

The Renco Group, Inc.

Claimant

v.

The Republic of Peru

Respondent

(UNCT/13/1)

**PERU'S SUBMISSION ON MATTERS
ARISING FROM THE HEARING ON WAIVER**

23 September 2015



The Renco Group, Inc. v. The Republic of Peru

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PERU'S SUBMISSION ON MATTERS ARISING FROM THE HEARING ON WAIVER

I. INTRODUCTION

1. The Republic of Peru (“Peru”) hereby submits its submission on the matters arising from the hearing on the waiver requirement on 2 September 2015 (the “Hearing”), in accordance with the Tribunal’s communication of 16 September 2015.

2. Renco has commenced this arbitration pursuant to the Peru-United States Trade Promotion Agreement (the “Treaty”), whereby Peru consented to arbitration subject to certain conditions and limitations. Among other things, Article 10.18 of the Treaty requires the submission of comprehensive waivers. Compliance with the waiver requirement has both formal and material components, and a claimant’s failure as to either requirement vitiates consent to arbitration under the Treaty, as both Peru and the United States agree.¹ In this case, The Renco Group, Inc. (“Renco”) has violated the Treaty, both formally and materially, directly and through its subsidiary Doe Run Peru S.R.L. (“DRP”):

Requirements

FORMAL

- Comprehensive written waiver(s) of any right to initiate or continue any proceeding with respect to any measure alleged to constitute a breach of the Treaty
- On behalf of claimant, and on behalf of the local enterprise, where claims are submitted on behalf of that enterprise

MATERIAL

- No initiating or continuing other proceedings with respect to any measure alleged to constitute a breach of the Treaty

Violations

FORMAL

- Renco’s waiver is not comprehensive and is qualified by a reservation of the right to bring claims dismissed on jurisdictional or admissibility grounds in another forum for resolution on the merits
- DRP withdrew its waiver and Renco did not submit a waiver on behalf of DRP in the Amended Notice of Arbitration

MATERIAL

- Renco’s enterprise, DRP, initiated and continued local proceedings during the time it indisputably had a waiver in place and since the filing of the Amended Notice of Arbitration

¹ See Second Submission of the United States ¶ 7 (“Compliance with Article 10.18 entails both formal and material requirements 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 shall lack jurisdiction.”).

3. With respect to the Treaty's formal component, the Tribunal has posed four questions, which Peru addresses below. This submission focuses specifically on Question 2, addressed to both parties, which relates to the real effect of the additional language in Renco's waiver: "[t]o the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits."² Questions 1, 3, and 4 are addressed solely to Renco, and relate to examples demonstrating that the additional language in Renco's waiver is not superfluous, and the appropriate remedy for such a violation.

4. With respect to the Treaty's material component, Peru has demonstrated in this proceeding that Renco has violated the waiver requirement through the actions of its enterprise. Since this arbitration began, DRP has initiated and continued two separate proceedings in Peruvian courts, both of which concern the recognition of a credit in favor of the Ministry of Energy and Mines corresponding to DRP's unfulfilled Environmental Remediation and Management Program ("PAMA") investments, which Renco also alleges constitutes a breach of the Treaty.

- On 22 November 2010, DRP filed a constitutional *amparo* proceeding;
- On 4 April 2011, Renco submitted qualified waivers on its own behalf and on behalf of DRP with the Notice of Arbitration – DRP did not discontinue the *amparo* proceeding;
- On 9 August 2011, Renco submitted a qualified waiver on its own behalf, but not for DRP (which is a violation of the formal component of the Treaty, as Peru has shown);
- On 16 January 2012, DRP filed administrative action 368-2012;
- To date, DRP is continuing both the *amparo* proceeding and the administrative action.³

5. The Tribunal has not posed any questions as to Renco's failure to submit any waiver on behalf of DRP or the various material violations of the waiver requirement occasioned by DRP's initiating or continuing proceedings before Peruvian courts in connection with a measure alleged to constitute a breach of the Treaty in this arbitration, both before the withdrawal of DRP's waiver submitted with the Notice of Arbitration and since the Amended Notice of Arbitration.

