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VIA E-MAIL

Members of the Tribunal
c/o Natalí Sequeira
Secretary of the Tribunal
International Centre for Settlement of Investment Disputes
1800 G Street, N.W., 3rd Floor
Washington, D.C. 20006

Re: *The Renco Group, Inc. v. Republic of Peru* (UNCT/13/1)

Dear Members of the Tribunal:

Pursuant to Procedural Order No. 1, the Republic of Peru hereby notifies its intention to make preliminary objections under Article 10.20.4 of the Peru–United States Trade Promotion Agreement (the “Treaty”).¹

A. Preliminary Objections Under Article 10.20.4

Article 10.20.4 of the Treaty provides, inter alia, as follows:

Without prejudice to a tribunal’s authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal’s competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.1

Article 10.20.4 thus establishes Peru’s right to raise, as a preliminary matter, “any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.” Article 10.20.4 objections are “[w]ithout prejudice to a tribunal’s authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal’s competence.” The same language is used in the Spanish and English versions of the Treaty.²

¹ The Treaty entered into force February 1, 2009 (*available at* www.acuerdoscomerciales.gob.pe).

² Treaty, Article 23.6 (“The English and Spanish texts of this Agreement are equally authentic.”).

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1. The Scope of Article 10.20.4 Objections

Consistent with the Vienna Convention on the Law of Treaties, Article 10.20.4 must be interpreted based on the ordinary meaning of its terms in light of the object and purpose of the Treaty.³ The scope of Article 10.20.4 is clear:

- ***Peru has the right to make “any objection” under Article 10.20.4:*** The Treaty provides that Peru has the right to make *any* objection under Article 10.20.4, including jurisdictional and other objections.
- ***Article 10.20.4 is drafted in mandatory terms:*** The Treaty provides that objections falling under Article 10.20.4 *shall* be decided as a preliminary matter.
- ***A claimant’s alleged facts are presumed to be true for a 10.20.4 objection:*** The Treaty provides that the Tribunal shall assume to be true the factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and in the statement of claim. The Tribunal may also consider any relevant facts not in dispute.

Article 10.20.4 was designed to provide respondent States with a mechanism to avoid the time and expense of an evidentiary phase if the claims presented would fail as a matter of law, as confirmed in the U.S. implementing notes for the Treaty and by arbitral decisions interpreting Article 10.20.4.⁴ The right to make such objections under Article 10.20.4 is drafted in mandatory terms to give effect to this mechanism.⁵

Although this proceeding is the first investment arbitration brought under the Treaty, the language in Article 10.20.4 of the Treaty is nearly identical to the preliminary objection provision included in the Dominican Republic–Central America Free Trade Agreement (“DR–CAFTA”). The DR–CAFTA provision has been considered by at least three arbitral tribunals, each of which gives support to the position of Peru set forth herein. As the *Pac Rim v. El Salvador* tribunal has explained, preliminary objections under this procedure are “not limited to ‘frivolous’ claims or ‘legally impossible’ claims,” which would “significantly restrict the arbitral

³ Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(1), 1155 U.N.T.S. 331 (the “Vienna Convention”) (“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 the light of its object and purpose.”) (*available at* treaties.un.org).

⁴ See Peru – United States Trade Promotion Agreement, Summary of the Agreement, Senate Report 110-249, December 14, 2007 (“[T]he Chapter includes provisions similar to those used in U.S. courts to dispose quickly of claims a tribunal finds to be frivolous.”) (*available at* www.gpo.gov); *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 of August 2, 2010, ¶ 116 (“[T]he object and purpose . . . is to create, under CAFTA, an effective and flexible procedure for the swift and fair resolution of disputes between claimant investors and respondent host states.”); see also VANDEVELDE, KENNETH J., U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 608 (discussing the origins of the clause).

⁵ Treaty, Article 10.20.4 ([A] tribunal *shall* address and decide as a preliminary question . . .”) (emphasis added).

