

September 23, 2015

Dr. Michael J. Moser
Mr. Toby L. Landau QC
Hon. L. Yves Fortier, CC, QC
c/o Ms. Natali Sequeira
ICSID – The World Bank Group
MSN J2-200, 1818 H Street, N.W.
Washington, D.C. 20433

Re: *The Renco Group, Inc. v. The Republic of Peru*

Dear Members of the Tribunal:

Renco hereby responds to the Tribunal's questions posed on September 16, 2015.

I. “At the Hearing, counsel for Peru introduced a number of examples which, it contends, demonstrate that the effect of this additional language could be to defeat the object and purpose of the waiver...”

The object and purpose of the Treaty's waiver provision is to prevent concurrent domestic and international proceedings, inconsistent results, and double recovery.¹ Renco's reservation does not defeat that object and purpose, and the case examples do not demonstrate otherwise.

A. *World Duty Free v. Kenya*

Peru asserted that the claims in *Word Duty Free* were “dismissed on inadmissibility grounds for reasons of a bribe.”² This is incorrect. The Final Award was an award on the merits. That tribunal found that the contract at issue was both validly avoided and unenforceable under the English and Kenyan law and public policy, as well as the *ordre public international*.³ Because the Final Award in *World Duty Free* was an award on the merits, the waiver obligation would apply and constitute a distinct affirmative defense in addition to any other defenses that might otherwise be available if the

¹ Renco's Counter-Memorial on Waiver ¶¶ 53-64; Renco's Rejoinder on Wavier ¶¶ 8-21.

² Hearing on Peru's Waiver Objections, Sept. 2, 2015, Tr. 50-12-14.

³ **RLA-123**, *World Duty Free Company Limited v. Kenya*, ICSID Case No. ARB/00/7, Award, Oct. 4, 2006 ¶ 118 (“In conclusion: 1) The Respondent, Kenya, was legally entitled to avoid and did avoid legally by its Counter-Memorial dated 18 April 2003 the “House of Perfume”, namely the Agreement of 27 April 1989 as amended on 11 May 1990, under its applicable laws, the laws of English and Kenya; 2) The Respondent, Kenya, did not lose its right to avoid the said contract by affirmation or otherwise before 18 April 2003 under these applicable laws; and 3) The Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract's applicable laws.”).

claimant attempted to initiate a new proceeding regarding the same measures. Thus, this authority does not demonstrate that Renco's additional language undermines the waiver's object and purpose.

B. *Metal-Tech v. Uzbekistan*

The *Metal-Tech* tribunal found that it lacked jurisdiction because the claimant had engaged in corruption when it made its investment.⁴ Peru argued that if a claimant such as Metal-Tech were to initiate a new proceeding, the State might object to the new action on grounds of waiver.⁵

First, no suggestion of corruption or fraud has been made against Renco. Second, because the *Metal-Tech* tribunal found that it lacked jurisdiction, it held that there was no arbitration agreement. Thus, if a domestic forum were available to the claimant in *Metal-Tech* to assert those dismissed treaty claims or claims under domestic law regarding the underlying measures, the waiver requirement under the US-Peru TPA per se would not bar those claims. That result is not because of Renco's additional language; that is because the waiver's existence is conditioned upon the arbitration agreement's existence. If there is no arbitration agreement, then no binding waiver can exist.

At the hearing, the Tribunal asked whether the Arbitral Tribunal's authority to decide on its own jurisdiction (*kompetenz-kompetenz*) renders Renco's argument circular.⁶ With respect, the answer is no. An arbitral decision to deny jurisdiction would vindicate Respondent's position that Peru did not consent arbitrate Renco's claims. In reaching this hypothetical conclusion, the arbitrators will have exercised and exhausted their *kompetenz-kompetenz* authority. As a result, this Tribunal would not hear or adjudicate Renco's claims.

So, where does this leave Renco? Renco proffered the waiver required by the Treaty with the sole purpose of permitting adjudication of its claims under the Treaty. Its waiver inextricably attaches to these claims. If the Arbitral Tribunal were to hypothetically find that Peru did not consent to arbitrate Renco's claims and that it will not hear or adjudicate any of them because it is not vested with jurisdiction under the Treaty, the Treaty cannot be read to nonetheless require Renco to maintain the waiver. The Treaty cannot be interpreted to strip investors of claims that will never be heard in arbitration under the Treaty.