6. Each of Renco's formal and material violations independently is sufficient to vitiate Peru's consent to arbitration. Consequently, the Tribunal does not have jurisdiction and must dismiss Renco's claims. Any other result would be to allow the dispute to go forward despite not falling within the terms of Peru's submission to arbitration.

² Amended Notice of Arbitration, ¶ 67 (emphasis added).

³ See Memorial on Waiver, Annex A.

II. TREATY PURPOSE AND CONSEQUENCES (QUESTIONS 1, 3, AND 4)

7. The Tribunal has asked Renco to address three questions related to the formal waiver requirement and Renco's reservation of rights in connection with this particular proceeding:

- *Object and Purpose* (Question 1).⁴ The first question concerns the relationship between Renco's reservation and the object and purpose of the waiver requirement. As to this issue, the examples discussed during the Hearing confirm that Renco's reservation is contrary to the object and purpose of the Treaty, as Peru consistently has argued.⁵
- *Request for Undertaking by Respondent* (Question 3).⁶ The second question concerns the request by Renco for an undertaking by Peru with reference to the "no harm/foul, no statute of limitations issue" raised by Renco. As to this issue, Article 10.18 is unambiguous: "[n]o claim may be submitted to arbitration under this Section [absent requisite waivers]."⁷ The Treaty imposes the waiver requirement on claimants such as Renco, as both parties to the Treaty, Peru and the United States, agree. The Treaty does not impose an obligation on a respondent State to make undertakings related to a claimant's failure to comply with the waiver requirement under the Treaty.
- *Cure of Written Waiver* (Question 4).⁸ The third question asks Renco to clarify how it would propose to "cure" its written waiver. As to this issue, Article 10.18 is unambiguous: "[n]o claim may be submitted to arbitration under this Section unless [...] the notice of arbitration is accompanied [by the waiver]."⁹ The Treaty requires claimants such as Renco to comply with the waiver requirement as of the time of the notice of arbitration, as both parties to the Treaty, Peru and the United States, agree. The Treaty does not provide for a "cure" of a claimant's failure to comply with the waiver requirement, and the Tribunal is not competent to give Renco an "opportunity to cure" its

⁴ See Tribunal's communication of 16 September 2015 ("A key issue in dispute between the Parties concerns the effect of the additional language contained in the waiver presented by Renco, namely: '*To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits.*' 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 requirement. [T49/18-22 and T50-T56/20] Renco has complained that this was '*a new argument...which Peru had not placed into the record of the case before the oral hearing (requiring Renco to address spontaneously.)*' [Renco email dated 15 September 2015] The Tribunal wishes to afford Renco the opportunity to address it on this argument.").

⁵ See, e.g., Memorial on Waiver ¶ 27 ("Renco's reservation of rights also contravenes the very object and purpose of Article 10.18."); Reply on Waiver ¶¶ 12 *et seq.* ("Renco is incorrect to contend that its reservation of rights does not run afoul of the Treaty because it is 'superfluous and simply states the obvious.'").

⁶ See Tribunal's communication of 16 September 2015 ("At the Hearing, counsel for Renco maintained that the additional language contained in Renco's waiver was '*superfluous*' [T123/13] and '*doesn't do anything more than the Treaty allows*' [T123/18]. Counsel for Renco went on to state: '*...[I]f Peru were [sic] commit that no harm/foul, no statute of limitations issue, we would—we would quite gladly strike it, because, as I say, it is superfluous and it does nothing more than what the Treaty allows us to do in the first instance...and we would, of course, subject to statute of limitations, we would raise issues. But, you know, that's the reason we're not striking it and have not already stricken it.*' [T123/19-22 through T124/1-6] The Tribunal invites Renco to clarify the above. In particular, what was intended by the references to the '*no harm/foul, no statute of limitations issue*'?").

⁷ See Treaty, Art. 10.18 (emphasis added) (RLA-1).

