

9 September 2016

Members of the Tribunal
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The Renco Group, Inc. v. Republic of Peru (UNCT/13/1)

Dear Members of the Tribunal:

Further to the Tribunal's communication of 2 September 2016, the Republic of Peru respectfully submits focused and limited comments on the issue of costs, and reiterates its request that it be awarded the totality of the costs it has incurred in connection with this arbitration.

1. Renco's Procedural Violation Underscores Why Peru Should Be Awarded Costs

Renco violated an agreed procedural order by prejudicially citing new evidence out of context in its Submission on Costs, with procedural and substantive consequences (including necessitating these supplemental comments) that underscore why Peru should be awarded its full costs.

- *The Violation:* The Parties agreed and the Tribunal ordered that “[n]o new evidence or reports will be permitted” with the submissions on costs.¹ Renco nevertheless described and discussed in two paragraphs of its submission a letter that it sent to Peru on 21 July 2016 – a letter with which it was fully familiar when it agreed not to use new evidence. The inaccurate discussion included, among other things:

By letter dated July 21, 2016, Renco advised Peru that Renco intends to commence an arbitration shortly under the Treaty, and requested that Peru advise in writing whether it accepts that time stopped running for purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011. Renco requested a response by August 10, 2016, but Peru has not responded.²

- *Procedural Consequences:* The present submission was made necessary as a result of Renco's violation, as well as the further prejudice that arose after Peru sent a brief procedural objection on 30 August 2016. Specifically, Renco compounded its initial violation by making additional inaccurate and misleading arguments on 31 August 2016. Among other things, Renco falsely stated it was “undisputed” that Peru did not respond to its letter of 21 July 2016, and attempted to draw a false equivalence between its procedural violation and Peru's generalized statement that it has invited a focus on solutions related to La Oroya.³

¹ Letter from Peru to Renco dated 25 Jul. 2016; Email from Renco to Peru dated 27 Jul. 2016; Email from the Tribunal dated 15 Aug. 2016. Among other things, Peru sought an agreement prohibiting new material given Renco's history of sandbagging Peru, including in its submission of 23 Oct. 2015, which Peru did not have the opportunity to address.

² Claimant's Submission on Costs, ¶ 25.

³ Compare Letter from Renco to the Tribunal dated 31 Aug. 2016 and Peru's Submission on Costs, ¶ 21.

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- *Peru's Prior Response to the Renco Letter:* Contrary to Renco's repeated misstatements, Peru did respond to Renco's letter of 21 July 2016, despite having no obligation to do so. Specifically, the Special Commission for the Defense of the Peruvian State responded directly to Renco on 12 August 2016, referencing, among other things, Renco's recent correspondence and observing that Peru will consider the implications of any claim at the appropriate time.
- *Context and New Claims:* In selectively citing new evidence, Renco also failed to reveal to the Tribunal that it had filed two new notices of dispute, which were received by counsel to Peru on the same day that the submissions on costs were due. Although the possibility of any future case remains hypothetical, Renco's formulation of the new claims is tellingly responsive to Peru's arguments in this case:
 - Renco has changed its Treaty claims, including by withdrawing claims relevant to Peru's other objections in this proceeding that were not decided by the Tribunal. Renco's actions thus demonstrate the validity of Peru's longstanding objections and that any new Treaty proceeding will not simply repeat the prior proceeding, and the appropriateness of ordering Renco, as the unsuccessful party in this arbitration, to bear the entire costs of this arbitration.
 - Renco also added new Treaty claims based precisely on the Peruvian Supreme Court's ruling in the very same proceeding that was the focus of Peru's material waiver objection. Renco's conduct thus validates Peru's warning in its letter of 29 April 2015 that, in the event Renco was unsuccessful in the local proceedings, it likely would "turn to the Tribunal and claim that the decisions of the Peruvian courts constitute or are evidence of an additional Treaty violation."⁴ In other words, Renco is now seeking to benefit from its material violation of the waiver requirement and oblige Peru to incur further defense costs.
 - Renco also requests the appointment of a technical expert to render a decision according to the Contract, which Peru argued in this arbitration was a prerequisite.

Peru remains ready to provide copies of the referenced materials, previously discussed out of context by Renco, to the extent requested by the Tribunal.

2. Renco's Comments Are Inaccurate and Inapposite

Renco's procedural violation was a troubling ploy to advance arguments against Peru that are inaccurate, inapposite, and provide no basis to deviate from the "loser pays" principle. It was a vehicle to punish Peru for diligently raising and winning on the waiver objection. The timing of Renco's 21 July 2016 letter and its argument that the Tribunal ought to take "Peru's [alleged] refusal to affirmatively accept [that time stopped in 2011 for purposes of Article 10.18(1)] into account when allocating the costs of this proceeding"⁵ lay bare Renco's inappropriate motivation for sending its letter.

