

December 16, 2019

VIA E-MAIL

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PCA Cases No. 2019-46/47

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Dear Members of the Tribunal:

Further to the letter sent on behalf of the Tribunal dated December 11, 2019 in the above referenced matter, Respondents hereby respond, as applicable, to Claimants' letters dated December 10, 2019.

A. Treaty Case

With respect to the case pursuant to the Peru-United States Trade Promotion Agreement (the "Treaty"), Peru remains prepared to file a pleading promptly and requests that the Tribunal fix a definitive procedural schedule to include two rounds of briefing in order to protect due process.

1. Procedural Schedule

The Treaty Provision. The Treaty provides at Article 10.20.5 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." As coordinated with Claimant, Peru requested that the Tribunal decide on an expedited basis certain objections pursuant to Article 10.20.5 of the Treaty on December 3, 2019. Renco confirmed in its letter of December 10, 2019, its position that the request was filed "on the 45th day after the Tribunal's constitution."

The Timeframe. Pursuant to the Treaty and Peru's request, Article 10.20.5 requires that the Tribunal (i) "suspend any proceedings on the merits" and (ii) "issue a decision or award" within the timeframe established in the Treaty. The Treaty-based timeframe provides for a decision within 150 days of the request (May 1, 2020); or within 180 days if a hearing is requested (May 31, 2020); or within 210 days on a showing of extraordinary cause (June 30, 2020). The Parties previously concurred together as to these calculations and that there should be at least some form of hearing, if the Tribunal considers it relevant.

The Procedural Schedule. Based on the foregoing, the following schedule provides time for the Parties to be heard and for the Tribunal to manage the current phase consistent with the Treaty.

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|-------------------|--|
| December 20, 2019 | Peru Memorial |
| February 21, 2020 | Renco Counter-Memorial (9 weeks) |
| March 20, 2019 | Peru Reply (4 weeks) |
| April 17, 2019 | Renco Rejoinder (4 weeks) |
| Early May | Hearing (e.g., half a day or as the Tribunal considers relevant) |
| May 31, 2020 | Deadline for decision, if a hearing is requested (+ 30 days) |
| June 30, 2020 | Deadline on a showing of extraordinary cause (+ 30 days) |

Request. Peru requests that the Tribunal adopt this schedule promptly so that it may proceed to file with certainty. This is a practical approach that tracks a schedule for a two-round procedure discussed by the Parties prior to Renco's last letter. Peru also remains open to page limits of, e.g., 30 pages per submission. There also is ample time for any Submission of the Non-Disputing Party after the first round of submissions.

2. The Request Pursuant To The Treaty

Article 10.20.5 refers to a “request” by the respondent for an expedited decision on any competence objection. Peru duly submitted a request stating: “Respondent hereby notifies its request for the Tribunal to decide on an expedited basis certain objections that the dispute is not within the Tribunal’s competence,” and, in particular, that “Claimant’s claims do not meet the Treaty’s temporal requirements” under Articles 10.1.3 and 10.18.1 because “the measures that Claimant alleges to have breached the Treaty occurred before the Treaty’s entry into force and Claimant first acquired or should have first acquired, knowledge concerning a breach and loss or damage arising therefrom before the relevant prescription period.” These are issues that have been in play — and subject to prior briefing — for years.¹

It is unfortunate, in this context, that Renco now seeks to deny Peru’s right to be heard pursuant to the Treaty, proposes a later filing by Peru in January, and seeks to deny Peru the opportunity to respond to a submission which Renco seeks months to prepare.

Renco’s contention that the word “request” under Article 10.20.5 means that a respondent must submit a full briefing is contrary to the unambiguous Treaty text, which says no such thing.² Nor can Renco rely on the practice of respondents in other treaty cases to rewrite the plain meaning of this Treaty. Indeed, cases cited by Renco contradict its position. In *Railroad Development v. Guatemala*, for example, the respondent did not “fully brief[] its objections within the 45-day deadline,” as Renco suggests. Rather, Guatemala filed a three-page letter “request[ing] that the Tribunal consider on an expedited basis an objection . . . to the Tribunal’s competence,” and “reserv[ing] the right to modify and/or supplement this challenge.”³ Guatemala later filed a full brief as part of the ordered briefing schedule.

Renco’s misreading of the Treaty would defeat the object and purpose of Article 10.20.5. As both Peru and the United States have confirmed, the Treaty’s expedited review mechanism serves to efficiently and cost-effectively address preliminary objections that may narrow the scope of claims or result in dismissal of all claims.⁴ Renco’s demand that the Tribunal reject Peru’s objections due solely to the formulation of its

¹ See, e.g., *Renco v. Republic of Peru*, ICSID Case No. UNCT/13/1, Respondent’s Notification of Preliminary Objections dated 21 March 2014, at 5 (“Renco has submitted claims to arbitration for alleged claims that arose before the entry into force of the Treaty. Similarly, Renco has submitted claims to arbitration that are based on alleged facts that pre-date the entry into force of the Treaty.”).

² See, e.g., Kenneth J. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 607-08 (2009) (commenting that the provision analogous to Article 10.20.5 in the U.S. Model BIT provides that “[i]f the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide the objection on an expedited basis,” and “suspend any proceedings on the merits,” whereas under the mechanism analogous to Article 10.20.4 “[u]pon receipt of the objection, the tribunal ‘shall’ suspend any proceedings on the merits.”); Lee M. Caplan & Jeremy K. Sharpe, Commentary on the 2012 U.S. Model BIT, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 835 (Chester Brown ed., 2013) (stating that under the analogous provision “if a respondent raises such an objection within 45 days after the tribunal has been constituted, the tribunal is required to suspend any proceedings on the merits and issue a decision or award on the objections within 150 days.”).

