IN THE ARBITRATION UNDER CHAPTER TEN
OF THE UNITED STATES-PERU TRADE PROMOTION AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

THE RENCO GROUP, INC.

Claimant/Investor,

-and-

REPUBLIC OF PERU,

Respondent/Party.

(ICSID Case No. UNCT/13/1)

SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

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1. The United States of America hereby makes this submission pursuant to Article 10.20.2 of the United States-Peru Trade Promotion Agreement ("U.S.-Peru TPA" or "Agreement"), which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Waiver Requirement (Article 10.18)

2. One of the preconditions to the Parties' consent to arbitrate claims under Chapter Ten of the U.S.-Peru TPA is the waiver required by Article 10.18. That provision is entitled "Conditions and Limitations on Consent of Each Party" and states in relevant part:

> 2. No claim may be submitted to arbitration under this Section unless:
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> . . .
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> (b) the notice of arbitration is accompanied,
>
> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
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> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

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

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

3. Similar to provisions found in many of the United States' international investment agreements,[1] Article 10.18 requires a claimant, at the time the notice of arbitration is submitted, to waive "any right to initiate or continue" any other dispute settlement "proceeding." Article 10.18 does not require a claimant to exhaust domestic remedies prior to submitting a claim to arbitration under the Agreement. Nor does Article 10.18 require a claimant to make an irrevocable choice between domestic proceedings and arbitration pursuant to the Agreement (as with a so-called "fork in the road" clause).[2]

4. Instead, Article 10.18 is a "no U-turn" waiver provision. Under this clause, claimants may elect to pursue any proceeding (including in domestic court) without relinquishing their right to assert a subsequent claim through arbitration under the Agreement, subject to compliance with the three-year statute of limitations for claims under the Agreement. But when asserting claims under the Agreement, claimants must waive their right to initiate or continue any proceeding with respect to the measure(s) challenged in the arbitration.

5. The purpose of the waiver provision is to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[3]

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[1] For example, waiver provisions similar to Article 10.18 of the U.S.-Peru TPA can be found in the North American Free Trade Agreement ("NAFTA") at Article 1121, in the Dominican Republic-Central American Free Trade Agreement ("CAFTA-DR") at Article 10.18, and in the 2012 U.S. Model Bilateral Investment Treaty ("BIT") at Article 26.

[2] As certain countries allow for private causes of actions in domestic courts for treaty violations, recent international investment agreements, including the U.S.-Peru TPA, contain a "fork in the road" clause in an Annex (here, Annex 10-G) that precludes "an investor from presenting a claim under the Agreement if it or an enterprise it owns or controls alleges a breach of the Agreement in the domestic courts or administrative tribunals of one of the Parties." Gary Sampliner, "Arbitration Innovations in Recent U.S. Investment Treaties" in John Norton Moore, INTERNATIONAL ARBITRATION: CONTEMPORARY ISSUES AND INNOVATIONS 153-54 (Martinus Nijhoff 2013).

[3] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) (stating, in relation to a waiver provision similar to Article 10.18 of the U.S.-Peru TPA, that "[t]he consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure."); *see also Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No.

6. As the plain language of both the title and the text of Article 10.18 make clear, as a condition precedent to submission of a claim to arbitration, a claimant must submit an effective waiver together with its Notice of Arbitration. Without an effective waiver, there is no consent from the respondent, which is necessary for a tribunal to assume jurisdiction.[4]

7. Compliance with Article 10.18 entails both formal and material requirements.[5] A claimant must not only provide a written waiver (formal requirement), but must also act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to the measure(s) alleged to constitute a Chapter Ten breach in another forum (material requirement). If all formal and material requirements are not met, the waiver shall be deemed ineffective and will not engage the respondent's consent to arbitration under the Treaty, and the tribunal will lack jurisdiction.[6]

8. As to the formal requirements, the waiver must be in writing and must be "clear, explicit and categorical."[7] The waiver must waive any right to initiate or continue any action with respect to measure(s) challenged in the arbitration, excluding any action that seeks "interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the

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ARB(AF)/98/2, Award § 27 at 236 (June 2, 2000) ("*Waste Management I*") (finding that, under the Article 1121, which is similar to Article 10.18 of the U.S.-Peru TPA, "when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the *double benefit* in its claim for damages") (emphasis added).