⁸ See Tribunal's communication of 16 September 2015 ("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.*' [T124/8-11] The Tribunal invites Renco to clarify precisely how they would propose to 'cure' their written waiver?").

⁹ See Treaty, Art. 10.18.2 (emphasis added) (RLA-1).

violation, given that compliance with the waiver requirement is a prerequisite to consent to arbitration under the Treaty and to the vesting of jurisdiction in the Tribunal.¹⁰

8. As to each of these questions directed to Renco, Peru awaits Renco's comments as requested by the Tribunal, and will respond pursuant to the Tribunal's instructions.¹¹

III. EFFECT OF RENCO'S RESERVATION OF RIGHTS (QUESTION 2)

9. The Tribunal has posed the following question to both parties:

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

10. As detailed below, there is no "effects test" for Article 10.18.2. Because the additional language in Renco's waiver constitutes a reservation of rights in direct violation of the Treaty, the only effect that follows is that Peru's consent is vitiated and, correspondingly, that the Tribunal must dismiss Renco's claims. Although it is unnecessary for Peru to demonstrate any prejudice or any other "effect" from the violation, Peru notes that Renco's reservation of rights in fact defeats the object and purpose of the Treaty, at prejudice to Peru.

A. There Is No "Effects Test" For Violation Of The Treaty

11. Article 10.18 ("*Conditions and Limitations on Consent of Each Party*") provides:

(2) No claim may be submitted to arbitration under this Section unless: [...]

(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

(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.¹²

¹⁰ See, e.g., Memorial on Waiver ¶¶ 9-11, 15-16; Reply on Waiver ¶ 58.

¹¹ See, e.g., Tribunal's communication of 16 September 2015 ("Submissions in reply, if any, shall be filed within seven (7) days [of the responses to the Tribunal's questions].").

¹² Treaty, Art. 10.18 (RLA-1).

12. The terms of Peru’s consent are unequivocal. The sole, limited exception to the otherwise absolute waiver requirement contained in Article 10.18.3 is not applicable to the instant case and has not been invoked by Renco. Peru’s consent will only engage when claimants submit comprehensive waivers with the notice of arbitration, on their own behalf, and on behalf of the local enterprise, where claims are submitted on behalf of that enterprise. To be comprehensive, waivers must cover “any right to initiate or continue ... any proceeding with respect to any measure alleged to constitute a breach” of the Treaty. Failure to submit a waiver in such terms constitutes a *per se* violation of the Treaty that vitiates Peru’s consent to arbitration.

13. The plain language and the object and purpose of the Treaty are clear. Moreover, Peru and the United States agree on the proper understanding of the Treaty. Among other things, the United States confirmed in a submission pursuant to Article 10.20.2 of the Treaty that “[a]s to the formal requirements, the waiver must be in writing and must be ‘clear, explicit and categorical’ [...] a claim can be submitted, and the arbitration can properly commence, only if a claimant submits an effective waiver.”¹³ Pursuant to the Vienna Convention, the Treaty is to 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 light of its object and purpose.”¹⁴ As the Vienna Convention makes clear, the interpreter shall take into account, together with context, “[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,” as well as “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”¹⁵ At a minimum, the agreement between Peru and the United States on the interpretation of this Treaty Article “falls under the realm of subsequent practice,” as Renco acknowledged at the Hearing,¹⁶ and therefore must be taken into account by the Tribunal.

14. To the extent that a claimant has submitted a waiver that covers only *some* rights to bring *some* proceedings – and its carve out is not covered by the sole exception contained in the Treaty – the arbitration may not proceed, regardless of the defect’s actual present or potential future effect, if any. Indeed, an “effects test” is inconsistent with the Treaty to the extent that it looks beyond the submission of a comprehensive waiver at the time of the notice of arbitration. To find that compliance with the Treaty by a partial or qualified waiver is contingent on potential present or future effects would be to rewrite the Treaty, and introduce exceptions that are nowhere to be found in the plain text.

