRP are in breach of PAMA obligations.”<sup>72</sup>

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<sup>65</sup> Statement of Claim ¶ 68.

<sup>66</sup> *Renco I*, Claimant’s Memorial on Liability 20 Feb. 2016 ¶ 151 (R-12-8).

<sup>67</sup> Renco’s Counter Memorial ¶ 58.

<sup>68</sup> Renco’s Counter-Memorial ¶ 106.

<sup>69</sup> These newly available documents are just the “tip of the iceberg” from the voluminous dockets in the Missouri Litigation, including public and sealed documents, which could be relevant and may have to be brought into the record of this case (*Renco II*) and/or the Contracting Case (*Renco III*) for examination by Respondents and the Tribunal should Renco’s claims proceed to the merits.

<sup>70</sup> DRP Management Review Presentation dated 2 Dec. 2008 at 72 in *A. et al. v. Doe Run Resources Corp., et al.*, (E.D. Mo. Case No. 4:11-cv-00044-CDP), Dkt. 871 Ex. EEE (R-34).

<sup>71</sup> DRP Management Review Presentation dated 2 Dec. 2008 at 72 in *A. et al. v. Doe Run Resources Corp., et al.*, (E.D. Mo. Case No. 4:11-cv-00044-CDP), Dkt. 871 Ex. EEE (R-34).

<sup>72</sup> Doe Run Peru meeting minutes dated 5 Dec. 2008 at 2 in *A. et al. v. Doe Run Resources Corp., et al.*, (E.D. Mo. Case No. 4:11-cv-00044-CDP), Dkt. 871 Ex. GGG (R-33).

43. Thus, even before the Treaty's entry into force, DRP understood that its ongoing noncompliance with PAMA obligations, which had been established years prior, would put DRP in a precarious operational and financial situation.<sup>73</sup> As these internal Renco documents highlight, significant pre-Treaty acts and facts – including measures implemented by Peru and DRP's noncompliance with those measures over time – form the foundation of Renco's expropriation claim with respect to the bankruptcy that followed. Notwithstanding Renco's more recent focus on 2012, those later alleged measures cannot be sufficiently detached from the pre-entry into force acts and facts so as to be independently actionable.

44. Accordingly, Renco's expropriation claim must be dismissed for lack of jurisdiction under Article 10.1.3 because the claim arises *both* from alleged acts or facts that occurred before the Treaty's entry into force, *and* from post-entry into force alleged acts or facts that are rooted in, and not independently actionable from, the earlier alleged acts or facts.

### III. The Treaty's Prescription Requirement

45. Article 10.18.1 unambiguously provides, and the Contracting Parties agree, that no claim may be submitted to arbitration under the Treaty if more than three years have elapsed from the date on which the claimant first acquired, or should have acquired, knowledge of the alleged breach and alleged loss or damage. The Contracting Parties likewise agree that this limitations period is a clear and rigid requirement that is not subject to any suspension, prolongation, or other qualification. Renco's claims violate Article 10.18.1 and must be dismissed because, as Renco concedes, it first learned of the alleged breaches and damages well over three years before submitting claims in this arbitration.

#### A. The Treaty Standard

46. Under Article 10.18.1 of the Treaty, “[n]o claim may be submitted to arbitration . . . if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the [Treaty] breach alleged . . . and knowledge that the claimant . . . has incurred loss or damage.”<sup>74</sup>

47. In its Memorial, Peru established that the prescription period under Article 10.18.1 is a clear and rigid jurisdictional requirement.<sup>75</sup> Constructive knowledge is sufficient to trigger the prescription period; actual knowledge is not required.<sup>76</sup> Peru further established that a claimant need not have full or precise knowledge of loss or damage, or to be able to fully particularize its claim; rather, the limitations period is triggered by the first appreciation of alleged loss or damage.<sup>77</sup> Finally, Peru established that a continuing course of alleged measures

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<sup>73</sup> The DRP bankruptcy was not the first time Renco and its affiliates had used bankruptcy to evade obligations. *See, e.g.,* Roland Klose, Herky Jerk, *Doe Run's Owner Has Done This Before – And That Has Regulators Braced for Trouble*, Riverfront Times dated 20 Feb. 2002 (R-30); Ryan Boysen, *Supreme Court Won't Hear Case On 'Nonsensical' Renco Trial*, LAW360 dated 10 Oct. 2017 (“At trial, jurors heard that Renco and Rennert were well aware in the mid- to late-1990s that the outdated technology at MagCorp’s plant in Utah, which wrung magnesium out of brine extracted from the Great Salt Lake, wasn’t in compliance with new environmental regulations. Instead of investing in new infrastructure, jurors were told, Renco seized on a brief spike in magnesium prices to justify raising \$150 million in bond debt that left the company overleveraged and undercapitalized while simultaneously jacking up the dividend payouts to Renco and Rennert. Rennert used some of that money to finance a sprawling, \$200 million, 29-bedroom compound in the Hamptons, jurors were told.”) (R-32).

<sup>74</sup> Treaty, Art. 10.18.1 (RLA-1).

<sup>75</sup> Peru’s Memorial ¶¶ 21-24, 30-31.

<sup>76</sup> Peru’s Memorial ¶ 32.

<sup>77</sup> Peru’s Memorial ¶ 32.

cannot renew the prescription period, and that to allow otherwise would permit a claimant to evade the limitations period by basing its claim on the most recent measures in a series.<sup>78</sup>

## 1. The Contracting Parties Agree On The Treaty Standard

48. In its Submission, the United States confirms its agreement with Peru in all respects.

49. As to jurisdictional implications, the United States confirms that Article 10.18.1 “imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute,” such that “the Parties did not consent to arbitrate an investment dispute if” it falls outside of the three-year period.<sup>79</sup> The U.S. Submission further affirms that the Treaty’s “limitations period is a ‘*clear and rigid*’ requirement that is not subject to any ‘suspension,’ ‘prolongation,’ or ‘other qualification.’”<sup>80</sup>

50. As to knowledge triggering the prescription period, the U.S. Submission confirms that “a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date,” and that “an investor may ‘incur’ loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.”<sup>81</sup>

51. As to a claimant’s attempt to circumvent the prescription period by focusing on subsequent alleged transgressions, the United States confirms:

An investor or enterprise first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular “date.” Such knowledge cannot first be acquired on multiple dates or on a recurring basis. . . . [S]ubsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. To allow otherwise would permit an investor to evade the limitations period by basing its claim on the most recent transgression in that series, rendering the limitations provisions ineffective.<sup>82</sup>

52. Renco’s claims fail because Renco first acquired (or should have acquired) knowledge of the alleged breaches and corresponding alleged damages well over three years before it submitted claims in this arbitration, as detailed in Peru’s Memorial and further addressed below in view of the Contracting Parties’ agreement on Treaty interpretation.

## 2. Renco Mischaracterizes The Treaty Standard

53. In its Counter-Memorial, Renco seeks to narrow the scope of the prescription requirement by suggesting that the Treaty is “silent” on issues that the Treaty expressly addresses, and by invoking general principles of law as to suspension of prescription which cannot supersede the Treaty’s specific requirements. In both respects, Renco mischaracterizes the applicable standard, contrary to the Treaty and the Contracting Parties’ agreed interpretation of the Treaty.

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<sup>78</sup> Peru’s Memorial ¶ 33.

<sup>79</sup> U.S. Submission ¶ 3 (internal citations omitted).

<sup>80</sup> US Submission ¶ 3 (emphasis added) (quoting *Grand River Enterprises Six Nations, Ltd. v. United States*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 ¶ 29 (RLA-10)).

<sup>81</sup> U.S. Submission ¶ 5 (citing *Grand River Enterprises Six Nations v. United States*, Decision on Objections to Jurisdiction, ¶ 77 (RLA-10); *Berkowitz v. Costa Rica*, Interim Award (Corrected), ¶ 213 (RLA-26)).

<sup>82</sup> U.S. Submission ¶ 4 (emphasis added) (internal citations omitted).

a. The Treaty Text Is Not “Silent”

54. Renco does not contest the ordinary meaning of the three-year prescription period set forth in Article 10.18.1. Remarkably, however, Renco suggests that the Tribunal should “not place *any* weight” on the Contracting Parties’ agreed interpretation – or the consistent rulings of tribunals interpreting the same or similar treaty language – because other cases addressing the prescription requirement involved “very different facts” and “Renco’s circumstances obviously are materially different.”<sup>83</sup> Renco does not even attempt to explain how the alleged *facts* of this case should somehow override the Treaty’s text and prevailing *legal standard*. Indeed, they cannot. This is underscored by the fact that the Contracting Parties’ agreed interpretation of Article 10.18.1 in this proceeding is virtually identical to the interpretations they articulated in *Gramercy v. Peru*, as Peru noted in its Memorial.<sup>84</sup>

55. In an unfounded attempt to rewrite the governing Treaty standard, Renco asserts that “[t]he [t]ext of Article 10.18.1 is [s]ilent as to [w]hether the [i]nitiation of an [a]rbitration [s]uspends the [l]imitations [p]eriod.”<sup>85</sup> Renco thus suggests that the mere “*initiation*” of an arbitral proceeding serves to satisfy the prescription period – and, accordingly, that Renco satisfied the prescription requirement of Article 10.18.1 through its filing of the Notice of Arbitration in *Renco I*.<sup>86</sup> This interpretation is clearly precluded by the Treaty’s express text and the Contracting Parties’ agreed construction.

56. Indeed, the Treaty is not silent or even ambiguous in this regard:

- Article 10.16.2 provides that, “[a]t least 90 days *before submitting any claim to arbitration* under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration.”<sup>87</sup>
- Article 10.16.3 requires that “six months have elapsed since the events giving rise to the claim” before that claim may be submitted to arbitration.
- Article 10.16.4 provides, in relevant part, that a “claim *shall be deemed submitted* to arbitration under this Section when the claimant’s notice of or request for arbitration . . . (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent.”<sup>88</sup>
- Article 10.18.2 provides that “[*n*]o claim may be submitted to arbitration under this Section unless” the notice of arbitration is accompanied by a waiver of the continuation or commencement of local proceedings.<sup>89</sup>
- Article 10.18.1 requires that “[*n*]o claim may be *submitted to arbitration*” if the three-year prescription period has lapsed.<sup>90</sup>

57. These provisions make clear that a mere notice of intent to arbitrate, or even the filing of a notice of arbitration (without more), *do not* suspend the running of the prescription period. Rather, these provisions confirm that the relevant event for purposes of the Treaty’s

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<sup>83</sup> Renco’s Counter-Memorial ¶ 128 (emphasis added).

<sup>84</sup> See Peru’s Memorial ¶¶ 23, 32-33.

<sup>85</sup> Renco’s Counter-Memorial, Heading at 32 & ¶¶ 107-109.

<sup>86</sup> See also, e.g., *id.* ¶ 109 (“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.”).

<sup>87</sup> Treaty, Art. 10.16.2 (RLA-1).

<sup>88</sup> Treaty, Art. 10.16.4 (emphasis added) (RLA-1).

<sup>89</sup> Treaty, Art. 10.18.2 (RLA-1).

<sup>90</sup> Treaty, Art. 10.18.1 (emphasis added) (RLA-1).

prescription period is the *submission of a claim to arbitration*, which requires delivering a notice of intent to arbitrate; waiting 90 days from the date of the notice and six months from events giving rise to the claim; filing a notice of arbitration; filing a valid written waiver as to local proceedings; and complying with the waiver by abstaining from continuing or commencing local proceedings. Until all of these preconditions are met, a claim is not submitted to arbitration – and the prescription period continues to run.

58. Consistent with these clear Treaty requirements, tribunals (including in *Renco I*) and the Contracting Parties (in various proceedings) have repeatedly confirmed that the relevant date for prescription purposes is when a claim has been submitted to arbitration, including through satisfaction of all preconditions to submission of a claim under the Treaty. In *Renco I*, for example, the tribunal held that a valid waiver “is a precondition to the initial existence of a valid arbitration agreement, and as such *leads to a clear timing issue*: if no compliant waiver is served with the notice of arbitration, Peru’s offer to arbitrate has not been accepted; there is no arbitration agreement; and the Tribunal is without any authority whatsoever.”<sup>91</sup> Likewise, in *Feldman v. Mexico*, the United States underscored that “only the submission of a claim to arbitration, and not the delivery of the notice of intent” is relevant for prescription purposes, and that “it is the act of submitting a claim to arbitration . . . that must fall within the three-year limitations period.”<sup>92</sup>

59. Accordingly, the elements that delineate the beginning and the end of the limitations period are clearly stated in the Treaty, and do not include a prior failed attempt to submit claims to arbitration in a separate proceeding. Indeed, the necessary consequence of Renco’s failure to comply with the Treaty’s waiver requirement in *Renco I* is that the claim *was never submitted to arbitration*. Renco’s entire argument as to the “initiation” of arbitration in *Renco I* is an attempt at misdirection from the Treaty’s plainly stated requirements, and nothing more.