[4] *See Detroit International Bridge Company v. Canada*, NAFTA/PCA Case No. 2012-25, Award on Jurisdiction ¶ 291 (April 2, 2015) (discussing conditions precedent, including waiver, in NAFTA Article 1121 (a waiver provision similar to Article 10.18 here) and stating that "[a] claimant's failure to meet these conditions renders the [ ] Party's consent to arbitrate without effect"); *id.* ¶¶ 293, 320 (recognizing the import of the waiver provision and that "the absence of a valid waiver prevents the Tribunal from having jurisdiction in this case"); *Commerce Group Corp and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award ¶ 115 (Mar. 14, 2011) ("*Commerce Group*") (stating "the waiver is required as a condition to Respondent's consent [ ]," that "[i]f the waiver is invalid, there is no consent," and that "[t]he Tribunal, therefore, does not have jurisdiction over the Parties' [ ] dispute").

[5] *See Waste Management I*, Award § 20 at 230 (stating that "[a]ny waiver . . . implies a **formal and material act** on the part of the person tendering same") (emphasis in original); *Commerce Group*, Award ¶¶ 79-80 (agreeing with respondent that "any waiver must comply with both a formal and material element" and noting that "to understand the concept of waiver in any other way would render it devoid of meaning").

[6] *See Commerce Group*, Award ¶¶ 79-80; *id.* ¶ 115 (noting that the waiver was invalid and lacked "effectiveness" because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction); *see also Waste Management I*, Award § 31 at 239 (stating that the tribunal is "compelled to hold that it lacks jurisdiction to judge the issue in dispute now brought before it, owing to breach by the Claimant of one of the requisites laid down by [the waiver provision] and deemed essential in order to proceed with submission of a claim to arbitration, namely, waiver of the right to initiate or continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the [Agreement]").

[7] *Waste Management I*, Award § 18 at 229.

arbitration."[8] As the written waiver is to "accompany" the Notice of Arbitration, it must be submitted at the same time as the Notice of Arbitration.[9]

9. Compliance with Article 10.18 requires that the claimant not only provide a written waiver, but that it act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to the measure alleged to constitute a breach of the Agreement in another forum. As explained in relation to a similar provision in NAFTA Chapter Eleven,

> the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. . . . [I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver[.][10]

As the tribunal in *Commerce Group* explained in relation to a similar waiver provision contained in CAFTA-DR Chapter Ten, "[a] waiver must be more than just words; it must accomplish its intended effect."[11] Thus, if a claimant initiates or continues proceedings with respect to the measure(s) in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute. Whether a claimant has "initiated or continued" a proceeding (as opposed to merely defending a claim) depends on the specific facts and circumstances presented.

10. Article 10.18.2(b) requires a waiver of a claimant's "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure that is alleged to constitute a breach referred to in Article 10.16." The phrase "with respect to" in Article 10.18.2(b) should be interpreted broadly.[12] As the tribunal in *Commerce Group* observed, the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different

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[8] U.S.-Peru TPA, art. 10.18.3.

[9] U.S.-Peru TPA, art. 10.18.2(b)(i) (stating that "the notice of arbitration is accompanied, for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver"); *id.*, art. 10.18.2(b)(ii) (stating that "the notice of arbitration is accompanied, for claims submitted under Article 10.16.1(b), by the claimant's and the enterprise's written waivers").

[10] *Waste Management I*, Award § 24 at 231-232.

[11] *Commerce Group*, Award ¶ 80; *see also id.* ¶¶ 81-84.

[12] *See, e.g.*, *Softwood Lumber Consolidated Proceeding*, NAFTA/UNCITRAL, Reply Post-Hearing Submission of Respondent United States of America at 2 n. 2 (Mar. 10, 2006); *Canfor Corp. v. United States*, NAFTA/UNCITRAL, Reply on Jurisdiction of Respondent United States of America at 12 (Aug. 6, 2004) (citing North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., at 147 (1993) and noting that"[t]he SAA explains that 'Article 1121 requires [investors] . . . to waive the right to initiate or continue any action in local courts or other fora *relating to* the disputed measures.'"); *see also id.* (commenting on the "with respect to" construction in other NAFTA provisions); *accord Softwood Lumber Consolidated Proceeding*, NAFTA/UNCITRAL, Decision on Preliminary Question ¶ 201 (June 6, 2006) ("[T]he Tribunal is of the view that the words 'with respect to' are to be interpreted broadly.").

measures at issue in such proceedings are "separate and distinct," and the measures can be "teased apart."[13]

Relationship Between Articles 10.16 and 10.18 with Respect to Waiver

11. Article 10.16.1 permits two types of claims, which serve distinct purposes. Article 10.16.1(a) permits a claim by an investor solely on its own behalf for direct loss or damage suffered by it. Article 10.16.1(b) permits a claim by an investor on behalf of an enterprise that it owns or controls. The scope of the waiver required by Article 10.18.2 depends upon the claims being asserted under Article 10.16.1.