That said, Renco agrees that a finding of illegality that is the product of a "full hearing in front of the Tribunal" cannot be relitigated in another forum. Even without the waiver, the *res judicata* that attached to the finding of bribery or some other finding of illegality would bar re-litigation of *that finding*. As a result, the subsequent domestic forum might dismiss the Claimant's claims based on the same finding that was the basis for the dismissal in the investment arbitration. But if the bribery or other illegality finding were not a bar to those claims in that domestic forum, or if another claim regarding the same or related measures were available to the claimant (for example, unjust enrichment regarding the benefits that a State obtained under a contract that is subsequently voided), that domestic forum could proceed to rule on the merits of the claims dismissed in the investment arbitration (or to rule on the measures that were asserted but not ruled upon in the arbitration). Notably, in this scenario, the investment tribunal did not make any findings regarding the measures that were the basis for the

⁴ **RLA-125**, *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, Oct. 4, 2013 ¶¶ 372, 423.

⁵ Hearing on Peru's Waiver Objections, Sept. 2, 2015, Tr. 51:2-4.

⁶ *Id.*, Tr. 166-167.

treaty claims. Thus, if a new forum subsequently rules on claims regarding those measures, that result would not undermine the object and purpose of the waiver because there would be no risk of double recovery, inconsistent results, or parallel proceedings.

C. *Plama v. Bulgaria*

As with *World Duty Free* and *Metal-Tech*, Peru cited *Plama* as an example of illegality giving rise to the dismissal of the claimant's entire case, this time on grounds of fraudulent misrepresentation. The *Plama* tribunal found that the knowing withholding of the investor's lack of financial capacity was a "deliberate concealment amounting to fraud,"⁷ and violated international public policy, which led to an exclusion of the investor's claims as inadmissible.⁸

For purposes of the Tribunal's inquiry, the situation in *Plama* is identical to *Metal-Tech* addressed above. Transposing the facts of *Plama* to this case, a finding of fraudulent misrepresentation would be *res judicata* upon Renco regardless of the terms of its waiver. But because the illegality complained of does not relate to any *measure* that served as the basis for Renco's claims, none of Renco's substantive claims would have been decided, and the possibility of instituting a new proceeding would therefore subsist—the waiver would not be triggered in the first place. If, as posited by Peru during the hearing, Renco were to "restart a case in local proceedings,"⁹ the State raising the same fraud defense no longer would need to prove that fraud occurred—Renco would be bound by the Tribunal's earlier finding. Further, following Peru's logic, if "local law would also preclude a claim from moving forward,"¹⁰ the outcome would also be the same—the case would be dismissed as inadmissible. That result is demanded not by Renco's waiver, but by *res judicata* coupled with the application of Peruvian law on the civil consequences of fraud. If, however, Peruvian law does *not* lead to an inadmissibility outcome even when fraud is proven, Renco would be able to seek relief from that local court to the extent that (i) it can prove its substantive claims, and (ii) some form of relief is allowed under that law. The object and purpose of the waiver would not be undermined, as there would not be any risk of double recovery, inconsistent results, or parallel proceedings.

D. *Loewen v. United States*

In the Award's *dispositif*, the *Loewen* tribunal made it clear that the dismissal was based on jurisdictional grounds. All of the *Loewen* tribunal's comments on the merits were *obiter dicta*.¹¹ It is uncontroversial to say that *obiter dicta* has no binding effect whether on future tribunals or indeed on the parties themselves. Tribunals must confine their decisions to those necessary to reach their decision, and the tendency to venture into *obiter* has been criticized severely.¹²

⁷ **RLA-124**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶ 135.

⁸ *Id.*, ¶¶ 135, 138-140, 146.

⁹ Hearing on Peru's Waiver Objections, Sept. 2, 2015, Tr. 50:17-19.

¹⁰ *Id.*, Tr. 51:1-2.

¹¹ **RLA-122**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003 ¶ 240.