60. Renco fails to address most of the prevailing jurisprudence, and mischaracterizes *Feldman* by suggesting that the case supports the view that *Renco I* “suspended the three-year limitations period.”<sup>93</sup> In doing so, Renco pulls an isolated quote out of context to argue that the *Feldman* 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>94</sup>

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<sup>91</sup> *Renco I*, Partial Award ¶ 158 (emphasis added) (RLA-24); *see also, e.g., Corona Materials v. Dominican Republic* (ICSID Case No. ARB/AF/14/3), Award on the Respondent’s Expedited Preliminary Objections dated 31 May 2016 ¶ 174 (“Under the ordinary meaning of this provision, a claim cannot be submitted unless and until it is accompanied by a waiver that complies with Article 10.18.2(b). Thus, a Notice of Arbitration that is unaccompanied by a valid waiver *does not constitute a claim* pursuant to the provisions of Chapter Ten.”) (emphasis added) (RLA-23).

<sup>92</sup> *Feldman v. Mexico* (ICSID Case No. ARB(AF)/99/1), Submission of the United States of America on Preliminary Issues dated 6 Oct. 2000 (CLA-1); *see also, e.g., Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Statement of Rejoinder of the Republic of Peru dated 13 Sept. 2019 ¶ 84 (confirming that date of satisfaction of the formal and material waiver requirements “is the earliest possible date on which Gramercy’s claims could be deemed submitted to arbitration, with attendant consequences under the Treaty’s prescription period”) (RLA-64); *Gramercy v. Peru*, U.S. Submission ¶ 11 (“The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Article 18.18.1, assuming all other relevant procedural requirements have been satisfied.”) (R-13); *Waste Management Inc. v. United Mexican States II* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal concerning Mexico’s Preliminary Objection concerning the Previous Proceedings dated 26 Jun. 2002 ¶¶ 32-33 (“Is it sufficient that a claimant, having given due notice of intent . . . has purported to commence the arbitration? Or must its notice be effective to attract the jurisdiction of the Tribunal . . . ? There are three reasons for preferring the latter view . . . if those conditions are not satisfied the dispute may not be submitted to arbitration . . . It was on this basis that the first Tribunal held that Claimant’s failure to lodge a valid waiver meant that it had no jurisdiction. The same would be true, evidently, of a failure by a claimant . . . to consent to arbitration in accordance with the procedures set out.”) (RLA-78).

<sup>93</sup> Renco’s Counter-Memorial ¶ 129.

<sup>94</sup> Renco’s Counter-Memorial ¶ 129 (quoting *Feldman v. Mexico*, Award, ¶ 63).

61. As the full paragraph makes clear, however, the *Feldman* tribunal was considering a different issue, namely, whether the respondent could be estopped from invoking the NAFTA prescription period based on prior assurances given by State tax authorities to the claimant as to the treatment its investment would receive – well before the arbitration was filed. Thus, the referenced “acknowledgment of the claim” had nothing to do with the arbitration claim itself, let alone the respondent’s defense in that arbitration. Indeed, in that very same paragraph, the tribunal rejected the claimant’s estoppel argument, and expressly underscored that “like many other legal systems, NAFTA . . . introduce[s] a clear and rigid limitation defense which, as such, is not subject to any suspension, prolongation or other qualification.”<sup>95</sup> Renco’s efforts to bend *Feldman* to support its unfounded suspension argument are meritless.

**b. The Treaty’s Object And Purpose Do Not Support The Creation Of Extra-Textual Requirements Or Exceptions**

62. With no support whatsoever in the Treaty text, the Contracting Parties’ shared interpretation, or prevailing jurisprudence, Renco next resorts to arguing that “[t]he [o]bject and [p]urpose of Article 10.18.1 [c]onfirm that Claimant’s [t]imely [i]nitiation of *Renco I* [s]uspends the [l]imitations [p]eriod.”<sup>96</sup> Renco’s object and purpose argument fares no better.

63. As an initial matter, Renco focuses on the alleged “object and purpose of the limitations period.”<sup>97</sup> Under Article 31(1) of the Vienna Convention, however, the Treaty’s text must be interpreted in light of *the Treaty’s* object and purpose, not that of a particular provision.<sup>98</sup> Notably, the object and purpose of the Treaty, as set forth in the Preamble, includes “ensur[ing] a predictable legal and commercial framework for business and investment,” and “establish[ing] clear and mutually advantageous rules governing . . . trade.”<sup>99</sup> The Treaty’s object and purpose thus support Peru’s objection under Article 10.18.1, which calls for consistent enforcement of the clear and rigid prescription requirements which the Contracting Parties agreed to apply in arbitrations brought under the Treaty. In contrast, Renco’s attempt to infer additional silent requirements (not included in the Treaty) as to suspension of the prescription period significantly undermines these goals of predictability and clarity.

64. Moreover, even to the extent that the object and purpose of Article 10.18.1 may be relevant, Renco itself characterizes the goal of the prescription provision as “promot[ing] the goals of ensuring the availability of sufficient and reliable evidence, as well as *providing legal stability and predictability for potential respondents*.”<sup>100</sup> A case highlighted by Renco in this regard, *Vanessa Ventures v. Venezuela*, likewise indicates 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>101</sup>

65. While Renco emphasizes its prior attempt to prosecute claims and the issue of availability of evidence, the bottom line remains that the Treaty’s prescription requirement is fundamentally a mechanism *to protect respondent States* from late (or recurring) claims as to

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<sup>95</sup> *Feldman v. Mexico*, Award, ¶ 63 (emphasis added) (CLA-25); see also *id.* (“Thus the NAFTA legal system limits the availability of arbitration within the *clear-cut period of three years*, and does so in full knowledge of the fact that a State, *i.e.*, one of the three Member Countries, will be the Respondent, interested in presenting a limitation defense.”) (emphasis added).

<sup>96</sup> Renco’s Counter-Memorial, Heading at 34 & ¶¶ 113-116.

<sup>97</sup> Renco’s Counter-Memorial ¶ 113.

<sup>98</sup> See Vienna Convention, Art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”) (RLA-3).

<sup>99</sup> Treaty, Preamble (RLA-1).

<sup>100</sup> Renco’s Counter-Memorial ¶ 113 (quoting *Corona Materials*, U.S. Submission ¶ 5 (RLA-22)) (emphasis added).

<sup>101</sup> Renco’s Counter-Memorial ¶ 114 (quoting *Vanessa Ventures v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, 22 Aug. 2008 ¶ 3.5.4 (CLA-7)) (emphasis added).

old issues. As the *Berkowitz* tribunal explained, “[w]hile, from a given claimant’s perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a *legitimate legal mechanism to limit the proliferation of historic claims*, with all the attendant legal and policy challenges and uncertainties that they bring.”<sup>102</sup>

66. Ultimately, Renco’s renewed effort in this proceeding to again bring claims which it unsuccessfully sought to submit to arbitration in 2011 underscores the very purpose of the prescription requirement: *i.e.*, to protect respondents from the proliferation of historic claims. Contrary to Renco’s suggestion, these circumstances hardly excuse its violation of the Treaty’s rigid temporal requirements. Just the opposite. (Indeed, as Peru has explained, Renco’s claims were temporally flawed even in *Renco I*, although the tribunal did not reach a decision on those issues.)

67. A claimant must meet *all* of the Treaty’s preconditions in order to submit a claim to arbitration. Renco cannot comply partially with the Treaty’s requirements in one proceeding,<sup>103</sup> do the same in a subsequent proceeding, and then somehow argue that the cumulative effect between the two deficient proceedings is that it has properly submitted claims to arbitration. Such an approach is contrary to the Treaty’s text and object and purpose – as well as, to the extent relevant, the object and purpose of Article 10.18.1, and all other provisions governing the submission of claims to arbitration under the Treaty.<sup>104</sup> Renco’s argument regarding the purported suspension of the prescription period has no basis whatsoever in the Treaty. It is thus no surprise that the U.S. Submission does not address it.

**c. General Principles Of International Law And Domestic Law Cannot Supersede The Treaty’s Express Requirements**

68. With no support in the Treaty text, the Treaty’s object and purpose, the agreed interpretation of the Contracting Parties, or prevailing jurisprudence, Renco turns finally to the purported “general principle of law that the timely presentation of a claim to the competent authority suspends limitations periods.”<sup>105</sup> Thus, Renco seeks to water down the Treaty’s prescription requirement *even further* by proposing that “a limitations period is suspended when a claimant puts a government *on notice* of a claim.”<sup>106</sup> Renco’s suggestion that mere notice alone is sufficient to stop the prescription period directly contradicts the Treaty which, as explained above, establishes a careful framework under which the notice of intent to file a claim is only one of several preconditions that a claimant must meet in order to submit claims to arbitration and thus suspend the prescription period. Even assuming, for the sake of argument, that Renco’s theory could rise to the level of a general principle of international law, Renco’s contention that such a principle would prevail over the Treaty’s express requirements is entirely without merit.

69. Fundamentally, Renco cannot invoke general principles of law to contradict the specific requirements of the Treaty. Just the opposite: the Treaty is a *lex specialis* agreed by

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<sup>102</sup> *Berkowitz v. Costa Rica* ¶ 208 (emphasis added) (RLA-26).

<sup>103</sup> For the avoidance of doubt, Renco’s claims in *Renco I* were deficient in multiple ways beyond the waiver violation.

<sup>104</sup> See Treaty, Arts. 10.16-18 (RLA-1); see also, e.g., *Waste Management Inc. v. United Mexican States II* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal concerning Mexico’s Preliminary Objection concerning the Previous Proceedings dated 26 Jun. 2002 ¶¶ 22, 32-34 (observing that the “[t]ribunal does not suggest . . . the Respondent agreed that a later arbitration complying with NAFTA’s procedural requirements would be permissible,” and noting that “[t]he normal meaning of ‘condition precedent’ is that of a condition *sine qua non*, a requirement without which any subsequent action is invalid or ineffective in law,” and that “if those conditions are not satisfied the dispute may not be submitted to arbitration”). (RLA-78).

<sup>105</sup> Renco’s Counter-Memorial ¶ 112.

<sup>106</sup> See, e.g., Renco’s Counter-Memorial ¶ 83 (emphasis added).

Peru and the United States that supersedes general principles.<sup>107</sup> As the United States has confirmed, “States routinely establish specific rules in international agreements that define governing rights and duties in lieu of general principles of international law, reflecting the maxim *lex specialis derogate legi generali*.”<sup>108</sup> Accordingly, and further to the Treaty’s governing law provision in Article 10.22, the Tribunal must first and foremost apply the Treaty, and cannot disregard the Treaty in favor of an alternative standard under general principles.<sup>109</sup>

70. *Feldman v. Mexico*, on which Renco repeatedly relies, underscores this fundamental point within the specific context of a prescription requirement. The claimant in that case argued that the limitations period should be suspended based on “equitable principles, including principles of estoppel and tolling,” that “form part of the established rules and principles of international law.”<sup>110</sup> The tribunal refused to suspend the prescription period on this basis and instead, as noted above, “stresse[d]” that the treaty “introduce[d] a clear and rigid limitation defense which, as such, is not subject to any suspension, prolongation or other qualification.”<sup>111</sup>

71. Renco also argues, with respect to the domestic law of a few States, that “[s]ome jurisdictions go further and state that the limitations period is suspended even if the claim is procedurally defective.”<sup>112</sup> Renco’s references to national law are entirely irrelevant. The Treaty’s governing law provision does not allow for recourse to national law in this regard, as tribunals have reinforced.<sup>113</sup> The *Feldman* decision (among others) is instructive on this point as well. There, the claimant argued that the limitations period under NAFTA’s nearly identical three-year limitations provision should be computed from the date of the notice of intent.<sup>114</sup>

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<sup>107</sup> See, e.g., *Amoco Int’l Fin. Corp. v. Iran*, 15 IRAN-U.S. CL. TRIB. REP. 189, 222, ¶ 112 (1987) (“As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law.”) (RLA-65); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 Nov. 2007 ¶ 118 (“[C]ustomary international law that the ILC Articles codify do not apply to matters which are specifically governed by *lex specialis* – i.e., Chapter Eleven of the NAFTA in the present case.”) (RLA-69); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, dated 27 Jun. 1986 ¶ 274 (“In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim.”) (RLA-71); Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, Art. 55, ILC, 53rd Sess. (2001) (providing that the Articles “do not apply where and to the extent that” issues “are governed by special rules of international law”) (RLA-7); H. LAUTERPACHT, INTERNATIONAL LAW 87 (1970) (“When a controversy arises . . . with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question.”) (RLA-72); *id.* at 86-87 (“The order in which the sources of international law are enumerated in the Statute of the International Court of Justice is, essentially, in accordance both with correct legal principles and with the character of international law as a body of rules based on consent to a degree higher than is the law within the State. *The rights and duties of States are determined, in the first instance, by their agreement as expressed in treaties.*”) (emphasis added).