15. Moreover, as a practical matter, an “effects test” would unduly burden the respondent insofar as the effects of a defective waiver might not be apparent, whether at the time of submission of the notice of arbitration or thereafter. Assuming for the sake of argument that this proceeding is not dismissed on account of the waiver violations at issue, neither the parties nor the Tribunal can know with certainty at this time whether all or part of Renco’s claims would be dismissed for lack of jurisdiction or admissibility or on what particular jurisdictional or admissibility grounds any such dismissal would be based. As the examples discussed at the Hearing illustrate, the effect of Renco’s defective waiver on Peru’s rights could vary depending upon the actual grounds for dismissal.

¹³ Second Submission of the United States ¶¶ 8,16.

¹⁴ Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(1) (RLA-3).

¹⁵ *Id.* Art. 31 (2).

¹⁶ *See* Hearing on Waiver, Tr. 273:16-18.

Because that cannot be known at this point, adopting an “effects test” thus would prejudice the respondent State.

B. The Effect Of Renco’s Reservation Is To Vitate Peru’s Consent

16. Renco has not complied with the Treaty requirements, as Peru has raised multiple times. Among other things, Renco violated Article 10.18 by qualifying the scope of its waivers submitted with both the Notice of Arbitration and the Amended Notice of Arbitration. Specifically, Renco impermissibly included the following language at the end of its waiver:

To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, *Claimant reserves the right to bring such claims in another forum* for resolution on the merits.¹⁷

17. On its face, such language violates the Treaty, and belies Renco’s statement that it “did not and does not reserve the right to do anything in connection with that statement more than the Treaty’s provision already allows it to.”¹⁸ Whereas the Treaty specifically requires the waiver of “*any right to initiate ... any proceeding with respect to any measure alleged to constitute a breach*” of the Treaty,¹⁹ Renco *does not* waive the right to initiate proceedings with respect to any claims the Tribunal declines to hear on jurisdictional or admissibility grounds. Contrary to what Renco suggests, nothing in the Treaty limits the waiver requirement to claims finally decided on the merits.

18. It is possible to imagine language that a claimant could add to a waiver that would be truly superfluous; for example, “claimant reserves the right to bring claims with respect to measures not alleged to constitute a breach referred to in Article 10.16,” or “claimant reserves the right to seek interim injunctive relief not involving the payment of monetary damages for the sole purpose of preserving the claimant’s rights and interests during the pendency of the arbitration.” Renco’s reserving the right to commence certain future proceedings for claims dismissed on jurisdictional or admissibility grounds is not comparable, insofar as it carves out a subset of proceedings Article 10.18.2 required to be waived.²⁰

¹⁷ Amended Notice of Arbitration, ¶ 67 (emphasis added).

¹⁸ Hearing on Waiver, Tr. 122:10-13.

¹⁹ Treaty, Art. 10.18.2 (emphasis added) (RLA-1).

²⁰ Also unavailing is Renco’s argument that its reservation of rights is superfluous because a jurisdictional dismissal would belie the existence of an arbitration agreement. See Hearing on Waiver, Tr. 165:10-20 (“[A] jurisdictional dismissal of claims that a Claimant attempted unsuccessfully to have heard by you on the merits means that the State never offered to arbitrate them and the investor couldn’t accept because there was never an offer. And there’s no Arbitration Agreement. And if there’s no agreement to arbitrate those claims in the first place, the jurisdictionally dismissed claims, then certainly the Claimant can’t be bound by a waiver that it gave as a condition to the creation of the agreement in the first place.”). Because Renco’s argument presupposes that a waiver would have no effect in the case of a dismissal on jurisdictional grounds, its argument is circular, as Arbitrator Landau observed at the Hearing. See Hearing on Waiver, Tr. 166:6-18.