¹² **CLA-134**, *see, e.g., Glamis Gold v. United States of America*, NAFTA (UNCITRAL), Final Award, Jun. 8, 2009 ¶ 8 ("... a tribunal should confine its decision to the issues presented by the dispute before it. ... given the Tribunal's holdings, the Tribunal is not required to decide many of the controversial issues raised in this proceeding. The Tribunal observes that a few awards have made statements not required by the case before it. The Tribunal does not agree with this tendency; it believes that its case-specific

Because the tribunal's comments in *Loewen* were *dicta*, they are not binding and thus, if the claimant in *Loewen* were to initiate a local proceeding regarding the same measures that were dismissed on jurisdictional grounds, there would be no risk of double recovery, inconsistent results, or parallel proceedings.

E. *Methanex v. United States*

In its *Final Award of the Tribunal on Jurisdiction and Merits*, the *Methanex* tribunal addressed the “merits” of some of the claimant’s claims because it was relevant to making its overall jurisdictional determination. The issue in the earlier *Partial Award* had been whether there was a “legally significant connection” between the parties (*i.e.* whether the “measures” adopted by the US “relat[ed] to” Methanex) such that NAFTA Chapter 11 applied. In the Final Award on Jurisdiction and Merits, the question of whether the tribunal had jurisdiction based on Methanex’s Amended Statement of Claim (alleging that the governor of California had been influenced to discriminate against Methanex by campaign contributions from a US maker of ethanol remained. This element of intent would potentially render Chapter 11 applicable, but was found not to have existed). The tribunal determined that it needed to address certain merits of the case in order to establish whether jurisdiction might yet exist should the merits have been proven.¹³

The *Methanex* tribunal considered that *if* it were to find in favor of the claimant on the merits, that finding retrospectively could show there was a legally significant connection between the parties, and therefore the tribunal would have jurisdiction over the dispute. But in performing this “merits” analysis, the Tribunal concluded that the claims failed on the merits, and thus its jurisdictional findings were justified.¹⁴

mandate and the respect demanded for the difficult task faced squarely by some future tribunal instead argues for it to confine its decision to the issues presented.”); **CLA-135**, Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012*, 28 Arb. Int'l. 577, 588 (2012) (“... we should be very much aware that arbitral tribunals receive their authority and mandate from the parties and institutions which appoint them for the case at hand. And that mandate is to decide on the relief sought, and to consider all factual and legal issues relevant for that decision, no less, but also no more.... To avoid misunderstanding: Of course, I accept that arbitral awards contribute to the further development of the law by being considered by the parties, their lawyers and later tribunals. But that effect should come from arguments which the tribunal had to consider for its decision on the relief sought in its specific case, and not by obiter dicta for which it had no mandate.”).

¹³ **RLA-12**, see *Methanex v. USA*, UNCITRAL, Final Award on Jurisdiction and Merits, Aug. 3, 2005 at IV/B/1 (“An affirmative finding of the requisite “relation” under NAFTA Article 1101, as decided in the Partial Award for the purposes of this case, does not necessarily establish that there has been a corresponding violation of NAFTA Article 1102 by the USA. But an affirmative finding under NAFTA Article 1102, which does not require the demonstration of the malign intent alleged by Methanex, could conceivably provide evidence relevant to a determination as to whether the “relation” required by NAFTA Article 1101 exists in this case. ...”); *Id.*, at IV/C/1 (“[A] failure to find a malign intent under Article 1101 might yet be repaired by an affirmative finding that an investor had not been accorded treatment in accordance with international law. Hence in fairness to Methanex, the Tribunal, as part of the joinder of jurisdictional questions and the merits, will now turn to the material adduced with respect to the claims under Article 1105 to determine whether a possible finding of a violation under Article 1105 could fulfill the requirements of Article 1101.”); *Id.*, at IV/D/1 (“As in the Tribunal’s consideration of Methanex’s claims under Articles 1102 and 1105 in the previous chapters, the Tribunal has considered it appropriate to examine Methanex’s claim arising under Article 1110 in order to determine if Methanex could thereby satisfy the threshold requirements of the required “relation” under Article 1101 NAFTA.”).

¹⁴ Notably, the tribunal had earlier found that the United States’ *jurisdictional challenges depended on issues intimately linked to the merits of the claimant’s case*, and thus required a full merits phase. **RLA-11**, *Methanex v. United States*, UNCITRAL, Partial Award, Aug. 7, 2002 ¶¶ 166-68; **RLA-12**, *Methanex v. United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Aug. 3, 2005 ¶ 16 (citing the tribunal’s order by letter of June 2, 2003).