<sup>108</sup> *Corona v. Dominican Republic*, U.S. Submission ¶ 6 n.6 (RLA-22).

<sup>109</sup> See, e.g., Treaty, Art. 10.22(1) (“[T]he tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”) (RLA-1); *Ballantine Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award, 3 September 2019 ¶¶ 530, 533 (“[T]his necessarily entails *first*, giving effect to the specific context provided for in this instrument as well as its object and purpose; *second*, giving effect to the customary rules of international law ‘as an applicable rule of international law.’ . . . [T]he Tribunal deems it appropriate to give specific meaning to the terms used in DR-CAFTA rather than directly incorporating any other standard, which would disregard the rules of treaty interpretation that we are bound to apply under the VCLT.”) (emphasis added) (RLA-68); *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016 ¶ 185 (“This means that the law to be applied by the Tribunal is public international law, constituted primarily by the specific source provided by the DR-CAFTA as *lex specialis* . . .”) (RLA-23).

<sup>110</sup> *Feldman v. Mexico*, Claimant’s Memorial on Preliminary Questions dated 2 Aug. 2000 ¶ 56 (RLA-82).

<sup>111</sup> *Feldman v. Mexico*, Award, ¶ 63 (CLA-25).

<sup>112</sup> Renco’s Counter-Memorial ¶ 118.

<sup>113</sup> See Treaty, Art. 10.22 (“[T]he tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”) (RLA-1); see also, e.g., *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016 ¶ 186 (“[B]oth Parties have introduced a considerable amount of legal analysis of the DR’s municipal law. It is then all the more important for the Tribunal to state that, as far as the examination of a Preliminary Objection filed under the DR-CAFTA is concerned, the municipal law of the Respondent, as such, cannot be considered as part of the law applicable to the examination of these objections.”) (RLA-23).

<sup>114</sup> *Feldman v. Mexico*, Claimant’s Memorial on Preliminary Questions dated 2 Aug. 2000 ¶ 51 (RLA-82).

The tribunal specifically acknowledged that “there are systems under which already taking preparatory steps towards commencing litigation or arbitration may have the effect of interrupting the running of limitation (see, e.g., German Civil Code §§ 210, 220 (1); Greek Civil Code Art. 262, 269),” but underscored “that NAFTA has adopted the reception of the notice of arbitration rather than any previous step as the critical point in time which stops the running of limitation.”<sup>115</sup>

72. Renco’s references to local jurisdictions that allow for suspension of the limitations period where a claim is procedurally defective cannot change the fundamental fact that the Treaty prohibits it. As the framework established by Articles 10.16 and 10.18 (addressed above) makes clear, a procedurally defective claim *cannot* be deemed submitted to arbitration under the Treaty; nor, accordingly, can a procedurally defective claim suspend the prescription period. Once again, Renco’s argument has no basis whatsoever in the Treaty. It is thus no surprise that the U.S. Submission does not address it.

#### d. Renco’s “Abuse” Theory Is Meritless

73. The U.S. Submission lends no support to Renco’s unfounded theory that invocation of the Treaty’s temporal requirements in this case constitutes an abuse of right. Indeed, the Treaty includes no mention of abuse of rights, and the United States does not address the general abuse principles on which Renco so heavily relies – and without which, Renco largely concedes, its claims must fail for lack of temporal jurisdiction. The Contracting Parties’ shared focus on the specific requirements of the Treaty underscores that the Treaty is the *lex specialis* which supersedes any general principles on which Renco purports to rely in the alternative. In any event, as a matter of law, Renco’s “abuse” theory is not supported by those general principles; and, as a matter of fact, Renco’s theory is refuted by the procedural history of *Renco I*.

74. It is of little surprise that the U.S. Submission interpreting the requirements of the Treaty does not even mention Renco’s abuse allegations. Renco does not and cannot identify any language in the Treaty that would support its theory that general abuse-of-right principles should or could prevail over the Treaty’s express requirements. Instead, Renco purports to apply “abuse” as a general principle of international law.<sup>116</sup> General principles of law, however, “require a certain level of recognition and consensus,”<sup>117</sup> as confirmed by tribunals and reflected in Article 38(1)(c) of the ICJ Statute.<sup>118</sup> Renco has made no showing that its abuse theory – let alone its application of that theory to particular issues of prescription – has achieved such widespread recognition and consensus as to constitute a general principle of international law.

75. Even the authorities on which Renco relies caution against the broad application of general abuse principles. Renco highlights the writings of Sir Hersch Lauterpacht, who proposes as a general matter 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>119</sup> Renco fails to mention that, in his very next sentence, Sir Lauterpacht warns that the theory of abuse of rights requires “caution” and “must be wielded with studied restraint.”<sup>120</sup> Numerous other authorities confirm that the theory of abuse “is only rarely applied by international tribunals

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<sup>115</sup> *Feldman v. Mexico*, Interim Decision on Preliminary Jurisdictional Issues dated 6 Dec. 2000, ¶45 (RLA-6).

<sup>116</sup> See, e.g., Renco’s Counter-Memorial ¶¶ 152-60.

<sup>117</sup> *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award dated 18 July 2014 ¶1359 (RLA-70).

<sup>118</sup> The Statute of the International Court of Justice, Art. 38(1) (requiring the ICJ to apply, among other things, “the general principles of law recognized by civilized nations”) (RLA-67).

<sup>119</sup> Renco’s Counter-Memorial ¶ 152.

<sup>120</sup> Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge Grotius Publications Limited, 1982) (CLA-27).

and subject to a high threshold to prove.”<sup>121</sup> In fact, the two obscure, century-old decisions cited by Renco for the proposition that a State can be denied an otherwise available prescription defense make no mention of abuse of rights – and, in any event, are both readily distinguishable because they involved a State’s attempt to invoke a time bar after it had spent years refusing to adjudicate the claims.<sup>122</sup> No such circumstances are present here.

76. Renco further contends that “[i]nvestment treaty tribunals also uniformly endorse the abuse of rights theory as a fundamental principle of international law.”<sup>123</sup> In fact, investment treaty tribunals to date have applied abuse theories largely (if not entirely) in the context of abuses *by claimants*, and in particular where a claimant makes an alleged investment in order to elevate a preexisting dispute to a treaty dispute, or where a claimant restructures an investment so as to access the protections of a treaty otherwise not available.<sup>124</sup> Such cases concern attempts by investors to improperly access treaty protections for which they are not eligible – *not* efforts by States to invoke requirements which they specifically agreed to under a treaty. Renco notably has not identified any case where a tribunal applied abuse theories to the conduct of a respondent State, let alone to deny the State a prescription defense when the claimant failed to comply with a treaty’s express prescription requirements.

77. Renco relies heavily on excerpts from the *Renco I* decision where the tribunal noted, in *dicta*, that it “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”; that it “admonish[ed] 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”; and that “justice would be served if Peru accepted that time stopped running” when Renco filed its Amended Notice of Arbitration in August 2011.<sup>125</sup> As the quoted language itself makes clear, however, the tribunal cautiously referred to a “possibility” based on “Renco’s submission,” and plainly did *not* rule that Peru’s invocation of the Treaty’s prescription requirement in any future proceeding would be an abuse. Nor could the *Renco I* tribunal have made any such finding with respect to an issue that was not even before it; were

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<sup>121</sup> *Caratube Int’l Oil Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award dated 27 Sept. 2017 ¶ 378 (RLA-28); *see also, e.g.,* ZIMMERMAN ET AL., EDs., THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (3d ed. 2019) at 999-1000 (“The existence of such an abuse is not easily to be assumed; it must be *rigorously proven*. . . . The case law of the ICJ is replete with instances where the principle of abuse of procedure has been invoked. The Court, however, has *never* found the conditions for an application of the principle to be fulfilled. . . . [T]he threshold for admitting an abuse is quite high, and possibly exacting.”) (emphases added) (RLA-74); *Chevron Corp. v. Republic of Ecuador [I]*, PCA Case No. AA 277, Interim Award dated 1 Dec. 2008 ¶ 143 (“It is only in *very exceptional circumstances* that a holder of a right can nevertheless not raise and enforce the resulting claim. The *high threshold* also results from the seriousness of a charge of bad faith amounting to abuse of process.”) (emphasis added) (RLA-75).

<sup>122</sup> *See Stevenson Case*, Reports of International Arbitral Awards, Vol. IX, pp. 385-387 (CLA-35); *Irene Roberts Case*, Reports of International Arbitral Award, Vol. IX, pp. 204-208 (CLA 36).

<sup>123</sup> Renco’s Counter-Memorial ¶ 156.

<sup>124</sup> *See, e.g., Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 Dec. 2015 ¶¶ 540-553 (canvassing investment treaty jurisprudence and concluding that “abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute”) (CLA-34); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 ¶ 142 (“Claimant made an ‘investment’ not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. . . . The unique goal of the ‘investment’ was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty.”) (RLA-13).

<sup>125</sup> *See, e.g.,* Renco’s Counter-Memorial ¶ 149 (quoting *Renco I*, Partial Award ¶¶ 187-188) (emphases added).

it to have done so, moreover, such ruling would not be binding on this Tribunal.<sup>126</sup> This Tribunal must rule on its own jurisdiction independently from the views of any other tribunal.<sup>127</sup>

78. The *Renco I* tribunal, moreover, *did* make an affirmative finding that Peru's raising of its waiver defense – on which the claim was dismissed – was *not* an abuse of right. Specifically, the *Renco I* tribunal ruled:

- “It is clear that the threshold for establishing an abuse of rights is high.”<sup>128</sup>
- “Having considered the issue with great care, the Tribunal has concluded that, in raising its waiver objection, Peru has sought to vindicate its right to receive a waiver which complies with the formal requirement of Article 10.18(2)(b) and a waiver which does not undermine the object and purpose of that Article.”<sup>129</sup>
- “In so finding, the Tribunal does not accept the contention that Peru's waiver objection is tainted by an ulterior motive to evade its duty to arbitrate Renco's claims. Indeed, Peru has no duty to arbitrate Renco's claims under the Treaty unless Renco submits a waiver which complies with Article 10.18(2)(b).”<sup>130</sup>
- “[T]his Tribunal cannot prevent Peru from exercising in the future what it then considers to be its legal rights . . . .”<sup>131</sup>

79. Renco notably fails to mention many of these elements of the *Renco I* decision, as they considerably undermine Renco's contentions that the manner in which Peru raised its waiver defenses was “troublesome and suspicious”;<sup>132</sup> that the defense concerned a “hyper-technical” issue;<sup>133</sup> and that Peru's raising of Article 10.18 defenses in this proceeding accordingly is somehow abusive.

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<sup>126</sup> See, e.g., Peru's Memorial ¶ 87; *Caratube Int'l Oil Co. and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 ¶ 467 (“[A] jurisdictional issue can only have preclusive effect in further or other arbitration proceedings if that jurisdictional determination was fundamental to the prior award on jurisdiction and only if the identical jurisdictional issue arises again in the further or other proceedings.”) (RLA-28); International Law Association Resolution No. 1/2006, Annex 2: Recommendations on Res Judicata and Arbitration, Recommendation No. 4 (providing that “[a]n arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to . . . issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.”) (RLA-11); *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 Resubmitted Case Decision on Jurisdiction, 10 May 1988 ¶ 32 (“It is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*.”) (RLA-4).