Furthermore, Renco’s argument incorrectly assumes that anything occurring in an arbitration dismissed on jurisdictional or admissibility grounds would be a nullity, without any binding or preclusive effect. As Arbitrator Landau also observed during the Hearing, this is incorrect, as it ignores the concept of competence-competence and the fact that the Tribunal might make findings or issue rulings in the course of its determination of its competence that would have effect on the parties and in later proceedings. See Hearing on Waiver, Tr. 167:1-13. Renco’s suggestion that a dismissal on jurisdictional or admissibility grounds means that a claimant cannot be bound as a result of its failed attempt to bring a proceeding is clearly incorrect; a claimant, for example, may be ordered to pay costs for the proceeding, notwithstanding the finding of an absence of an agreement to arbitrate. A waiver is consideration that Peru requires for claimants to submit a claim to arbitration; it is not a deposit to be refunded or revoked if a claim does not reach the merits.

In any event, the relevant question for the Tribunal is whether Renco did or did not submit a sufficient waiver, and not what the effects of that waiver may be.

19. Accordingly, the additional language in Renco’s waiver must result in the dismissal of all of Renco’s claims. As Renco concedes, “the issue of waiver ultimately goes to the question of consent.”²¹ Indeed, the submission of a complying waiver with the claimant’s notice of arbitration is a condition precedent to Peru’s consent to arbitrate.²² As the United States also indicated:

Failure ... 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.*

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. 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.*²³

20. Although Peru has bound itself to arbitration under various investment treaties and free trade agreements, the scope of its consent is defined by the four corners of each agreement, which Renco must respect. Renco recognizes that “an agreement to arbitrate is the only basis for the Investment treaty Tribunal’s jurisdiction,” a proposition it says is “obviously uncontroversial.”²⁴ The mechanics of the arbitration agreement are simple: Peru has granted its consent to arbitration under the Treaty contingent on certain conditions and limitations. If Renco wishes to accept the offer and engage in arbitration against Peru under the Treaty, it must comply with the terms set forth in the Treaty. Renco cannot simply rewrite the conditions of Peru’s consent.

21. Nor can the Treaty be disregarded on the basis of Renco’s novel appeal to equity during the Hearing. According to Renco, “[i]nterpreting the Treaty as Peru proposes here, would leave Claimant with no forum at all.”²⁵ Even if this were true, it is not a basis for changing the scope of Peru’s consent. Renco is correct to recognize that “[t]he investment treaty process was created in part ... with the purpose of creating effective means of resolving disputes.”²⁶ It would be surprising, however, if a party that could not otherwise enjoy the dispute resolution proceedings under an investment treaty were allowed to do so merely because other dispute resolution proceedings are unavailable. The mere absence of other fora is irrelevant to Peru’s consent, and would not make this Tribunal competent to hear Renco’s claims.

22. Far from being harsh, dismissal is fully deserved, and Renco’s assertion that dismissal would “frustrate justice” is baseless in this case.²⁷ Renco previously had the opportunity to

²¹ Rejoinder on Waiver ¶ 31.

²² See Treaty, Art. 10.18 (“No claim may be submitted to arbitration under this Section unless...”); see also, *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 321 (“The lack of a valid waiver preclude[s] the existence of a valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprive[s] the Tribunal of the very basis of its existence.”) (RLA-100); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶ 115 (“If the waiver is invalid, there is no consent.”) (RLA-22).

²³ Second Submission of the United States ¶¶ 15-16 (emphasis added).

²⁴ Hearing on Waiver, Tr. 164:15-18.

²⁵ Hearing on Waiver, Tr. 127:12-13.

²⁶ Hearing on Waiver, Tr. 148: 7-11.

²⁷ Hearing on Waiver, Tr. 147:18.

bring claims before other fora. Once it chose to commence this arbitration, however, it was obliged to accept the terms of the Treaty. Although Renco could easily have complied with the waiver requirement, it did not do so, deliberately choosing to include qualifying language in its waivers submitted with both the Notice of Arbitration and the Amended Notice of Arbitration. Renco's failure to comply with the waiver requires dismissal of its claims.

C. Renco's Reservation Defeats The Object And Purpose Of The Waiver Requirement

23. Although, as set forth above, the effect of the additional language in Renco's waiver is irrelevant to the finding of a violation of the Treaty, Peru nonetheless observes that the potential effect of Renco's defective waiver would be to defeat the object and purpose of the waiver requirement, at prejudice to Peru.