- *Renco seeks to punish Peru for protecting its Treaty rights.* Renco could not have seriously expected that State officials with accountability obligations would have considered and determined – within a deadline imposed by a claimant – to sign an abstract waiver of potential rights that the State may have under the Treaty to a theoretical future case. As Peru observed previously, Renco does not get to rewrite the Treaty negotiated and ratified by Peru and the United States; the Treaty conditions consent on the waiver requirement, and does not authorize Renco to impose new requirements on Peru.⁶ In

⁴ Letter from Peru to the Tribunal dated 29 Apr. 2015, at 6.

⁵ Claimant's Submission on Costs, ¶ 26.

⁶ See e.g. Waiver Hearing Tr., 239:6-10.

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the event that Renco's new Treaty notice materializes into an arbitration despite consultations, Peru will consider at that time the implications of any claims and its defenses to such claims, which will then be decided by the new tribunal. For now, this Tribunal clearly concluded that Renco did not comply with the Treaty, that Peru did not commit an abuse of rights, and that the Tribunal itself has no power to remedy Renco's non-compliance. Accordingly, the Tribunal held that Renco had failed to establish the requirements for Peru's consent to arbitrate under the Treaty and that Renco's claims must be dismissed for lack of jurisdiction. Correspondingly, it would be prejudicial under the circumstances to deviate from the rule that the unsuccessful party (*i.e.*, Renco) must bear the costs of the arbitration.

- *Renco delayed Peru from being heard.* Renco falsely suggested in its final submission in the waiver phase and again in its Submission on Costs that Peru intentionally delayed the hearing of its waiver objection in order to obtain an undue advantage.⁷ Renco is wrong, and Peru and its counsel object to this misrepresentation of the facts. It is Renco, not Peru that delayed this issue. Renco grossly misstates the facts concerning the timing of Peru's objection in direct contradiction with Renco's submission of 3 April 2014 acknowledging Peru's objection to Renco's formal violation of the waiver requirement,⁸ and its requests that Peru present all jurisdictional objections together, even if that required delaying the submission of jurisdictional objections until Peru's Counter-Memorial.⁹ Moreover, Peru acted diligently and in a timely manner, raising concerns regarding the waiver requirement at the outset of this proceeding, and timely notified its objection under the Treaty, the UNCITRAL Rules and Procedural Order No. 1.¹⁰ This case thus stands in sharp contrast with *Zhinvali v. Georgia* (on which Renco relies), in which the respondent submitted its objection with its Rejoinder and in violation of Article 41(1) of the ICSID Arbitration Rules.¹¹
- *Renco wrongly suggests this was an issue of first impression.* Renco chose to include a reservation of rights in its waiver, even though Article 10.18(2) of the Treaty requires a clear and categorical waiver and, as the Tribunal observed, tribunals "have repeatedly held that a waiver is invalid if an investor purports to carve out from its scope certain domestic court proceedings."¹² The issue, therefore, was not novel. Moreover, although this was the first case under the Treaty, as the Tribunal observed, the Treaty's waiver requirement and the consequences of a failure to comply with it are "much more explicit" than in other treaties that have been the basis for waiver decisions.¹³ Indeed, where investment arbitrations have "become so well known and established," tribunals have concluded that

⁷ Claimant's Submission on Costs, ¶¶ 19, 20, 27; see Partial Award, ¶ 174.

⁸ Compare Renco's Submission on the Scope of Preliminary Objections dated 3 Apr. 2014, at 1 (dividing Peru's waiver objection into a formal and a material component); Claimant's Submission on Costs, ¶¶ 17, 20 (arguing that Peru raised the formal violation "for the first time in the streamlined waiver phase of the case" in July 2015).

⁹ First Session Tr., 176:23 – 177:5 (counsel to Renco stating that "we would ask that *all jurisdictional objections be addressed at the same time.*") (emphasis added); see also, *e.g.*, Claimant's Comments On The Submission Of The United States Of America Regarding The Interpretation Of Article 10.20(4) dated 1 Oct. 2014, at 14 ("Claimant respectfully requests that the Tribunal issue an award declaring that . . . Respondent will bring its objections to the Tribunal's competence during the merits phase of the case."); Email from Renco to the Tribunal dated 8 May 2015 ("[T]he proper time for Peru to raise its jurisdictional waiver defenses is in its jurisdictional and merits memorial – not as a preliminary matter."); Letter from Renco to the Tribunal dated 10 Jun. 2015, at 3 ("If Respondent wishes to bring [the waiver] objection in these proceedings, it should be directed to do so with its Counter-Memorial on Liability.").

¹⁰ UNCITRAL Arbitration Rules, Art. 23(2); Procedural Order No. 1 dated 22 Aug. 2013, Annex A; see also, *e.g.*, ICSID Arbitration Rules, Rule 41(1).

¹¹ *Zhinvali Development Limited v. The Republic of Georgia* (ICSID Case No. ARB/00/1) Award dated 24 Jan. 2003, ¶¶ 422, 423 (CLA-187).

¹² Partial Award on Jurisdiction dated 15 Jul. 2016 ("Partial Award"), ¶ 75 (emphasis added).