<sup>127</sup> See, e.g., *Mobil Investments Canada Inc. v. Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, dated 13 July 2018 ¶ 144 (referring to the prior tribunal's statement that “the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings,” and concluding that “[w]hatever the relevance of this passage to the *res judicata* issue . . . , it is of little importance in relation to the decision which the Tribunal must make regarding the interpretation and effects of [prescription] . . . . [I]t cannot confer upon the present Tribunal a jurisdiction which it would not otherwise possess . . . . Whether the present claim complies with the requirements of Articles 1116(2) and 1117(2) [on prescription] is a matter which the Tribunal must determine for itself.”) (RLA-76); *Waste Management Inc. v. United Mexican States II* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal concerning Mexico's Preliminary Objection concerning the Previous Proceedings dated 26 Jun. 2002 ¶¶ 19-20 (“[T]he parties placed considerable emphasis on what the first Tribunal perceived it was doing in dismissing the proceedings . . . . On a careful reading of the first Tribunal's reasons and decision, we cannot find any expression of opinion on the point which now has to be decided. The first Tribunal did not need to decide what effect its decision had for the future, and there is no indication in the Award that it did so.”) (RLA-78).

<sup>128</sup> *Renco I*, Partial Award ¶ 177 (RLA-24).

<sup>129</sup> *Id.* ¶ 186.

<sup>130</sup> *Id.* (emphasis added).

<sup>131</sup> *Id.* ¶ 188.

<sup>132</sup> See, e.g., Renco's Counter-Memorial ¶ 147; see also *id.* ¶¶ 9, 134 (same).

<sup>133</sup> Renco's Counter-Memorial ¶ 141 (quoting Letter from King & Spalding to Members of Tribunal, September 23, 2015, at 9 (C-37)).

80. Indeed, if it was not abusive for Peru to raise its waiver objection – as the *Renco I* tribunal confirmed – then it cannot be abusive for Peru to raise non-compliance with a different precondition to arbitration in this proceeding. To the extent that the *Renco I* tribunal’s *dicta* reflects that tribunal’s discomfort with the consequences of its own ruling, that cannot justify having this Tribunal disregard the Treaty’s plain language. There was nothing abusive about Peru raising in *Renco I* Renco’s non-compliance with the waiver requirement – as well as its non-compliance with the Treaty’s temporal requirements, which was not decided upon – and there is nothing abusive about Peru raising Renco’s non-compliance with the retroactivity and temporal requirements in this arbitration.

81. In any event, under Renco’s formulation of the abuse theory, “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>134</sup> Even assuming, for the sake of argument, that that is a relevant standard, Peru’s invocation of the Treaty’s temporal requirements is decidedly in pursuit of the legitimate interests served by those requirements: namely, to protect itself from claimants attempting to bring claims with respect to acts or facts that arose before any Treaty obligation entered into force, or claimants attempting to prosecute old claims after expiration of the Treaty’s three-year prescription period. These are the elements that are reinforced by the U.S. Submission, which does not engage at all with Renco’s extratextual abuse theories.

82. Further, Peru’s temporal objections are not “calculated to prejudice” Renco, but rather to hold Renco to the plainly stated requirements of the Treaty under which Renco itself chose to bring claims, as the procedural history detailed in the Memorial and further below confirms.

## **B. Implications And Application**

83. Peru established that all of Renco’s claims violate the prescription requirement under Article 10.18.1 of the Treaty because Renco acquired knowledge of any alleged breach and loss or damage before the relevant prescription date of November 13, 2013. The Contracting Parties’ agreed interpretation of the Treaty underscores that Renco’s claims violate the rigid prescription requirements of Article 10.18.1. Accordingly, Peru has not consented to arbitrate any of the claims, and the Tribunal does not have jurisdiction to hear them. Renco’s incorrect Treaty interpretation cannot change that fact, as further detailed below.

### **1. The Unfair Treatment And Expropriation Claims Are Both Time-Barred**

84. Peru demonstrated that Renco knew or should have known of Peru’s alleged unfair treatment breach prior to the cut-off date because the claim allegedly arose when Peru “mandated [additional environmental projects] through resolutions,” “granted only a limited extension and imposed additional and onerous obligations upon DRP,” “unreasonably refused . . . a second [PAMA] extension in 2009,” and “engaged in a smear campaign in the press” – all of which indisputably occurred between 1997 and 2010.<sup>135</sup> Renco’s newfound focus on a March 2009 MEM letter in response to the Treaty’s non-retroactivity requirement does nothing to salvage its claim with respect to the prescription requirement.

85. Peru also demonstrated that Renco’s indirect expropriation claim, arising from the same alleged facts as the unfair treatment claim and other related measures, is similarly time-

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<sup>134</sup> Renco’s Counter-Memorial ¶ 154 (quoting Bin Cheng at 128-129).

<sup>135</sup> Peru’s Memorial ¶¶ 60-64.

barred.<sup>136</sup> That Renco attempted to submit nearly identical unfair treatment and expropriation claims in *Renco I* in 2011 can leave no doubt in this respect.<sup>137</sup> Further, the 2012 measures Renco now emphasizes for its expropriation claim also predate the prescription cut-off date.

86. Renco does not contest, and effectively concedes, that both its unfair treatment claim and its expropriation claim fail to comply with the express requirements of Article 10.18.1. Indeed, Renco specifies in the Counter-Memorial that it “first became aware of Peru’s breaches of Article 10.5 of the Treaty on *March 10, 2009*, and first became aware of Peru’s breaches of Article 10.7 of the Treaty in *July 2012*.”<sup>138</sup> In fact, on Renco’s account, it must have become aware of the alleged expropriation even earlier, as it also contends that it “initiated *Renco I* on August 9, 2011, well within three years of first becoming aware of Respondent’s breaches.”<sup>139</sup>

87. Article 10.18.1 expressly provides, and the Contracting Parties agree, that the limitations period starts running “from the date on which the claimant *first acquired*, or should have first acquired, knowledge of the breach,”<sup>140</sup> and “[s]uch knowledge cannot *first* be acquired on multiple dates or on a recurring basis.”<sup>141</sup> Accordingly, by Renco’s own admission – and regardless of whether it first learned of the alleged expropriation in 2012 or even earlier – both claims fall well outside of the November 13, 2013, cut-off date.

88. Unable to dispute the necessary consequences of applying Article 10.18.1 to its claims, Renco urges the Tribunal to consider in the alternative that the mandatory prescription period was suspended under general principles of international law with “initiation” of *Renco I*, “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.”<sup>142</sup> Renco’s suspension arguments fail for all of the reasons articulated above. Moreover, by acknowledging that it is “resubmit[ting]” the unfair treatment and expropriation claims, Renco further concedes that it knew of the alleged breaches and damages no later than the August 9, 2011, Notice of Arbitration – if not the December 29, 2010, notice of intent to initiate arbitration with respect to these same claims.

89. Accordingly, Renco’s unfair treatment and expropriation claims violate the prescription period in Article 10.18.1, Peru has not consented to arbitrate either claim under the Treaty, and the Tribunal must dismiss the claims for lack of jurisdiction.

## 2. The Denial Of Justice Claim, Purportedly Arising From Later Measures, Remains Time-Barred

90. Peru also demonstrated that Renco’s denial of justice claim is not distinct from its other claims, but rather concerns the same fundamental theory of liability – *i.e.*, that the MEM’s credit in the bankruptcy proceedings was illegitimate.<sup>143</sup> Renco has raised virtually no allegation of impropriety in the Peruvian court proceedings, other than dissatisfaction that the MEM credit was not reversed (and that the judicial reasoning was allegedly “incoherent”),<sup>144</sup>

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<sup>136</sup> Peru’s Memorial ¶¶ 69-75.

<sup>137</sup> Peru’s Memorial ¶¶ 59, 74; Figure C.

<sup>138</sup> Renco’s Counter-Memorial ¶ 106 (emphasis added).

<sup>139</sup> Renco’s Counter-Memorial ¶ 106.

<sup>140</sup> Treaty Art. 10.18.1 (emphasis added) (RLA-1).

<sup>141</sup> U.S. Submission ¶ 4.

<sup>142</sup> Renco’s Counter-Memorial ¶ 76 (emphasis in original).

<sup>143</sup> Peru’s Memorial ¶¶ 76-82.

<sup>144</sup> Renco’s entire articulation of its denial of justice claim in the Statement of Claim is a single conclusory paragraph that states: “The credit that MEM asserted in DRP’s bankruptcy is patently absurd. When DRP failed to complete its last PAMA project before the deadline that MEM improperly failed to extend, MEM did not incur any obligation to complete that project itself. The best evidence of that is that to this day – some several years after asserting the credit – MEM has not taken a single step towards completing the last sulfuric acid plant. Judicial reasoning that is so incoherent that it can only be explained by either incompetence or improper bias constitutes a denial of justice under

which plainly could not meet the high threshold for a denial of justice.<sup>145</sup> Renco's later alleged exhaustion of local remedies through 2015 does not, without more, give rise to a legally distinct injury or renew the limitations period that ended in 2013. The claim likewise is time-barred.<sup>146</sup>

91. In its Counter-Memorial, Renco contends that Peru "unsuccessfully attempts to muddy the waters by relying on the decisions in *Mondev v. United States* and *ATA v. Jordan*."<sup>147</sup> Renco highlights that, in each of those cases, the tribunal did not address a question of prescription, but rather whether a denial of justice claim could survive a temporal jurisdictional challenge when the dispute underlying the judicial proceedings in question had arisen before the treaty entered into force.<sup>148</sup> The distinction Renco seeks to draw between prescription and non-retroactivity in this context is irrelevant.

92. In *Mondev*, the tribunal held that "it must still be possible to point to conduct of the State after that [cut-off] date which is itself a breach," and that, "[u]nless those [court] decisions were themselves inconsistent with applicable provision[s] of [the treaty], the fact that they related to pre-[treaty] conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist."<sup>149</sup> Likewise, in *ATA v. Jordan*, the tribunal held that "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 . . . must fail if, as in this case, the occurrence is part of a dispute which originated before the entry into force of the BIT."<sup>150</sup> Thus, both *Mondev* and *ATA* underscored that a claimant could not rely solely on a later-in-time judicial decision, on a theory of denial of justice, to circumvent a treaty's temporal requirements when the underlying measures subject to the judicial proceedings arose outside of the relevant temporal timeframe. That general consideration applies with equal force here.

93. Renco also fails to distinguish *Corona Materials v. Dominican Republic*, a case cited by Peru that did specifically concern application of a prescription provision to a denial of justice claim. In that case, the tribunal similarly concluded that "there is no valid basis for treating the alleged denial of justice as distinct from the non-issuance of the environmental license" – *i.e.*, the underlying measure which fell beyond the prescription cut-off and which the claimant later sought to challenge in judicial proceedings.<sup>151</sup> The tribunal confirmed that "[a]ll of the alleged breaches relate to the same theory of liability, which is predicated on the notion that" the respondent had improperly refused to issue a license.<sup>152</sup> The respondent's "failure to reconsider the refusal to grant the license is nothing but an implicit confirmation of its previous decision,"

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customary international law. International legal authorities uniformly recognize that denials of justice violate the fair and equitable treatment standard." Statement of Claim, ¶ 67.

<sup>145</sup> See, e.g., *Chevron Corporation & Texaco Petroleum Company v. The Republic of Ecuador*, (PCA Case No. 2009-23), Second Partial Award on Track II dated 30 August 2018, ¶ 8.40 (confirming that denial of justice requires a "claimant to prove objectively that the impugned judgment was clearly improper and discreditable, with the failure by the national system as a whole to satisfy minimum standards") (internal quotations omitted) (RLA-75); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 60 (2005) ("The modern consensus is clear to the effect that the factual circumstances must be *egregious* if state responsibility is to arise on the grounds of denial of justice.") (emphasis added) (RLA-79); *Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award, 26 June 2003 ¶ 132 (denial of justice requires "gross judicial impropriety" such as a "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety") (RLA-80).

<sup>146</sup> Peru's Memorial ¶¶ 76-82.

<sup>147</sup> Renco's Counter-Memorial ¶ 171.