12. As the United States explained with respect to similar provisions in NAFTA, Article 10.16.1(a) is not intended to derogate from the rule of customary international law that shareholders may assert claims only for injuries to their interests and not for injuries to the enterprise.[14] Examples of direct losses sustained by an investor that would give rise to a claim under Article 10.16.1(a) include wrongful expropriation of the shareholders' ownership interests, whether directly through an expropriation of the shares, or indirectly by expropriating the corporation as a whole, or losses sustained as a result of the investor having been denied its right to vote its shares in a company incorporated in the territory of the host State.

13. In contrast, Article 10.16.1(b) *is* intended to derogate from customary international law by allowing an investor of a Party that owns or controls an enterprise to submit a claim on behalf of that enterprise for loss or damage incurred *by the enterprise*.[15]

14. If the claim is brought by an investor for losses it suffers directly, then only a waiver from the claimant under Article 10.18.2(b)(i) is required.[16] Likewise, an investor that owns or

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[13] *Commerce Group*, Award ¶¶ 111-12 (holding that the waiver barred the claimant from pursuing a claim in a domestic proceeding that was "part and parcel" of its claim in a pending CAFTA-DR arbitration, because the measures subject to the claims in the respective proceedings could not be "teased apart").

[14] *See GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, U.S. Article 1128 Submission ¶ 14 (June 30, 2003) ("*GAMI*"), *available at* http://www.state.gov/documents/organization/22212.pdf (last visited Aug. 26, 2015). Under Article 10.26.2, where a claim is made under Article 10.16.1(b), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. This provision prevents the investor from effectively stripping away a corporate asset – the claim – to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors. Moreover, under Article 10.26.2(c), where a claim is made under Article 10.16.1(b), the award must provide that it is made without prejudice to any person's right (under applicable domestic law) in the relief. *See Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh U.S. Article1128 Submission ¶ 7 (Nov. 6, 2001), *available at* http://www.state.gov/documents/organization/8251.pdf (last visited Aug. 26, 2015). If an investor could bring a claim under Article 10.16.1(a) for losses or damages incurred by an enterprise, both Articles 10.16.1(b) and 10.26.2 would be rendered ineffective, contrary to the customary international law principle of effectiveness. *See id.* (citing *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, ¶51 (rejecting construction that was "contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness.") (collecting authorities); *accord Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.")).

[15] *See GAMI*, U.S. Article 1128 Submission ¶¶ 11-12.

[16] U.S.-Peru TPA, arts. 10.16.1(a), 10.18.2(b)(i).

controls an enterprise in the territory of the respondent State and makes a claim on behalf of the enterprise must bring such a claim under Article 10.16.1(b) and must submit waivers both for itself and for the enterprise under Article 10.18.2(b)(ii).[17] If an investor seeking to recover for its direct loss or damage also seeks to recover loss or damage sustained by the enterprise, but the waiver is not for the enterprise, then the waiver requirement would not be met for the claims of loss or damage suffered by the enterprise.

15. Failure to make a claim under the appropriate provision(s) in Article 10.16 and to comply with the conditions and limitations on consent in Article 10.18, including the waiver provision, results in lack of consent by the Party and the concomitant lack of jurisdiction of the tribunal with respect to that claim.

16. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent as a function of the respondent's general discretion to consent to arbitration.[18] Therefore, while a tribunal may determine whether a waiver complies with the requirements of Article 10.18, a tribunal itself cannot remedy an ineffective waiver. Accordingly, a claim can be submitted, and the arbitration can properly commence, only if a claimant submits an effective waiver. The date of the submission of an effective waiver is the date on which the arbitration commences for purposes of Article 10.18.1.

Respectfully submitted,

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September 1, 2015

[17] U.S.-Peru TPA, arts. 10.16.1(b), 10.18.2(b)(ii).

[18] *Railroad Development Corporation v. Republic of Guatemala*, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5 ¶ 61 (Nov. 17, 2008) (stating that "the Tribunal has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver" and that "[i]t is for the Respondent and not the Tribunal to waive any deficiency under Article 10.18 or to allow a defective waiver to be remedied [ ]").