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remedy under Article 10.20.4 [of DR–CAFTA], when the structure of this provision permits a more natural and effective interpretation consistent with its object and purpose.”⁶

Furthermore, DR–CAFTA tribunals have decided jurisdictional objections under Article 10.20.4 and the related fast track procedure under Article 10.20.5, consistent with the “any objection” language of the Article. These include three objections as to invalid waivers required as a precondition for respondent’s consent to arbitrate, an objection as to jurisdiction *ratione temporis*, an objection as to jurisdiction *ratione materiae*, and inadequate pleading as to facts and law. All of these objections were addressed as preliminary objections by the respective tribunals.⁷

As set forth below, Peru’s objections fall within the scope of Article 10.20.4. The Renco Group’s (“Renco”) invented allegation during a prior procedural phase that Peru may seek to “shoehorn” objections outside of the scope of Article 10.20.4 into this mandatory phase remains meritless.⁸ On the basis of this notification, there is no ground to deny Peru the right to make these preliminary objections and to have them decided at this stage.⁹

2. Facts Under Peru’s Article 10.20.4 Objections

Under Article 10.20.4, when deciding preliminary objections, the Tribunal “shall assume to be true claimant’s factual allegations in support of any claim,” and “may also consider any relevant facts not in dispute.”¹⁰ The mandatory scope of Article 10.20.4 objections is thus clear. As long as any objection, including jurisdictional objections, assumes the facts as pled by a claimant without the need to consider or weigh disputed evidence, it falls within the scope of Article 10.20.4.

Peru’s preliminary objections assume Renco’s allegations (however inaccurate) to be true, pursuant to the Treaty. Renco is also bound by the same facts it has pled and may not now amplify or change its facts in response to Peru’s preliminary objections in an attempt to create an issue of disputed fact, where none now exists.

⁶ See *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 of August 2, 2010, ¶ 108. The same tribunal explained that “comparisons between [preliminary objections provisions under CAFTA] and national court procedures on one Contracting Party, the USA” are misplaced because “there is also no reason to equate such common law court procedures to provisions in CAFTA agreed by Contracting Parties with different legal traditions and national court procedures.” *Id.* ¶ 117.

⁷ See *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 of August 2, 2010; *Railroad Development Corp. v. Republic of Guatemala* (“*RDC v. Guatemala*”) (ICSID Case No. ARB/07/23), Decision on Objection to Jurisdiction CAFTA Article 10.20.5 of November 17, 2008; *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction of May 18, 2010; *Commerce Group Corp. et al. v. El Salvador* (ICSID Case No. ARB/09/17) Award of March 14, 2011. All available at icsid.worldbank.org.

⁸ See Letter from Renco to Tribunal of July 29, 2013.

⁹ If the Tribunal were to determine that one or more of Respondent’s objections required the determination of a disputed fact, then the Tribunal would deny the objection, after it was heard. See, e.g., *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 of August 2, 2010, ¶¶ 256-258 (denying the objection in part because of “facts, as invoked by the Respondent, are disputed by the Claimant”).

¹⁰ Treaty, Article 10.20.4(c).

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Let there be no doubt, however: Renco's factual allegations are inaccurate, incomplete, and in any event insufficient to prove its claims. Peru strongly rejects Renco's distortions, omissions, and evolving version of its factual allegations. The Republic of Peru disagrees with Renco's factual assertions, and its acceptance of those facts as true for purposes of making its Article 10.20.4 objections should in no way be deemed an acceptance of the truth of any of those allegations. Peru expressly reserves all rights.

B. Peru's Notice of Preliminary Objections Under Article 10.20.4

Peru notifies that it intends to raise three objections under Article 10.20.4, including: (1) Renco's violation of the Treaty's waiver provisions, (2) lack of jurisdiction *ratione temporis*, and (3) the failure of claims under the plain language of the contract. Each of these objections assumes the truth of the facts as alleged by Renco (despite the inaccuracies thereof) and, in each instance, Renco's claims fail as a matter of law.