¹³ Partial Award, ¶¶ 140-142.

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the novelty “factor is no longer applicable when considering apportionment of costs.”¹⁴ Tribunals also have refused to deviate from the loser pays principle based on the circumstance that the case “was never an easy, simple or straightforward case.”¹⁵

- *Renco did not fully reveal its costs.* Renco has chosen not to reveal the entire costs it has incurred in connection with this arbitration. Regardless of Renco’s motive for not doing so, this is an admission that Renco is not entitled to recoup those costs. Peru, in turn, has revealed the totality of its costs, which reflect the many deficiencies in Renco’s case, beginning with its problematic original notice of arbitration of April 2014, and including its numerous attempts to delay a decision on Peru’s waiver objection. Peru, in fact, had to present at least 12 submissions and numerous other communications over more than 18 months in order to be heard and brief its waiver objection.¹⁶

3. The Fundamental Reasons Why Peru Must Be Awarded Its Costs Are Incontrovertible

The Treaty requirement is clear. Renco violated the Treaty, and Peru prevailed in this arbitration on an objection that it raised diligently and on which it sought to be heard sooner, rather than later. Neither Renco’s procedural violation nor anything in its Submission on Costs changes the fundamental rules governing this arbitration and reasons why Peru must be awarded its full costs:

- The Treaty provides that the Tribunal may award costs in accordance with the applicable arbitration rules, which in this case provide that the “loser pays.”
- The Tribunal dismissed *all* of Renco’s claims for lack of jurisdiction. It rejected Renco’s arguments to the contrary, including its eleventh hour argument on abuse of rights, and found that Peru’s objection was not tainted by any ulterior motive to evade its duty to arbitrate.
- The Tribunal already concluded that Renco’s failure to comply with the waiver requirement is significant and “not a trivial defect which can be easily brushed aside.”¹⁷ Indeed, Renco made a conscious decision to repeatedly submit a non-compliant waiver, despite the Treaty’s unambiguous language and object and purpose, and despite the fact that similar requirements have been discussed in multiple arbitral decisions.
- Renco consistently sought to block Peru from protecting its Treaty rights, even as Peru repeatedly sought to be heard. Had Renco had its way, Peru would have had to wait until the time of its Counter-Memorial to present its objection, and the Tribunal would not have decided the issue for years. Instead, Peru incurred reasonable costs given the numerous submissions it had to make on the waiver objection in light of Renco’s conduct, as well as prepare for and defend against Renco’s substantial claims. Renco must now bear these costs.
- Renco has once again delayed and aggravated the proceeding by violating the procedural agreement and Tribunal’s order for the submissions on costs by submitting new evidence to the Tribunal, which, moreover, is inaccurate and incomplete.

¹⁴ *International Thunderbird Gaming Corp. v. The United Mexican States* (UNCITRAL) Award dated 26 Jan. 2006, ¶ 218 (CLA-19).

¹⁵ *Gemplus S.A. et al. and Talsud S.A. v. The United Mexican States* (ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4) Award dated 16 Jun. 2010, ¶¶ 17-24 (RLA-199).

¹⁶ See Peru’s Submission on Costs, ¶ 28.

¹⁷ Partial Award, ¶ 138.

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- The costs that Peru has incurred to defend against Renco's claims reflect the significance and complexity of the claims, the length of the proceedings, and the complications caused by Renco's strategic choices. Peru's should be fully reimbursed by Renco.

* * *

For all the reasons set forth above and in Peru's Submission on Costs dated 15 August 2016, Peru is entitled to the totality of the costs it has incurred in connection with this arbitration, including the indicated additional costs related to Renco's latest procedural violation, and without the application of any offsets. Peru respectfully requests that the Tribunal award Peru its costs for the total amount indicated in Appendix A. Peru appreciates the Tribunal's attention to this issue.

Respectfully,



Jonathan C. Hamilton

Andrea J. Menaker

SUMMARY OF COSTS AND EXPENSES

<i>Costs/Expenses</i>	<i>Amount (US\$)</i>
BEFORE NOTIFICATION OF PRELIMINARY OBJECTIONS	
Experts	654,613.80
Local and International Counsel	2,154,559.80
Costs	98,564.39
Tribunal/Administrative Expenses	175,000
Subtotal	3,082,737.99
AFTER NOTIFICATION OF PRELIMINARY OBJECTIONS	
Experts	142,327.97
Local and International Counsel	1,306,744.66
Costs	9,777.13
Tribunal/Administrative Expenses	200,000
Subtotal	1,658,849.76
AFTER PERU OBJECTED TO ONGOING VIOLATIONS	
Experts	992,993.94
Local and International Counsel	2,374,665.70
<i>Additional fees incurred due to Renco's latest procedural violations</i>	30,000
Costs	83,531.23
Tribunal/Administrative Expenses	200,000
Subtotal	3,681,190.87
TOTAL	US\$ 8,422,778.62