Thus, as reflected in the title of its Final Award, the *Methanex* award was decided on jurisdiction *and* merits.¹⁵ The Final Award was not limited to jurisdiction, and thus would not have been encompassed by Renco's waiver, which applies to dismissals on jurisdiction or admissibility *alone*. Thus, transposing *Methanex* to the circumstances of this case, Renco would have received an award on the merits that would have discussed and ruled upon the measures, *precluding* it from going to another forum under the terms of its written waiver.

F. *Occidental v. Ecuador*

In *Occidental v. Ecuador*, the tribunal dismissed as inadmissible an expropriation claim based on specific tax measures. That tribunal, however, admitted and ruled upon other claims regarding those same tax measures. Peru argues, "in that case, the tribunal did find a national-treatment violation and a fair-and-equitable-treatment violation. But imagine if the tribunal had dismissed the fair-and-equitable-treatment claim and the national-treatment claim on the merits. Then, again, according to Renco, it could not relitigate those claims, because those were merits dismissals. But the even more unmeritorious expropriation claim that didn't even make it to the merits, because it was so lacking in merit or substance, according to the tribunal, that it was dismissed on admissibility grounds it could relitigate, because its waiver would carve this out."¹⁶

Peru's analysis is incorrect. The *Occidental* tribunal ruled on the merits of two treaty claims regarding the specific tax measures. Whether that tribunal ruled in favor of the claimant or respondent on the merits of those claims, the waiver would apply to preclude any further litigation based on the rulings concerning those *measures*. The waiver would bar *Occidental* from initiating any new proceeding regarding those tax measures whether as an expropriation claim or under any other underlying theory of law. It is undisputed that a party may not avoid the waiver requirement by casting its claims under a different theory of law in a different forum concerning the same measures. Thus, transposing those facts to the present case, Renco would be barred from bringing *any* claims in another forum based on measures already decided upon by the Tribunal on the merits. The object and purpose of the waiver would not be undermined, because there would be no risk of concurrent domestic and international proceedings, inconsistent results, and double recovery.

G. *Examples in this arbitration*

At the hearing on waiver, Peru noted several of its Article 10.20.4 objections, including: a) Peru is not a party to the Stock Transfer Agreement, (b) the Guaranty Agreement is void under Peruvian law, and (c) Renco failed to submit factual issues to a technical expert. Peru argued that, in

¹⁵ There has been commentary to the effect that "jurisdictional" determinations of the type made in the *Methanex* tribunal's earlier partial award were, in reality, neither jurisdiction nor admissibility findings, but decisions on the merits. **CLA-136**, See J. Paulsson, *Jurisdiction and Admissibility*, in REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601, 607 (G. Aksen et al eds., 2005)("The tribunal quite correctly took the view that [the U.S. objection on grounds that "taking all of the allegations of fact made to be true ... as a matter of law, there can be no claim, and the claim is ripe for dismissal at this stage"] was not a jurisdictional challenge. Regrettably it did not clear the air by adding that it was not an objection of inadmissibility either. This can be easily demonstrated. By its own definition, the USA's challenge required consideration of the 'matter of law' which would preclude the claim. The merits of a case are not limited to issues of fact.").

¹⁶ Hearing on Peru's Waiver Objections, Sept. 2, 2015, Tr. 53:13-54:4.

Renco's view, if the Tribunal dismisses any of Renco's claims for lack of jurisdiction on these grounds, Renco should be able to re-litigate those holdings in a domestic proceeding.¹⁷

Peru misstates Renco's view for two reasons. First, the *res judicata* of the investment award dismissing those claims would preclude Renco re-litigating those holdings in a subsequent domestic proceeding. Second, if the State measures at issue in the dismissed claims still were before this Tribunal during the merits phase because those measures were also the basis for other claims, then the waiver obligation would attach to those measures and bar Renco from initiating any new proceeding.¹⁸ On the other hand, if the dismissal on jurisdictional grounds were such that measures in the dismissed claim would not be at issue in the merits phase of this arbitration as part of another claim, then the waiver would not bar Renco from initiating a new proceeding regarding that measure. And if Renco pursued that claim, there would be no risk of concurrent domestic and international proceedings, inconsistent results, or double recovery regarding that measure.