<sup>148</sup> Renco's Counter-Memorial ¶¶ 171-172.

<sup>149</sup> *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002 ¶ 70 (RLA-8); see also Peru's Memorial ¶ 80.

<sup>150</sup> *ATA Construction v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 ¶ 108 (RLA-17); see also Peru's Memorial ¶ 80.

<sup>151</sup> *Corona Materials v. Dominican Republic*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, ¶ 214 (RLA-23); see also Peru's Memorial ¶ 81.

<sup>152</sup> *Corona Materials v. Dominican Republic*, Award ¶ 210 (RLA-23).

and could not serve as a separate denial of justice breach with a separate prescription period.<sup>153</sup> Accordingly, the tribunal concluded that all claims were time-barred, notwithstanding the fact that the denial of justice claim included allegations that post-dated the prescription cut-off.<sup>154</sup>

94. Renco notably does not contest the holding in *Corona Materials*, but instead attempts to distinguish it on the basis that “the facts . . . are so different, the tribunal’s decision in that case is not material.”<sup>155</sup> Renco emphasizes that the tribunal “found also that the claimant’s denial of justice claim was not, in fact, a denial of justice.”<sup>156</sup> The *Corona Materials* tribunal, however, specifically held that an assessment on the merits was unnecessary: the tribunal “could simply end its task at this juncture and consider that it has already fulfilled its task, having firmly reached the conclusion that, in application of . . . Article 10.18.1, it has no jurisdiction.”<sup>157</sup> Renco further contends that, by comparison, its denial of justice claim “truly is about the failure of Respondent’s justice system.”<sup>158</sup> This is belied by the single, conclusory paragraph in which Renco articulates the claim in its Notice of Arbitration. As stated there, the claim turns on allegations that the Peruvian judicial proceedings resulted in an outcome which Renco did not like (*i.e.*, they did not reverse the MEM credit) through decision-making with which Renco did not agree (*i.e.*, the judicial reasoning was “incoherent”). This hardly rises to the demanding threshold required for a denial of justice. In any event, as the *Corona Materials* tribunal emphasized, this Tribunal need not consider the purported merits of the denial of justice claim to determine that, like Renco’s other claims, it is time-barred.

95. Renco further argues that *Corona Materials* is distinguishable because Renco “is not alleging that MEM’s improper assertion of a US\$ 163 million credit against DRP constitutes a breach of the Treaty.”<sup>159</sup> Renco’s late efforts to separate the MEM credit from the judicial proceedings in which DRP challenged that credit are meritless. In fact, the first sentence of Renco’s denial of justice claim in the Notice of Arbitration states: “[t]he credit that MEM asserted in DRP’s bankruptcy is patently absurd.”<sup>160</sup> Likewise, with respect to the expropriation claim, the Notice of Arbitration states: “Peru asserted large and baseless credits that gave it unjustified, creditor voting rights in DRP’s bankruptcy proceeding” in breach of Article 10.7 of the Treaty.<sup>161</sup> Notwithstanding Renco’s unfounded efforts to parse the component parts of the bankruptcy proceedings and related judicial proceedings, they are all fundamentally founded on the same theory of liability: *i.e.*, that the MEM credit was improper, and therefore various alleged related measures constitute Treaty breaches. Accordingly, as was the case in *Corona Materials*, there is no basis for treating Renco’s denial of justice claim as separately actionable, with a separate prescription period.

96. Renco’s denial of justice claim ultimately hinges on its view that the prescription period as to that claim began to run only on November 3, 2015, the date of the Supreme Court decision rejecting DRP’s appeal with respect to the credit, because “there can be no denial of justice . . . without the exhaustion of local remedies.”<sup>162</sup> In this respect, Renco will no doubt highlight the U.S. Submission’s statement that the prescription period for a denial of justice claim generally “will not begin to run” until “all available domestic remedies have been

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<sup>153</sup> *Id.* ¶¶ 211-216.

<sup>154</sup> *Id.* ¶ 238.

<sup>155</sup> Renco’s Counter-Memorial ¶ 178.

<sup>156</sup> Renco’s Counter-Memorial ¶ 177.

<sup>157</sup> *Corona Materials v. Dominican Republic*, Award ¶ 239.

<sup>158</sup> Renco’s Counter-Memorial ¶¶ 177-179.

<sup>159</sup> Renco’s Counter-Memorial ¶ 178.

<sup>160</sup> Renco’s Notice of Arbitration and Statement of Claim ¶ 67.

<sup>161</sup> Renco’s Notice of Arbitration and Statement of Claim ¶ 69.

<sup>162</sup> Renco’s Counter-Memorial ¶ 168.

exhausted.”<sup>163</sup> This general proposition, however, is without prejudice to the fundamental principle (and the Contracting Parties’ agreement) that, as the U.S. Submission further states, “a continuing course of conduct cannot renew the limitations period under Article 10.18.1,” as only “[a] legally distinct injury . . . can give rise to a separate limitations period.”<sup>164</sup>

97. Indeed, in a non-disputing party submission in *Corona Materials*, the United States further specified in the context of Article 10.18.1 that, “[i]n the case of a challenge to a measure adopted or maintained by a Party, *the exhaustion of local remedies will not give rise to a legally distinct injury*, unless the institutions to whom appeal has been made commit some new breach of the applicable standard.”<sup>165</sup> Because Renco has not alleged any new breach by the Peruvian judiciary, aside from non-reversal of the MEM credit issued years earlier, Renco cannot rely on DRP’s alleged efforts to exhaust local remedies or the 2015 Supreme Court decision to renew the otherwise expired prescription period.<sup>166</sup>

98. Renco’s denial of justice claim amounts to little more than an attempt to survive the Treaty’s mandatory prescription requirement by refocusing on alleged transgressions that occurred after the prescription period cut-off. This is not permitted by Article 10.18.1, as detailed above. Because the alleged acts of the Peruvian judiciary do not give rise to a legally distinct injury, but instead turn on the same fundamental theory of liability with respect to issuance of the MEM credit, Renco cannot rely on them to renew the prescription period. Accordingly, as with its two other claims, Renco’s denial of justice claim is time-barred, Peru has not consented to arbitrate it, and the Tribunal does not have jurisdiction to decide it.

### 3. Renco’s Prior Violation Of The Treaty Cannot Undo The Time Bar

99. The U.S. Submission gives no support to Renco’s argument that Peru’s objections under the Treaty constitute abuse. As Peru has explained, there is no legal basis for Renco’s position. Moreover, Renco’s legally baseless abuse theory hinges on its accusation that Peru “concealed its objection [in *Renco I*] that Claimant’s reservation of rights language in its waiver did not comply with the Treaty . . . for three and a half years.”<sup>167</sup> On that basis, Renco argues that “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.”<sup>168</sup> Renco’s theory remains unsupported by the record in *Renco I*.

100. Contrary to Renco’s assertions, Peru did not “run the clock” on its waiver objection in *Renco I*.<sup>169</sup> As previously detailed, Peru sought an efficient and expedient determination of Renco’s failure to comply with a number of Treaty requirements, including the waiver requirement – and *Renco* opposed Peru’s efforts at every juncture.<sup>170</sup> Peru raised concerns in its preliminary response to the Notice of Arbitration, in the preliminary objections phase, and in the aftermath of the *Renco I* tribunal’s decision as to the scope of preliminary objections.

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<sup>163</sup> U.S. Submission ¶ 7.

<sup>164</sup> U.S. Submission ¶ 4, n. 7 (emphasis added).

<sup>165</sup> *Corona Materials*, U.S. Submission ¶ 5 (emphasis added) (RLA-22).

<sup>166</sup> Renco’s heavy reliance on DRP’s pursuit of appeals with respect to the MEM credit in order to circumvent the Treaty’s temporal requirements in this case stands in contrast to Renco’s position in *Renco I*, where it argued in order to circumvent the Treaty’s waiver requirements that “Renco has never been party to the local bankruptcy proceedings” and that DRP’s acts could not “somehow be imputed to Renco.” *Renco I*, Claimant’s Counter-Memorial Concerning Peru’s Waiver Objections dated 10 Aug. 2015 ¶ 21 (R-12-25).

<sup>167</sup> Renco’s Counter-Memorial ¶¶ 132-133.

<sup>168</sup> Renco’s Counter-Memorial ¶ 133.

<sup>169</sup> Renco’s Counter-Memorial § V.D.1; Peru’s Memorial § IV.C.1.

<sup>170</sup> See Peru’s Memorial ¶¶ 88-89. As also previously noted, this is detailed even further in Peru’s August 15, 2016 Submission on Costs in *Renco I* (R-12-42).

Indeed, Renco does not dispute that Peru was not required to raise an objection to Renco's violation of the waiver requirement until its Counter-Memorial on Liability, which was scheduled to be filed after the tribunal's ruling on preliminary objections.<sup>171</sup> If the *Renco I* tribunal had followed Renco's preferred approach, Renco's claims would have been dismissed on the very same waiver grounds years later, after additional briefing, document production, and a full hearing on jurisdiction and the merits.

101. Renco has a duty to comply with the requirements imposed by the Treaty under which it chose to bring its claims. Renco inserted the impermissible language in its initial Notice of Arbitration, reiterated it in its Amended Notice of Arbitration, and used it as cover to pursue and initiate local proceedings that violated the material prong of the Treaty's waiver requirement.<sup>172</sup> While the *Renco I* tribunal did not reach the merits of Renco's material waiver violation, Renco now purports to benefit from its own prior Treaty violation. Among other things, Renco bases its new denial of justice claim on the last decision by Peru's judiciary in the same local proceedings that Renco's affiliates pursued in violation of the Treaty, using the reservation of rights language as cover.

102. Peru has no obligation to accept Renco's invitation to waive the Treaty rights that it negotiated with the United States, and thus assist Renco in its attempts to circumvent the Treaty.<sup>173</sup> In the Counter-Memorial, Renco points to excerpts from the *Renco I* hearing on preliminary objections where it argued that "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."<sup>174</sup> Peru did not offer any such assurance; nor was it required to do so. Rather, Peru confirmed at the time that 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>175</sup>

103. The same is true for the Treaty's temporal requirement. Indeed, Renco's representations at the *Renco I* hearing which Renco chooses to highlight underscore that Renco understood at that time that its claims *already* fell afoul of the Treaty's temporal restrictions. Then, in the aftermath of the dismissal of all claims in July 2016, Renco sent new notices of arbitration to Peru on August 12, 2016. Renco also asked Peru to accept that time had stopped running for prescription purposes in 2011, when Renco filed its claims in the First Arbitration. Peru, under no obligation to grant the request, did not agree and has, at all times, maintained the continuous reservation of all rights, including its rights under the Treaty. The limits on a respondent's consent to arbitration are fundamental, and include the waiver and limitations requirements. In the words of the *Renco I* tribunal:

It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru. Under the Treaty, an arbitration agreement is formed when an investor accepts Peru's standing offer to arbitrate claims by submitting a claim to arbitration in accordance with the requirements set forth in Section B of Chapter 10 of the Treaty. . . . The Treaty establishes several important conditions and limitations on Peru's consent to arbitrate claims under the Treaty. This is made clear by the title to Article 10.18 ("Conditions and Limitations on Consent of Each Party").<sup>176</sup>

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<sup>171</sup> See *Renco I*, Procedural Order No. 1 dated 22 Aug. 2013, Annex A (R-12-7); see also UNCITRAL Arbitration Rules, Art. 23(2) ("A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence.").

<sup>172</sup> *Renco I*, Peru's Memorial on Waiver dated 10 Jul. 2015 ¶¶ 38-55 (R-12-23); Peru's Reply on Waiver ¶¶ 33-40 (R-12-26).

<sup>173</sup> As Peru explained in *Renco I*, the Contracting Parties to the Treaty agree that "the waiver must be in writing and must be 'clear, explicit and categorical,'" and accompany the notice of arbitration, and "a tribunal itself cannot remedy an ineffective waiver," or "rely on a purported 'principle of severability.'" *Renco I*, Letter from Peru to the Tribunal dated 23 Oct. 2015 (quoting Third Non-Disputing State Party Submission of the United States of America) (R-12-38).

<sup>174</sup> *Renco I*'s Counter-Memorial ¶ 138.

<sup>175</sup> *Renco I*, Peru's Submission on Matters Arising from the Hearing on Waiver dated 23 Sept. 2015, at 3 (R-12-31).