1. Violation of the Treaty's Waiver Provisions

The Treaty delineates the scope of consent of each Party to arbitration and the conditions and limitations on that consent. The consent of Peru to arbitrate with Renco under the Treaty is subject to the submission of valid waivers, as set forth in Article 10.18 of the Treaty:

No claim may be submitted to arbitration under this Section unless [...] the notice of arbitration is accompanied for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and 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.

As Peru will discuss and amplify in its submissions, Renco has presented an invalid waiver in this proceeding because it does not conform with the language required by the Treaty, and that Doe Run Peru S.R.Ltda. ("Doe Run Peru") was required to submit a waiver and improperly purported to withdraw its waiver submitted with Claimants' Notice of Arbitration and Statement of Claim of April 4, 2011. In addition, through the initiation and continuation of certain proceedings with respect to measures alleged to constitute a breach by Renco, both Renco and Doe Run Peru also have violated the waiver requirement.

Pursuant to the Treaty, Peru's consent, and therefore the Tribunal's jurisdiction, is subject to the submission of valid waivers by Renco and Doe Run Peru, which are lacking here. This objection thus clearly falls within the scope of Article 10.20.4.¹¹

¹¹ As noted above, three DR-CAFTA tribunals have addressed issues relating to the validity of waivers in a preliminary phase under Articles 10.20.4 or 10.20.5.

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2. Lack of Jurisdiction *Ratione Temporis*

The Treaty entered into force on February 1, 2009.¹² Consistent with Article 28 of the Vienna Convention regarding non-retroactivity of treaties,¹³ the Treaty provides in Article 10.1.3:

For 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 this Agreement.

In addition, Article 10.18.1 of the Treaty bars any claim “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.”

As Peru will discuss and amplify in its submissions, 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. Finally, Renco has submitted claims to arbitration for alleged breaches that occurred more than three years after Renco first acquired knowledge or should have first acquired knowledge of the alleged breach. The Tribunal lacks jurisdiction over these claims. As required by Article 10.20.4, Peru’s objections in this regard assume Renco’s factual allegations as true and, thus, do not require adjudication of any disputed facts.¹⁴ This objection therefore falls within the scope of Article 10.20.4.

3. Failure of Claims Under the Plain Language of the Contract

As Peru will discuss and amplify in its submissions, Renco alleges that “Peru’s refusal to assume liability for the claims in the St. Louis Lawsuits violates the Treaty because it breaches the Guaranty Agreement and the Stock Transfer Agreement, which together constitute an Investment Agreement.”¹⁵ In its Memorial, Renco describes the St. Louis Lawsuits as follows:¹⁶

Plaintiffs seek damages for alleged personal injuries and punitive damages, and name as defendants Renco and Doe Run Resources, as well as their affiliated companies DR Acquisition Corp. and Renco Holdings, Inc., and directors and officers Marvin K. Kaiser, Albert Bruce Neil, Jeffery L. Zelms, Theodore P. Fox III, Daniel L. Vornberg, and Ira L. Rennert (collectively, the ‘Renco Defendants’). The plaintiffs did not bring claims against Centromin’s successor, Activos Mineros, nor against the Republic of Peru, or Doe Run Peru, and instead

¹² The date of entry into force of the Treaty is a matter of public record, and Renco does not dispute this fact. *See* Memorial ¶ 8.

¹³ Vienna Convention, Article 28 (“Non-retroactivity of treaties: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”).

¹⁴ *See* Treaty, Article 10.20.4. *See also* *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction of May 18, 2010 (addressing objections to jurisdiction *ratione temporis* under Article 10.20.4 of DR-CAFTA).

¹⁵ Memorial § IV(A)-(B).

¹⁶ Memorial ¶ 78.

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chose to sue Doe Run Peru's U.S.-based affiliates in the courts of the United States.