In short, none of Peru's hypotheticals demonstrate that the additional language in Renco's waiver defeats the waiver's object and purpose.

II. What is the *real effect*, in the circumstances of this case, of the additional language contained in Renco's waiver?

The real effect of the additional language contained in Renco's waiver, under the circumstances of this case, is the same as if the additional language had not been included.

First, by its terms, Renco's waiver will apply to all claims and all measures over which the Tribunal asserts jurisdiction. Thus, if the Tribunal asserts jurisdiction over all of Renco's claims, the additional language will have no object and no real effect.

Second, if the Tribunal dismisses claims on jurisdictional or admissibility grounds (without deciding merits), and no claims remaining in the arbitration involve measures overlapping with dismissed claims, the waiver does not apply and the Treaty permits Renco to attempt to have the merits of those claims heard in a different forum irrespective of the additional language contained in Renco's waiver. Consequently, the additional language has no real effect in this second scenario.

Finally, although Peru has, on the one hand, placed the issue of the scope of Renco's written waiver before this Tribunal by bringing its jurisdictional objection to the Tribunal under the guise of urgency, which caused the Tribunal to order these streamlined proceedings under UNCITRAL Rule 23(3), Peru argues, on the other hand—and paradoxically—that the question as to whether Renco's waiver would bar that future claim from going forward must be resolved by a future hypothetical court or Tribunal that is seized with that claim, and certainly *not* by this Tribunal.

If the Tribunal accepts Peru's argument that a future court or tribunal must decide this issue (*i.e.*, the scope of Renco's waiver) and that this Tribunal should not do so, then there is absolutely no real effect of Renco's additional language in the circumstances of *this* case. Moreover, the additional language contained in Renco's waiver *also will* be of no consequence in any such hypothetical future

¹⁷ Hearing on Peru's Waiver Objections, Sept. 2, 2015, Tr. 55:13-56:1.

¹⁸ *Id.* at Tr. 151:8-157:7.

proceedings. Specifically, as a result of Peru's objections that resulted in these waiver proceedings, a future court or tribunal will not view the written waiver in isolation and disassociated from these proceedings. In these proceedings, Renco has made clear and binding statements that the additional language was not intended to—and does not—reserve to Renco any rights concerning waiver that the Treaty does not already allow. Under international law, Renco is bound by those statements.¹⁹

Specifically, Peru set forth its purported concerns with respect to the additional language in Renco's waiver as follows at the waiver hearing:

But that question as to whether its waiver would bar that future claim from going forward must be resolved by that future court or Tribunal that is seized with that claim. That's not an issue that should be negotiated with Peru now, *and it's certainly not an issue for this Tribunal to decide...*

The issue is whether Peru is entitled to argue before any future Tribunal that Renco's waiver precludes it from bringing the Claim separate and apart from any argument that this Tribunal's decision would have *res judicata* effect...and Renco wants to foreclose Peru from putting a waiver defense forward....²⁰

Peru argues that Renco wants to foreclose Peru from putting a waiver defense forward, notwithstanding the fact that immediately after Peru *first raised the issue* in this streamlined waiver proceeding, Renco made repeated binding statements that its additional language does *not* foreclose Peru from putting a waiver defense forward to the same extent Peru could or would in a potential future proceeding were the additional language not present.

Renco believes that its interpretation of the Treaty is the correct one, such that Renco would be permitted to bring claims in another forum to the extent this Tribunal dismisses such claims on jurisdictional or admissibility grounds and no overlapping measures go forward in the arbitration, irrespective of the additional language. But to the extent that Renco is mistaken in this belief (which it is not), a future court or tribunal deciding the scope of the Treaty's waiver will place no relevance whatsoever in the additional language. In *Softwood Lumber*, the claimant withdrew its NAFTA claim, and respondent asked the tribunal to pre-determine whether the treaty barred the claimant from bringing claims in a different forum by declaring the dismissal of the NAFTA arbitration "with prejudice." The tribunal declined stating, "the question whether or not the termination as to Tembec is with or without prejudice to reinstatement is to be considered and decided upon by the Article 1120

¹⁹ **CLA-137**, *Nuclear Tests Case* (New Zealand v. France) Judgment 1974 ICJ Rep. ¶ 49 ("One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the *principle of good faith*. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, *so also is the binding character of an international obligation assumed by unilateral declaration*. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."); *see, also*, Renco's Rejoinder on Waiver ¶¶ 68-69.