<sup>176</sup> *Renco I*, Partial Award ¶¶ 71-72.

104. Renco’s accusation that “Respondent refused to take any responsibility for its own role in the creating of the limitations issue” is incorrect and must be disregarded.<sup>177</sup> Renco caused its own temporal violations. Among other things, Renco chose to submit a noncompliant waiver and refused Peru’s repeated attempts to be heard on the waiver violation at an early phase in *Renco I*. In any event, Renco’s claims have been plagued by temporal deficiencies all along, including because they have been predicated on alleged acts that predate the Treaty’s entry into force. Peru is exercising its Treaty rights accordingly and reasonably.

105. Peru did not delay raising its waiver objection and did not commit an abuse of rights. On the contrary, Renco’s attempt to excuse its prior Treaty violation, hide its role in impeding an earlier review of Peru’s waiver objection in *Renco I*, and seek to benefit from its waiver violation in *Renco I* through the denial of justice claim in *Renco II*, all confirm that Renco’s temporal violation cannot be excused and its claims must be dismissed for lack of jurisdiction.

## IV. The Treaty’s Mechanism For Preliminary Objections

### A. The Treaty Standard

106. Article 10.20.5 of the Treaty provides, in relevant part 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 . . . any objection that the dispute is not within the tribunal’s competence.”<sup>178</sup> As Peru established, the ordinary meaning of this provision is clear: if, within 45 days of the tribunal’s constitution, a respondent State “requests” that the tribunal decide a preliminary objection on an expedited basis, the tribunal “shall” so decide within the time provided.<sup>179</sup>

107. The U.S. Submission underscores that there is no basis for denying the right set out in the Treaty based on implied restrictions, limitations, or requirements not plainly stated in the Treaty. Indeed, the United States does not even address Renco’s contention that Peru “attempted, but failed, to properly invoke the Article 10.20.5 procedure.”<sup>180</sup> By maintaining that the Treaty purportedly requires a respondent to “make *and brief* its objections within forty-five days,”<sup>181</sup> Renco seeks to inject new, supplementary requirements into Article 10.20.5 that are not supported by the ordinary meaning of the Treaty, nor by the Contracting Parties’ agreed interpretation of the Treaty. In any event, Renco’s 60-page Counter-Memorial responding to Peru’s 30-page Memorial belies even the inference that Renco somehow was hindered by the manner in which Peru invoked the mandatory Article 10.20.5 mechanism.<sup>182</sup>

108. The United States likewise is silent as to Renco’s contention that the U.S. non-disputing party submission in *Feldman v. Mexico* is relevant to the sufficiency of Peru’s request. Renco states that, in *Feldman*, the United States took the position that “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>183</sup> It is still not clear what Renco seeks to draw from this. As Peru previously explained,<sup>184</sup> the issue in that case concerned whether the relevant date for

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<sup>177</sup> Renco’s Counter-Memorial ¶ 139.

<sup>178</sup> Treaty, Art. 10.20.5 (emphasis added).

<sup>179</sup> See Peru’s Memorial ¶¶ 4-10, 93-104.

<sup>180</sup> Renco’s Counter-Memorial ¶ 49.

<sup>181</sup> Renco’s Counter-Memorial ¶ 51 (emphasis added).

<sup>182</sup> Renco’s purporting to find Peru’s notice unclear is merely a pretext and not credible given the background to Peru’s objection and Renco’s own prior actions over the course of years. See e.g., Peru’s Memorial ¶¶ 93-104. Nor does Renco have any response to the plain fact that the Parties discussed procedural issues up to and immediately prior to Peru’s December 3 notice. See Renco’s Counter-Memorial ¶¶ 49-54; Peru’s Memorial ¶ 100.

<sup>183</sup> Renco’s Counter-Memorial ¶ 52.

<sup>184</sup> See, e.g., Peru’s Memorial ¶ 102.

prescription purposes under NAFTA was the date of the notice of intent or the date of submitting a claim to arbitration. Like the Treaty (as explained above), NAFTA expressly draws a distinction between a notice of intent and the submission of a claim. That the United States noted this express distinction under NAFTA in *Feldman* has no bearing whatsoever on the sufficiency of Peru's preliminary objections request under Article 10.20.5 of the Treaty. It is thus no surprise that the U.S. Submission does not address it in this proceeding.

## B. Implications And Application

109. Peru plainly filed its request within 45 days of the Tribunal's constitution, exactly as the Treaty requires. The Contracting Parties definitively agree that the filing of a request triggers the mandatory expedited mechanism.

110. Ultimately, even Renco does not even suggest that the Tribunal should disregard Peru's temporal objections, nor does it offer any response to the factual circumstances leading to Peru's filing. By seeking to invent new filing requirements that do not exist under Article 10.20.5, Renco simply seeks to deny Peru a right to be heard at this juncture, and to delay consideration of the temporal objections until later. Indeed, Renco's efforts to defer Peru's temporal objections until a later phase in this case mirror Renco's efforts in *Renco I* to delay consideration of Peru's preliminary objections, including as to waiver – a delay that Renco now uses as purported justification to excuse its non-compliance with the Treaty's temporal requirements.

111. As there is no basis for delaying a decision on Peru's temporal objections, the Tribunal must dismiss Renco's claims at this time.

## V. Conclusion

112. For the foregoing reasons and those set forth in its Memorial on Preliminary Objections, Peru reiterates its request that the Tribunal:

- Find that Renco violated the Treaty and failed to establish the requirements for Peru's consent to arbitrate under the Treaty; and
- Render an award dismissing Renco's claims, with an award of costs in favor of Peru, and such further and other relief as the Tribunal may deem appropriate.

113. For the avoidance of doubt, Peru reserves all rights with respect to these proceedings, including the right to address any new issue or argument that Renco may raise in its simultaneous submission, in accordance with applicable instruments, laws and rules.

Respectfully submitted,

  
**WHITE & CASE**

*Counsel to the Republic of Peru*

March 20, 2020

## FIGURE D

### **RENCO'S FACTUAL ALLEGATIONS IN RELATION TO TEMPORAL RESTRICTIONS ARISING UNDER THE TREATY**

The following table sets forth all factual allegations, with corresponding dates, in Renco's Statement of Claim and Counter Memorial on Preliminary Objections.<sup>1</sup>

| <u>Date</u>       | <u>Claimant's Allegations</u>   | <u>Source</u>                                      |
|-------------------|---|--|
| <b>1922-1990s</b> | "From 1922 through the 1990s, 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. During the more than seventy years that Cerro de Pasco and Centromin owned and operated the Complex, they caused significant environmental contamination in and around the town of La Oroya."  | Statement of Claim ("SOC") ¶ 11                    |
| <b>1970s</b>      | "The Peruvian government publically recognized in the 1970s that the La Oroya Complex was one of the worst polluters in the country, but during the ensuing twenty years under Centromin's control, Centromin continued to contaminate the soil and waters in and around the town of La Oroya, with little or no environmental oversight or State regulation."  | SOC ¶ 12   |
| <b>1922-1970s</b> | "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."   | Counter-Memorial on 10.20.5 Objections ("CM") ¶ 14 |
| <b>1994</b>       | "In 1994, Newsweek reported: 'Richard Kamp figured he had seen the worst wastelands the mining industry was able to create. But that was before the American environmentalist – a specialist on the U.S.-Mexican border area – laid eyes on La Oroya, home to Centromin, Peru's biggest state-owned mining company. Last month, as his car rattled toward the town through hills that once were green, Kamp fell silent. Dusted with a whitish powder, the barren hills looked like bleached skulls. Blackened slag lay in heaps on the roadsides. At La Oroya, Kamp found a dingy cluster of buildings under wheezing smelter smokestacks. Pipes poking out of the Mantaro River's banks sent raw waste cascading into the river below. 'This,' he said, 'is a vision from hell.'" | SOC ¶ 13   |
| <b>1994</b>       | "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."  | CM ¶ 15  |
| <b>1994</b>       | "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."   | CM ¶ 16  |

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<sup>1</sup> Peru takes no position herein on the veracity, or not, of Renco's factual allegations, which violate the Treaty's temporal restrictions even if assumed to be true.

| <u>Date</u>        | <u>Claimant's Allegations</u>   | <u>Source</u> |
|--------------------|---|---------------|
| <b>Early 1990s</b> | “Peru then considered closing the La Oroya Complex because of its environmental problems, but decided that the facilities needed to keep operating. The Complex was a major employer in the region and also provided health care and educational services to the local population. In addition, the Complex was the only facility in the region that could process complex polymetallic concentrates produced at surrounding mines, meaning that those mines, which were also a crucial source of employment, would suffer serious economic difficulties if Peru closed the Complex. Thus, Peru recognized that it needed to both remediate the Complex’s historical impacts and modernize the Complex to reduce its ongoing impacts while at the same time preserving the economic viability of its operations.” | SOC ¶¶ 15-16  |
| <b>1990s</b>       | “Given the obsolete condition of many of Peru’s mining facilities, Peru enacted new environmental regulations that created a transitional regime for existing operations. During that phase, companies had to prepare a preliminary environmental study identifying issues and proposing a program of projects intended to reduce pollutants and bring the company into compliance with current standards. These programs were referred to as a “PAMA,” which was an acronym of Programa de Adecuación y Manejo Ambiental. MEM would approve a PAMA, and a company performing PAMA projects would be deemed in compliance with environmental regulations.”  | SOC ¶ 17      |
| <b>1990s</b>       | “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.”   | CM ¶ 17       |
| <b>1990s</b>       | “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.”  | CM ¶ 18       |
| <b>1995</b>        | “In 1995, Centromin submitted to MEM both a preliminary environmental study and a proposed PAMA for the La Oroya Complex.”  | SOC ¶ 18      |
| <b>1995</b>        | “The study highlighted a number of significant issues, including substantial lead, arsenic, and other heavy metal contamination of nearby rivers through leakage and direct discharges as well as particulate emissions into the air of lead and other heavy metals throughout the plant. Peru’s Privatization Committee then retained an expert environmental consulting group to provide an independent assessment of the La Oroya Complex and assess Centromin’s proposed PAMA program.”   | SOC ¶ 18      |
| <b>1995</b>        | “These experts opined that there was insufficient quality data and engineering studies to list specific actions required to bring the Complex into compliance with current regulatory standards. In fact, these experts questioned whether the facilities would ever be able to comply and thus recommended considerable flexibility in the implementation and application of new standards if La Oroya is to continue as an economically viable operation and that continued long-term operation of the smelter and progress on privatization can be achieved only if La Oroya is subject to realistic requirements to gradually reduce emissions.”  | SOC ¶ 18      |

| <u>Date</u> | <u>Claimant's Allegations</u>  | <u>Source</u> |
|-------------|--|---------------|
| 1996-1997   | “In late 1996, Centromin submitted its final PAMA, which MEM approved on January 14, 1997. The PAMA set forth sixteen projects and estimated the total cost to complete all of them at US\$ 129 million. These sixteen projects were intended to address four categories of environmental impact: (i) air emissions and air quality, (ii) soil remediation, (iii) control of liquid effluents, and (iv) management of slag and other waste deposits. The PAMA set forth a ten-year deadline to complete all sixteen projects. Ten days after MEM approved the PAMA, Peru again called for privatization of the Complex and issued a Public International Bidding No. PRI-16-97.”                             | SOC ¶ 19      |
| 1996-1997   | “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.”   | CM ¶ 19       |
| 1997        | “Peru awarded the bid to a consortium that included Renco. Renco and its affiliates own some of the largest mining, metals, and manufacturing companies in the world, and they have a strong track record of achieving high environmental standards of operations and developing innovative new environmental technologies. The consortium assigned its rights to a Peruvian subsidiary of Renco, DRP, as required, authorized, and approved by the relevant Peruvian authorities.”  | SOC ¶ 20      |
| 1997        | “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.”                     | CM ¶ 20       |
| 1997        | “On October 23, 1997, DRP, Doe Run Resources Corp., Renco, and Centromin executed the Stock Transfer Agreement, under which DRP acquired the majority shares of Empresa Metalúrgica La Oroya S.A. (“Metaloroya”) for US\$ 121.4 million. DRP later invoked its rights to acquire the remaining shares for US\$ 126.4 million.”   | SOC ¶ 20      |
| 1998-2002   | “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 PAMA projects. For instance, in October 1999, MEM approved DRP’s request to add more PAMA tasks, which increased the originally anticipated PAMA investment amount by US\$ 60,767,000 to total of US\$ 168,342,000. Similarly, DRP and MEM increased the amount needed for projects to improve an industrial liquid effluents treatment plant from an initial US\$ 2,500,000 to US\$ 33,600,000.” | SOC ¶ 21      |
| 1998-2002   | “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.”  | CM ¶ 21       |