Renco alleges that the Guarantee Agreement makes Peru liable for the contractual obligations undertaken by Centromin in the Stock Transfer Agreement (the "Contract").¹⁷ The Contract itself provides:¹⁸

Clause 6.5: Centromin will protect and hold the Company harmless against third party claims and will indemnify it for any damages, liabilities or obligations that may arise for which it has assumed liability and obligation.

Clause 8.14: Should the Company or the Investor receive any demand or judicial, administrative notice or notice of any kind, related to any act or fact included within the responsibilities, declaration and guarantees offered by Centromin, they pledge to report it to Centromin within a reasonable term which will allow Centromin to exercise its right to a defense, releasing the company or the investor from any obligation with regard to the same and Centromin shall be obliged to immediately assume those obligations as soon as it is notified. The Company shall also be entitled to be represented in those procedures by lawyers it has chosen and whose fees shall be solely assumed by it. Centromin shall keep the Company fully informed on all the aspects and activities related to that defense, including the supplying of copies of all legal papers, pleading and other matters.

The plain language of Contract Clauses 6.5 and 8.14 concerns third-party claims in relation to Doe Run Peru, which is the entity referred to in these clauses as the "Company" or "Investor."¹⁹ Doe Run Peru is not a party to the St. Louis Lawsuits. Thus, even assuming the facts as alleged by Renco to be true, Peru, as a matter of law, could not have breached this Contract.

In addition, as Peru will discuss and amplify in its submissions, the Contract in Clauses 5.3 and 5.4 provides that should there be "any controversy on the determination of whether . . . the standards or practices used by the Company were or were not less protective of the environment or of the public health than those that were applied by Centromin," or "in those cases in which no consensus was reached between Centromin and the Company with regard to the causes of the presumed damage that is the subject of the claim or with regard to the manner in which liability will be shared amongst them . . .," then the matter is to be submitted to a technical expert to render a decision. In the event that the amount of the claim is less than US\$ 50,000, the technical expert's decision is binding. If the amount of the claim is more than US\$ 50,000, either party may submit the matter to arbitration in accordance with the Contract's provisions if one or both parties disagree with the decision of the technical expert.

¹⁷ Memorial ¶ 4 ("[A] Guaranty issued by the Republic of Peru ('Peru' or the 'Government') on November 21, 1997, by which Peru guaranteed all of Centromin's 'representations, securities, guaranties and obligations' under the Stock Transfer Agreement.").

¹⁸ Contract (C-2). The English translation provided by Renco is used solely for this phase and Peru reserves all of its rights to challenge any portion of that translation and to submit a different translation at any future phase of these proceedings.

¹⁹ Contract, Memorandum to Notary; *see also* Memorial, Definition of "Doe Run Peru" and "Metaloroya."

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It is undisputed that neither Renco nor Doe Run Peru has submitted a claim to a technical expert in accordance with the Contract and, therefore, as a matter of law, Peru cannot be deemed to have breached any contractual obligation with respect to the “St. Louis Lawsuits.” This objection thus also falls within the scope of Article 10.20.4.²⁰

For the foregoing reasons, the preliminary objections notified herein are within the scope of Article 10.20.4 of the Treaty and this case should proceed to a full briefing of preliminary objections as mandated by the Treaty. Should Renco nonetheless challenge the scope of these objections, Peru reserves all rights necessary to ensure an equal opportunity to be heard, consistent with due process. As a general matter, and in accordance with Article 10.20.4(d) of the Treaty, Peru expressly reserves all of its rights, and presents this notification of preliminary objections without prejudice to any other arguments or objections regarding jurisdiction, the merits or otherwise.

Respectfully,



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²⁰ This type of objection is akin to a failure to state a claim, which Renco agrees falls within the scope of Article 10.20.4. *See* Letter from Renco to Tribunal of July 29, 2013 (“This is similar to the motion to dismiss a claim for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the U.S. Federal Rules of Civil Procedure.”).