24. The Treaty's waiver requirement has several objectives.²⁸ Not only does the waiver requirement seek to prevent double redress, as Renco has indicated,²⁹ it also seeks to avoid a multiplicity of proceedings, to ensure finality and legal certainty, and to encourage foreign investors to use local and contractually-agreed dispute settlement mechanisms before internationalizing the dispute. All of these objectives could be compromised by allowing Renco to reserve the right to bring claims that the Tribunal declines to hear on jurisdictional or admissibility grounds in another forum, in violation of the Treaty.

25. With respect to the objective of avoiding a multiplicity of proceedings and ensuring finality, the additional language in Renco's waiver expressly aims to allow Renco to initiate future proceedings related to its Treaty claims if its claims are dismissed by the Tribunal on jurisdictional or admissibility grounds. To the extent that Renco initiates such proceedings, Peru would be deprived of a waiver defense, including, for example, as to issues that would potentially have been litigated in this arbitration. The prejudice to Peru would not be diminished merely because Peru might have other defenses to such claims, such as *res judicata*. Were the possibility of other defenses sufficient, the Treaty might not make the submission of a comprehensive waiver a condition precedent to consent to arbitration. Moreover, because neither the respondent State nor a tribunal can anticipate on what grounds a claim might be dismissed or where, when, or how a claimant might begin another proceeding, they cannot, at the time of submission of the claim to arbitration, compare the efficacy of *res judicata* or other defenses to a comprehensive waiver. In any case, whatever a future court or tribunal might decide as to the effect of a waiver on the ability of Renco to initiate proceedings in another forum regarding the same measures at issue in this arbitration, is irrelevant to whether this Tribunal is or is not competent to decide Renco's claims, as Peru has shown.³⁰

26. Renco's reservation of rights also is antithetical to the waiver requirement's goal of ensuring legal certainty. As Respondent has noted, the "no U-turn" provision in Article 10.18 is designed to give the respondent State certainty that a claimant will not file additional proceedings once it has commenced an international arbitration under the Treaty. If Renco's reservation of rights

²⁸ See, e.g., Memorial on Waiver ¶¶ 12 *et seq*; Reply on Waiver ¶¶ 6, 11, 30; Second Submission of the United States ¶ 5.

²⁹ See Counter Memorial on Waiver ¶ 17.

³⁰ See Reply on Waiver ¶¶ 15-18; see also, *Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America* ("Consolidated Softwood Lumber"), Order for the Termination of the Arbitral Proceedings with respect to Tembec et al. dated 10 Jan. 2006, ¶ 1.3 (RLA-116)

is accepted, however, Peru may not know until the end of these proceedings whether Renco may again submit a claim against it challenging the same measures in another proceeding.

27. Allowing Renco's claim to proceed notwithstanding its submission of a non-comprehensive waiver also could have serious implications for the Treaty's objective of encouraging recourse to international arbitration under the Treaty as a last resort. Investors weighing whether to commence an arbitration might be more likely to do so, knowing that the possibility exists that even if they lose on jurisdictional or admissibility grounds they will still be able to resort to other dispute settlement procedures. To allow Renco to reserve the right to bring claims dismissed on jurisdictional or admissibility grounds thus could invite future claimants to likewise violate the waiver requirement or even include other, additional language in their waivers, further eroding the effectiveness of the waiver requirement in the Treaty.

IV. CONCLUSION

28. Renco violated the Treaty by failing to submit a comprehensive waiver of all rights mandated by the Treaty. Renco further violated the Treaty by failing to submit a waiver on behalf of DRP and by DRP's initiating and continuing to local proceedings in Peru (violations which the Tribunal has not asked about). The Treaty establishes clear requirements, and the consequences of their violation are not subject to rewriting by a claimant, or a tribunal. Accordingly, the Republic of Peru respectfully reiterates its request that the Tribunal render an award dismissing Renco's claims in their entirety, with an award of costs in favor of Peru.

Respectfully submitted,



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