| <u>Date</u> | <u>Claimant's Allegations</u>   | <u>Source</u> |
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| 2002        | “In 2002, MEM asked DRP to engage in eight new emissions reduction projects. In particular, MEM asked DRP to do the following: (1) separate treatment for dusts to eliminate recirculation; (2) encapsulate the concentrates during warehousing; (3) an environmental management plan for the Huanchan deposit; (4) ongoing cleaning program for the plant; (5) establish self-limitations on the treatment of concentrates with high contents of arsenic and cadmium with the aim of reducing the levels of emission to acceptable national and international levels; (6) better the plant maintenance in order to reduce the emission of gasses and dust; (7) design a system of alert to prevent the occurrence of emission peaks; and (8) coordinate with the civil society the relocation of the educational centers of La Oroya Antigua, including transportation of the students.” | SOC ¶ 22      |
| 2002-2007   | “In response, DRP added the new projects to its growing list of projects that it was required to undertake and complete within the original ten-year timeframe of the PAMA.”  | SOC ¶ 22      |
| 2000s       | “DRP also engaged in numerous activities beyond the scope of the PAMA projects to reduce lead contamination and to address public health concerns related to lead exposure for both workers and the community. These efforts included (among other things) the mandated use of respirators and the change room (where workers start and end each day in a clean set of clothes), the use of spray trucks to reduce dust, and frequent medical check-ups. When DRP acquired the Complex, the blood lead levels of workers averaged 51.1 µg/dl. By 2002, the workers’ blood lead levels had fallen below the World Health Organization’s recommended worker levels of 40 µg/dl for men and 30 µg/dl for women. By 2005, these average numbers had dropped to 32.18 µg/dl. DRP also dramatically reduced accidents at the Complex, and received awards for its safety record.”               | SOC ¶ 23      |
| 2000s       | “DRP also constructed on-site change-houses, routinely washed trucks before they left the facility, and mandated that workers shower and change clothes after their shifts. These measures, which were not included in the original PAMA, prevented the transmission of contaminants to the workers’ homes.”  | SOC ¶ 24      |
| 2000s       | “DRP also enacted measures to reduce emissions from the main stack and to control fugitive emissions (which were the main sources of lead and other heavy metal emissions). Such measures included: a) installing a television system in an environmental control center to monitor and immediately address visible fugitive emissions, b) introducing portable radios to facilitate real-time communications on the Complex, c) repairing flues to improve dust recovery, and d) changing filter bags in 27 bag houses thereby increasing dust recovery from 96.5 percent to 98.1 percent. By the end of 2001, DRP had reduced the amount of particulate matter emitted from the main stack by 27.6 percent.”  | SOC ¶ 25      |
| 2000s       | “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.”  | CM ¶ 22       |
| 2000s       | “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.”  | CM ¶ 23       |

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|-------------|---|---------------|
| 1999-2000s  | <p>“In 1999 and 2000, the Peruvian Ministry of Health and an NGO separately reported studies showing higher than normal blood-lead levels in people living in La Oroya. In response, DRP performed a follow-up blood-lead level study on 5,000 residents and created the Hygiene and Environmental Health Program to carry out a series of actions based on the general recommendations of the United States Centers for Disease Control and Prevention and the World Health Organization. These actions included: (1) evaluating and monitoring the physical and psychological well-being of the children of La Oroya; (2) utilizing social workers to evaluate the family situation and potential risk factors for high blood lead levels in the home; (3) providing personalized training in hygiene and nutrition during house visits, including training in hand washing and bathing and training in proper cleaning of the house; (4) creating leaders in health and hygiene through community workshops; (5) sponsoring presentations on health and hygiene in local schools, including an educational puppet show and children’s book; and (6) sponsoring a campaign to clean the schools, roads, and neighborhoods on a weekly basis, for which Doe Run Peru provided cleaning supplies and pressurized water from a water truck.”</p> | SOC ¶ 26      |
| 2003        | <p>“In 2003, at DRP’s insistence, the Peruvian Ministry of Health entered into an agreement with DRP to support a public health program. Through this agreement, DRP provided the Peruvian Ministry of Health financial support to achieve the following objectives: (1) establishing a culture of prevention in the population with the adoption of healthy habits that reduce exposure to dust; (2) establishing a safer water system, a program for potable water, monitoring programs for the soil, crops, wild vegetation and animals, and air quality, and monitoring of blood lead levels; (3) gradually reducing blood lead levels; (4) creating a program to treat children and pregnant women with high blood lead levels; and (5) signing cooperation agreements with various local authorities and agencies. Before 2006, when MEM mandated its continuance, DRP provided US\$ 1 million a year for this program on a voluntary basis.”</p>   | SOC ¶ 27      |
| 2000s       | <p>“In another voluntary effort to reduce blood lead levels in the community, DRP hired the consulting firm Gradient Corporation to perform a study on the human health risks in La Oroya. Based on Gradient’s conclusions, Doe Run Peru began a series of complementary projects to reduce lead (and other particulate) emissions from the facility. The additional projects to reduce lead (and other particulate) emissions through chimneys or stacks included (1) installation of baghouse filters for the lead furnaces, the arsenic kitchen, and the lead foam reverberator furnace, (2) preparation of units 1, 2 and 3 of the Cottrell Process for the sintering plant, and (3) reducing particulate material from copper converters and from the Cottrell Process in the anode residue plant. Doe Run Peru also added an electrostatic precipitator to the Cottrell Central, which reduced particulate emissions by 23 percent. Combined with stopping one line roasters in the Zinc Circuit, the project created a 35 percent reduction in particulate emissions from the chimney.”</p>  | SOC ¶ 28      |
| 2000s       | <p>“The projects to reduce lead (and other particulate) fugitive emissions, in turn, included (1) repowering of ventilation systems A, B, C and D of the lead sintering plant, (2) closure of lead furnace buildings and foam plant, (3) management of lead plant fusion beds, (4) management of copper plant fusion beds, (5) management of nitrous gases at the anode residue plant, (6) a new ventilation system for the anode residue plant building, (7) reduction of recirculating fines and (8) restriction on entry of concentrates. Doe Run Peru also added industrial sweepers and paved the roads to the different plants.”</p>  | SOC ¶ 29      |
| 2000s       | <p>“DRP implemented these complementary projects alongside its rapidly expanding PAMA projects, with the twin goals of better environmental performance at the Complex and reducing blood lead levels in its workers and the community.”</p>  | SOC ¶ 30      |
| 2000s       | <p>“In addition to mandated and voluntary measures to reduce the Complex’s environmental impact on the local community, 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. DRP’s social programs included: [listing programs].”</p>   | SOC ¶ 31      |

| <u>Date</u> | <u>Claimant's Allegations</u>   | <u>Source</u> |
|-------------|---|---------------|
| 1990s-2000s | “The original PAMA was based on limited data and engineering studies and MEM’s own independent consultants had advised it that the PAMA would need to be implemented in a slow and flexible manner if the Complex was to remain economically viable. And from the beginning, DRP endeavored to implement the original PAMA and design and implement additional projects that DRP identified as necessary to modernize the Complex and reduce its environmental impact.”   | SOC ¶ 32      |
| 2004        | “Despite expending financial and technical resources far beyond what Centromin and the MEM had originally projected, DRP realized as early as 2004 that the La Oroya Complex would not meet the current regulatory standards for lead without significantly more work, investment, and time.”   | SOC ¶ 32      |
| 2004        | “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.”  | CM ¶ 26       |
| 2000        | “Lead was the most immediate and urgent health issue. A consultant that DRP retained, Gradient, had identified soil and particulate emissions, especially fugitive emissions (i.e., emissions leaving the plant from random points, such as leaky pipes or open windows, as opposed to from the stack) as the two primary sources of lead exposure. Under the Stock Transfer Agreement, Centromin was responsible for soil, and the original PAMA did not allocate funds or identify projects to reduce fugitive emissions. DRP thus emphasized the need to refocus its resources on reducing fugitive emissions.”  | SOC ¶ 33      |
| 2003-2006   | “At the same time, DRP was on track to complete all of the projects in the original PAMA with the exception of constructing three sulfuric acid plants, which would help reduce SO2 emissions. Although an important pollutant, SO2 does not have the same negative impact on human health as lead. Developing sulfuric acid plants is a very time-intensive and expensive project..”   | SOC ¶ 34      |
| 2003-2006   | “The original PAMA called for constructing two sulfuric acid plants. Under the PAMA schedule, this project was to be last, with construction beginning in 2003 and ending in 2006. During the planning and design process, DRP engineers discovered that the only design that could meet regulatory standards required constructing three separate sulfuric acid plants for three different circuits in the Complex. Constructing three separate plants would require more work, more money, and more time.”  | SOC ¶ 34      |
| 2004-2006   | “Under these circumstances, DRP requested a five-year extension to complete the PAMA. MEM granted DRP only two years and ten months. Even MEM’s own experts advised it that this schedule was “very aggressive.” At the same time, MEM imposed on DRP 14 new projects regarding fugitive emissions and converted over 60 voluntary public health projects into mandatory obligations.”  | SOC ¶ 35      |
| 2006        | “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.” | CM ¶ 24       |
| 2007        | “By January 2007, the original PAMA deadline, DRP had completed almost all of the PAMA projects, including the new projects that MEM had imposed as a condition of receiving the extension.”  | SOC ¶ 36      |
| 2008        | “By the end of 2008, DRP’s total investment on the PAMA and related projects had increased to more than US\$ 300 million—more than double the costs that Centromin and MEM had projected when they sold the Complex.”   | SOC ¶ 36      |

| <u>Date</u> | <u>Claimant's Allegations</u>   | <u>Source</u> |
|-------------|---|---------------|
| 2008        | “By late 2008, the only PAMA project remaining to be finished was the sulfuric acid plants, which had been totally redesigned in 2006. DRP worked diligently on this project, spending almost US\$ 160 million on it in 2007 and 2008.”   | SOC ¶ 37      |
| 2008        | “By Fall 2008, DRP had completed the sulfuric acid plants for two of the Complex’s three primary circuits. In addition, DRP had made good progress on the last sulfuric acid plant, which had required DRP to substantially redesign and overhaul its entire copper smelting process. DRP had completed the detailed engineering work for the redesign of its copper smelting operations, issued more than 90 percent of the purchase orders for the work on this project, including an order for a new state-of-the-art furnace, and had contracts for all of the preliminary and structural work. DRP also had issued requests for proposal for the final installation of the remaining mechanical and electrical equipment. By this point, DRP had completed more than 25 percent of the total construction work, including about 55 percent of the site work and almost 40 percent of the structural work.” | SOC ¶ 37      |
| 2008        | “At the same time, DRP was continuing work on the construction of the last sulfuric acid plant. This was also a complicated engineering task, requiring DRP to design essentially two separate facilities—one to clean the process gas (that is, to remove the particulate matter, heavy metals, and acid gases) and a second “gas contact and sulfuric acid production system” to convert the cleaned gas into commercial grade sulfuric acid. Here, again, DRP was making good progress: the detailed engineering work was virtually complete, more than three quarters of the contracts had been let, site work was more than 85 percent complete, and fully one-third of the mechanical and structural construction work had been completed.”   | SOC ¶ 38      |
| 2008        | “The photographs below demonstrate the significant improvements that DRP had accomplished by 2009.”   | CM ¶ 25       |
| 1970s-2000s | “DRP’s efforts yielded remarkable environmental results when compared to the situation that it inherited from Centromin in 1997. For nearly 20 years, Peru had invested few, if any, resources to limit the Complex’s environmental impacts. Highly contaminated wastewater poured from the facility into the Mantaro and Yauli Rivers. Many of the smokestacks at the Complex lacked pollution control equipment, venting huge amounts of lead, arsenic, selenium, zinc, cadmium, SO <sub>2</sub> and other pollutants into the environment. What little pollution control equipment did exist was poorly maintained and badly needed repairs. More than 80 uncontrolled sources of fugitive emissions released additional pollution at low altitudes, causing concentrated particulate matter containing lead and other heavy metals to settle quickly over the inhabited areas surrounding the Complex.”     | SOC ¶ 39      |
| 2000s       | “The industrial wastewater treatment plant and storm water systems that DRP constructed had effectively eliminated liquid effluent discharges to the Yauli River and it brought other discharges into compliance with Peru’s Class III water standards. At the same time, DRP dramatically reduced air emissions, bringing the emissions from significant emission control points (i.e., stacks) into regulatory compliance. To put these results in context, DRP reduced particulate matter emissions from the main stack by 78 percent compared to 1997 levels. It reduced lead emissions from the main stack by 68 percent, and arsenic emissions decreased by 93 percent over the same period. Even SO <sub>2</sub> emissions had been reduced by 52 percent, even though the final SO <sub>2</sub> plant had not yet been completed.”  | SOC ¶ 40      |
| 2008        | “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.”  | CM ¶ 27       |
| 2008-2009   | “During the Global Financial Crisis, the price for copper and other metals collapsed. The crash in metal prices wiped out the profits that DRP used to finance the PAMA projects. At the same time, DRP’s lenders, themselves reeling from the financial crisis, refused to provide financing because of concerns about the tight PAMA deadline and because the government had launched a negative media campaign against DRP.”   | SOC § 42      |