²⁰ Hearing on Peru's Waiver Objections, Sept. 2, 2015, Tr. 45:8-13, 47:13-17, 48:3-4; *see, also*, Peru's Reply on Waiver ¶ 17 ("To the extent this Tribunal dismisses Renco's claims for lack of jurisdiction or admissibility, and Renco chooses to bring these same claims in another forum, that forum will have sole authority to determine whether Renco's claims are barred by the waiver which it was required to submit in order to commence this Treaty claim.").

tribunal, if any, to which Tembec may seek to resubmit the aforementioned NAFTA claims....”²¹ Just as the tribunal in *Softwood Lumber* declined the invitation to pre-judge what a hypothetical future court or tribunal may or may not do, so too should this Tribunal. It is undisputed that Renco provided a written waiver. The only question is whether the waiver that Renco has given bars potential future claims from going forward in a hypothetical future court. A pre-judgment of that issue in Peru’s favor by this Tribunal would be particularly inappropriate and unfair in the circumstances of this case because even Peru acknowledges, as it must, that at least some types of jurisdictionally dismissed claims may go forward in another forum.²² Thus, because a waiver undisputedly has been given, and the only question is how a hypothetical future court may interpret the additional language in the context of Renco’s many binding statements that the language is merely superfluous and does not impact the given waiver, it is respectfully submitted that it is the hypothetical future court, and not this Tribunal, that should make that determination, should the issue ever even arise.

Given that: (i) Peru has argued that whether Renco’s waiver would bar potential future claims from going forward must be resolved by a future court or Tribunal that is seized with that claim; and is “certainly not an issue for this Tribunal to decide,” (ii) the “real effect” of the additional language is that it will have no object in a hypothetical future proceeding even if Peru’s interpretation of the Treaty’s waiver provision is correct (which it is not), because Renco has made clear and binding statements in these proceedings that the additional language was not intended to and does not narrow or impact the scope of the waiver that the Treaty requires, and which Renco has given, and (iii) Renco has not taken any action inconsistent with the waiver, the Tribunal should refrain from deciding the relevance of the additional language (*i.e.*, the scope of the waiver), and the Tribunal should decide instead to allow a future potential court or Tribunal seized with a potential claim to determine the issue, as Peru argues the Tribunal is compelled to do.

III. The Tribunal invites Renco to clarify what was intended by the reference to the “no harm/no foul, no statute of limitations issue” when it said that it would strike the additional language in its waiver.

Because Renco states affirmatively that the additional sentence in its waiver does not give it any more rights than are afforded to it under the Treaty, Renco is willing and prepared to manually strike the sentence. Manually striking the sentence is unnecessary under the circumstances of this case, for the reasons set forth in the answer to Question II above. But if manually striking the language would further ameliorate Peru’s alleged concern regarding what Renco may or may not do in any subsequent proceeding, Renco would do so. Peru certainly has not been prejudiced by the language to date, because the language by its terms would only have potential relevance after a jurisdictional award by this Tribunal in Peru’s favor. Indeed, the language has existed for more than four years, and Peru raised its objection regarding to this language for the first time only recently—after the agreement between the Parties resulting in Procedural Order No. 1, Renco’s filing of its Memorial on Liability, and the Tribunal’s 10.20(4) Scope Decision.

²¹ **RLA-116**, *Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec. et al. v. United States of America* (“*Consolidated Softwood Lumber*”), Order for the Termination of the Arbitral Proceedings with respect to Tembec et al., Jan. 10, 2006 ¶ 17; *see, also*, Renco’s Rejoinder on Waiver ¶¶ 16-18.

²² Hearing on Peru’s Waiver Objections, Sept. 2, 2015, Tr. 49:1-7 (“[I]t certainly may be the case that depending on what grounds a Tribunal might dismiss on jurisdictional or admissibility grounds, a waiver might not preclude a future claim; or in other cases depending on the grounds for the dismissal, it arguably could preclude the Claim.”); *see, also, id.* Tr. 228:3-13.