³ *Railroad Development v. Guatemala*, ICSID Case No. ARB/07/23 (DR-CAFTA), Letter from Guatemala to ICSID dated 29 May 2008 at 1, 3. Likewise, in *Jin Hae Seo v. Korea*, the respondent filed an initial application within the 45-day period, and later amended its application before further briefing. See *Jin Hae Seo v. Korea*, Case No. HKIAC/18117, Respondent’s Application for Preliminary Objections dated 26 Feb. 2019; Respondent’s Amended Application for Preliminary Objections dated 12 April 2019.

⁴ See, e.g., *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Non-Disputing Party Submission of the United States dated 10 September 2014, ¶ 3 (stating that “the United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary objections in an efficient manner.”); Peru’s Comments On The Non-Disputing Party Submission dated 3 October 2014, ¶ 11 (confirming that “both the United States and Peru had experiences that motivated them to provide procedures in their treaties to ensure that preliminary objections would be heard at an early phase of the proceedings”); see also, e.g., *Jin Hae Seo v. Republic of Korea*, Case No. HKIAC/18117, Non-Disputing Party Submission of the United States dated 19 June 2019, ¶ 5 (asserting that U.S.-Korea Free Trade Agreement’s preliminary objections provisions “establish complementary mechanisms for a respondent State to seek to efficiently and cost-effectively dispose of claims.”); *Bridgestone Licensing Services, Inc. v. Panama*, ICSID Case No. ARB/16/34, Non-Disputing Party Submission of the United States dated 28 August 2017, ¶ 5.

“request” would do just the opposite – postponing consideration of the temporal jurisdictional objections until later in the proceeding, at needlessly greater time and expense for all.⁵

3. Protecting Due Process

The schedule and approach set forth herein comport with the Treaty and due process, protecting the proceeding and the Parties. Renco accepts that “two rounds of briefing may be appropriate under normal circumstances.” There is no reason to deviate from that commonly accepted approach here, which would needlessly limit both Parties’ opportunities to be heard – and deprive Peru of any chance to respond to Renco’s response.⁶

Nor does the Treaty’s expedited procedure necessitate a single round of pleadings, as Renco contends.⁷ As a point of comparison, in the case of *Bridgestone v. Panama* (cited by Renco), the tribunal ordered two briefs from each party, two submissions by the Non-Disputing Party, a four-day hearing, and post-hearing briefing – and still rendered its decision within the expedited timeframe required.⁸

Finally, Renco’s implication that the timeframe for this phase was “brought about” by Peru is inconsistent with the Treaty, which establishes the timeframe, as well as the facts, which demonstrate Peru’s diligence. Over the past two months, Peru ensured that the joint letter confirming agreement on the Presiding Arbitrator provided that the Parties could coordinate as to the date for the constitution of the Tribunal in order to provide an opportunity for procedural coordination; Peru invited weekly conference calls, and when such calls were deferred for two weeks in a row, Peru wrote to confirm the procedural status and encourage coordination; and Peru participated in two calls immediately prior to filing its request and confirmed that the Parties would continue procedural discussions to fix a schedule for written submissions by each side, which is exactly what Peru did, including thorough discussion of the compromise schedule set forth herein.⁹ Renco’s effort to impede Peru from being heard pursuant to Article 10.20.5 was thus unexpected and unwarranted. It should be dismissed without further incident to avoid prejudice to Peru and permit a focus on the serious issues before the Tribunal.

For the foregoing reasons, Respondent requests that the Tribunal adopt the schedule proposed herein. This would give clarity to Peru to proceed with its filing promptly, and assist the Parties in addressing other issues prior to the first session, including ongoing coordination regarding a comprehensive procedural agreement.

B. Contract Case

With respect to the Contract Case, the Parties have engaged in related procedural discussions and Respondents will comment and coordinate further in anticipation of the procedural session with the Tribunal.

Respondents will continue to endeavor to advance on procedural matters before the anticipated procedural session. For the avoidance of doubt, Respondents reserve the right to articulate and expand upon the issues set

⁵ As Renco itself acknowledges, Peru would retain the right to raise any and all objections, either under Article 10.20.4 of the Treaty or Article 23 of the UNCITRAL Rules. It is mandated by the Treaty and within the power of the Tribunal, in any event, to proceed now.

⁶ REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 6th ed at 329 (“The duty to act judicially is . . . a matter of ensuring equality between the parties and giving each the right to respond to the other party’s position”).

⁷ If the Tribunal finds there is good cause and chooses to delay issuing its decision until June 30, 2020, as permitted by the Treaty, this would still be 193 days from the date of the proposed Memorial on Preliminary Objections, *i.e.*, almost two weeks *more* than the timeframe established in the Treaty for the expedited procedure and hearing. In addition, Respondent is open to agreeing to additional procedures to facilitate the resolution of these expedited proceedings, including page limits.

⁸ See *Bridgestone Licensing Services, Inc. v. Republic of Panama*, Decision on Expedited Objections dated 13 December 2017, ¶¶ 13-33; Procedural Order No. 1 dated 11 July 2017.

⁹ While we will provide further information if requested, we respect our counterparts and seek to maintain collegial coordination for the benefit of the proceeding.

forth herein at the appropriate time in accordance with applicable instruments, laws and rules, and reserve all rights with respect to these proceedings.

Respectfully,



Jonathan C. Hamilton

cc: Counsel to Claimants