| <u>Date</u>             | <u>Claimant's Allegations</u>   | <u>Source</u>   |
|-------------------------|---|---|
| <b>February 1, 2009</b> | <b>TREATY ENTRY INTO FORCE</b>  |   |
| <b>Feb. 2009</b>        | “In February 2009, DRP lost its US\$ 75 million revolving line of credit that provided day-to-day liquidity for its operations because DRP’s lenders would not extend the credit agreement unless DRP obtained a formal extension of the October 2009 deadline to complete the final PAMA project.”   | SOC§ 44; <i>see also</i> Memorial on Liability ¶ 169. |
| <b>Feb. 2009</b>        | “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.”   | CM ¶ 27   |
| <b>March 2009</b>       | “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.” | CM ¶ 28   |
| <b>2009</b>             | “Given that it was entitled to an extension under the Stock Transfer Agreement’s economic force majeure provision and recognizing that it would be impossible to complete the last sulfuric acid plant before October 2009, DRP asked MEM for an extension on March 5, 2009. DRP also advised MEM that its concentrate suppliers would freeze shipments if DRP could not obtain an extension. Without concentrate, DRP would need to reduce operations at the Complex, which would only exacerbate DRP’s financial condition.”  | SOC ¶ 45  |
| <b>2009</b>             | “Even though DRP was entitled to an extension under the economic force majeure provision, MEM demanded that DRP’s debt of US\$ 156 million to its parent, Doe Run Cayman, be 100 percent capitalized, and that Doe Run Cayman pledge 100 percent of its shares to DRP before MEM would even consider extending the October deadline.”   | SOC ¶ 46  |
| <b>2009</b>             | “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.”   | CM ¶ 29   |
| <b>2009</b>             | “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 (“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.”  | CM ¶ 30   |

| <u>Date</u> | <u>Claimant's Allegations</u>   | <u>Source</u> |
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| 2009        | “DRP and Doe Run Cayman agreed to these conditions in a Memorandum of Understanding (“MOU”) if MEM would grant it an adequate extension, but MEM refused to sign the MOU. By now, Renco was concerned that Doe Run Cayman would capitalize the debt and pledge the shares and MEM then would grant only an unreasonably short deadline that would not prevent DRP from falling into bankruptcy. In that scenario, without its debt and having pledged its shares, Doe Run Cayman would lose all of its voting rights in the bankruptcy proceeding.”   | SOC ¶ 46      |
| May 2009    | “In May 2009, Peruvian Government officials made public comments declaring that DRP would not receive any PAMA extension, and, in June 2009, DRP was forced to suspend operations at the Complex. Without an extension, DRP could not obtain financing, without which DRP could not pay its concentrate suppliers. Without concentrate, the Complex could not operate.”   | SOC ¶ 47      |
| 2009        | “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.”   | CM ¶ 31       |
| June 2009   | “After DRP ceased operations at the Complex, the Peruvian Government appointed a Technical Commission. That Commission concluded that a minimum 20-month extension was needed to complete the last sulfuric acid plant and that additional time on top of that was required to obtain financing.”   | SOC ¶ 48      |
| July 2009   | “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.” | CM ¶ 32       |
| Sept. 2009  | “A few months later, in September 2009, the Peruvian Congress passed a law granting DRP an extension of 30 months to complete construction of the last remaining environmental project.”  | SOC ¶ 48      |
| Sept. 2009  | “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.”  | CM ¶ 33       |
| 2009        | “This important extension soon became illusory and ineffective because MEM passed implementing regulations that undermined the new law’s benefits. For example, the regulations required DRP, inter alia, to pay 100% of its gross proceeds into a trust that would only release funds after securing three months’ worth of PAMA schedule obligations, thus making it virtually impossible for DRP to pay its workers or suppliers, or generally to operate the Complex.”  | SOC ¶ 49      |
| Oct. 2009   | “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 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.”   | CM ¶ 34       |

| <u>Date</u>              | <u>Claimant's Allegations</u>   | <u>Source</u>  |
|--------------------------|---|--|
| 2009                     | “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.”   | CM ¶ 35  |
| 2010                     | “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.” He also stated that the Government of Peru would “not allow a firm to blackmail the country.” 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.” | CM ¶ 36  |
| Feb. 2010                | “On February 18, 2010, one of DRP’s unpaid concentrate suppliers placed DRP into involuntary bankruptcy.”   | CM ¶ 39  |
| Feb. 2010                | “Then, in February 2010, one of DRP’s unpaid concentrate suppliers placed it into involuntary bankruptcy.”  | SOC ¶ 50   |
| Sept. 2010               | “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.”                              | CM ¶ 39  |
| 2010                     | “After DRP went into bankruptcy, Peru asserted a patently improper claim for US\$ 163 million. After DRP went into bankruptcy, Peru asserted a patently improper claim for US\$ 163 million. MEM alleged that because DRP failed to complete last sulfuric acid plant within the timeframe that Peru and MEM had improperly refused to extend, MEM itself would be required to complete those projects. 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 before INDECOPI.”   | SOC ¶ 51   |
| 2010                     | “That credit gave Peru nearly one third of all voting rights on the bankruptcy’s creditors’ committee. It also gave Peru the right to recover a large portion of DRP monies that should have gone to legitimate creditors, and it severely complicated DRP’s efforts to address the obligations 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, including one proposed by Renco, and supporting a subsequent vote to liquidate DRP.”   | SOC ¶ 52   |
| <b>December 29, 2010</b> | <b>NOTICE OF INTENT<br/>First Arbitration</b>   | Claimant’s Notice of Intent to Commence Arbitration Under the Treaty |

| <u>Date</u>       | <u>Claimant's Allegations</u>  | <u>Source</u>   |
|-------------------|--|---|
| 2011              | “DRP opposed MEM’s credit, and, in February 2011, the INDECOPI Bankruptcy Commission 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. The INDECOPI Commission correctly explained that the regulatory objective of the PAMA is to cause the owner of mining activity to implement steps needed to reduce or eliminate emissions. The INDECOPI Commission further held that if the owner of the La Oroya Complex does not complete a PAMA project, then the applicable legislation does not provide for—much less obligate— MEM to complete that PAMA project. It therefore cannot constitute a bankruptcy credit.” | SOC ¶ 53  |
| February 2011     | “MEM appealed the INDECOPI Commission’s Resolution to the Bankruptcy Chamber of INDECOPI’s Free Competition Tribunal (the “INDECOPI Tribunal”), the appellate body within INDECOPI.”   | SOC ¶ 54  |
| April 4, 2011     | <b>NOTICE OF ARBITRATION AND STATEMENT OF CLAIM<br/>First Arbitration</b>  | Claimants’ Notice of Arbitration and Statement of Claim         |
| September 9, 2011 | <b>AMENDEND NOTICE OF ARBITRATION AND<br/>STATEMENT OF CLAIM<br/>First Arbitration</b>   | Claimant’s Amended Notice of Arbitration and Statement of Claim |
| November 2011     | “[I]n November 2011, the INDECOPI Tribunal issued a resolution reversing the INDECOPI Bankruptcy Commission’s prior resolution reasoning that the nonfulfillment of the single remaining PAMA project “generated a direct and immediate damage” and that the estimated costs needed to complete the PAMA projects were an appropriate estimate of that damage  | SOC ¶ 54  |
| 2011              | “This decision drew a sharp dissent from one of the INDECOPI Tribunal’s members who explained that the estimated investment necessary to complete the PAMA at some future date does not constitute a valid bankruptcy credit, but that such noncompletion merely permitted MEM to impose (i) pecuniary sanctions upon the mining company and/or execute the performance bonds constituted to guarantee the fulfillment of the project contained in the PAMA; and, (ii) should non-compliance persist, the provisional closure and, eventually, definitive closure of the mining deposit.”  | SOC ¶ 54  |
| 2011              | “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.”  | CM ¶ 42   |
| 2012              | “DRP challenged the INDECOPI Tribunal’s resolution in an administrative action before the Peruvian judiciary, which assigned the case to the Fourth Transitory Administrative Court of Lima. The Fourth Administrative Court denied DRP’s request for annulment of the INDECOPI Tribunal’s resolution and therefore admitted MEM’s \$163 million bankruptcy credit. A special chamber of the Superior Court of Lima affirmed this decision in a 3-2 vote even though Peru’s Attorney General’s Office submitted an Opinion supporting DRP’s position.”   | SOC ¶ 55  |
| 2012              | “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.”  | CM ¶ 43   |

| <u>Date</u>              | <u>Claimant's Allegations</u>  | <u>Source</u>  |
|--------------------------|--|--|
| 2012                     | “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.”  | CM ¶ 40  |
| <b>November 13, 2013</b> | <b>ADJUSTED TREATY PRESCRIPTION DATE</b><br><b>Adjusted in the manner most favorable to Claimant</b>   | Treaty, Art. 10.18; SOC of Oct. 23, 2018; Framework Agreement of March 14, 2017; Consultation Agreement of Nov. 10, 2016 |
| 2014                     | “DRP appealed that decision to the Supreme Court of Justice, the highest judicial body in the Peruvian judiciary.”   | SOC ¶ 55   |
| 2014                     | “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.”  | CM ¶ 43  |
| <b>October 23, 2015</b>  | <b>TREATY PRESCRIPTION DATE</b><br><b>Based on the Treaty pursuant to Article 10.18</b>  | Treaty, Art. 10.18; SOC dated October 23, 2018   |
| 2015                     | “On November 3, 2015, the Supreme Court summarily rejected DRP’s appeal. Instead of ruling on the merits of DPR’s argument, the Supreme Court held that DRP (and Doe Run Cayman, which also participated in the appeal) had articulated why it considered the lower court’s ruling to be incorrect, but that it had failed to offer a proposed rule that the Supreme Court could accept or reject and that DRP’s appeal lacked ‘clarity and precision.’ The Court did not explain why DRP’s position that “a breach of the PAMA does not create a credit in favor of the MEM” was insufficiently clear. With the Supreme Court’s rejection of DRP’s appeal, DRP exhausted all local remedies under Peruvian law against the MEM credit. If the Supreme Court had granted DRP’s appeal and nullified the MEM credit, consistent with the initial ruling by INDECOPI Commission, all of MEM’s votes in the bankruptcy proceedings would have been declared invalid and DRP then could have attempted to restructure instead of liquidate (and do so without the US\$ 163 million MEM credit, which is the largest credit in DRP’s bankruptcy). In other words, when the Supreme Court rejected DRP’s appeal in November 2015, Renco lost any chance of regaining control of its investment and avoid DRP’s liquidation. As a result, Renco lost permanent control of its investment and the economic value of its investment in Peru.” | SOC ¶ 56   |
| 2015                     | “On November 3, 2015, the Supreme Court summarily rejected DRP’s appeal.”  | CM ¶ 43  |
| <b>July 15, 2016</b>     | <b>PARTIAL AWARD IN PRIOR TREATY CASE</b>  | <b><i>Renco v. Peru</i></b><br><b>(UNCT/13/1)</b>  |

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