Article 10.18 of the Treaty provides, “[n]o claim may be submitted to arbitration under this section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1....” Renco filed its Notice of Arbitration and Amended Notice of Arbitration well within the three-year statute of limitations under the Treaty. Renco is concerned (and that concern was validated by Peru’s counsel at the hearing) that if Renco were to manually strike the last sentence from its existing waiver now, Peru would argue that the arbitration was not even commenced until that ministerial act takes place, thus implicating the statute of limitations.

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

IV. At the Hearing, counsel for Renco stated that “even if there is a formal defect in the written waiver...Renco should be given a fair opportunity to cure it.” How would Renco “cure” their written waiver?

In *Thunderbird*, the claimant had failed to provide any waiver with its Notice of Arbitration, but cured that formal defect by providing a waiver in accordance with the Treaty’s requirements during the course of the arbitration. Renco has provided a waiver. If the Tribunal were to (i) engage in a scope analysis (which it may choose not to do for the reasons set forth in answer II above) and (ii) conclude that the additional language constitutes a formal defect under the Treaty (which it does not), Renco would propose to strike the additional language from its existing waiver or provide a new waiver that does not contain the additional language.

Once Renco takes the steps that this Tribunal deems necessary to cure any formal defect, Renco should be treated as if it complied with the Treaty’s waiver requirements from the outset of this arbitration even though any defect will have been eliminated at a point in time after Peru received Renco’s Amended Notice of Arbitration. Renco will not have, and never has, committed any material breach—unlike *all* of the authorities on which Peru relies—and it will have provided Peru with a complete formal waiver, which is what Renco intended and believes it did from the outset. Notably, Peru objected in writing years ago, by letter dated March 18, 2012, to Doe Run Peru’s filing of its challenge to the INDECOPI Tribunal’s decision regarding the Ministry’s claim in the bankruptcy, complaining incorrectly that the bankruptcy filings violated the Treaty’s waiver provision and that Doe Run Peru should abandon and discontinue its defense in the bankruptcy proceedings. Renco responded by letter dated March 20, 2012 (Ex. C-058), disagreeing with Peru’s argument and refusing the request that Doe Run Peru abandon its bankruptcy defense. If Peru truly were concerned with the additional language at issue in Renco’s written waiver, Peru should have raised its concerns before now. If Peru had previously raised its alleged concerns of the additional language in writing, as it did with the waiver issue relating to the bankruptcy proceeding, Renco would have responded and put Peru’s

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concerns to rest at that time, just as it has done in these proceedings. The language is, and always has been, superfluous.

As in *Thunderbird*, the only issue will have been a harmless delay in providing a complete formal waiver. Because the claimant had remedied the defect, the *Thunderbird* Tribunal—in a holding that is consistent with numerous holdings of the PCIJ and ICJ—held that “a failure to meet such requirement cannot suffice to invalidate the submission if the so-called failure is remedied at a later stage of the proceeding...Thunderbird effectively complied with the requirements of Article 1121 of the NAFTA.”²³ The object and purpose of the waiver will have been served. Peru will not have suffered any prejudice. And a contrary result would constitute an excessively technical application of the Treaty. Thus, should the Tribunal choose to pre-determine the issue concerning the relevance, if any, that a hypothetical future Tribunal may place on the additional language (which it should not), and in doing so determines that a formal defect exists (though one does not), and affords Renco an opportunity to cure it by striking the sentence, Renco requests that the Tribunal issue a Partial Award holding that: a) Renco has complied with the Treaty’s waiver requirement, and b) all of Renco’s claims shall be deemed submitted to arbitration on the date when Peru received Renco’s Amended Notice of Arbitration.

Very truly yours,



Edward G. Kehoe

cc: Mr. Jonathan C. Hamilton
Ms. Andrea J. Menaker

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²³ **CLA-19**, *International Thunderbird Corp. v. Mexico*, Award, Jan. 26, 2006 ¶¶ 117-18; Claimant’s PowerPoint Presentation at the Hearing on Waiver slides 31-40; Hearing on Peru’s Waiver Objections, Sept. 2, 2015, Tr. 169:1-180-5, 273:1-281:14.