

September 30, 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:

As directed, Renco comments on the Tribunal’s questions of September 27, 2015 regarding the principle of severability, and responds to Peru’s submission of September 23, 2015 concerning the Tribunal’s post-hearing questions.

I. The Principle of Severability Under International Law

The principle of severability under international law often has arisen in the context of invalid reservations in treaties.¹ For instance, in a separate opinion in *Norwegian Loans*, Judge Hirsch Lauterpacht examined the “automatic reservation” that France included with its acceptance of the International Court of Justice’s compulsory jurisdiction (the “Optional Clause”). In that reservation, France excluded from the Court’s jurisdiction “matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.”² According to Judge Lauterpacht, almost any issue could be considered “essentially within the national jurisdiction,” especially because France reserved the right to self-judge this issue as it had done *via* the terms “as understood by the Government of the French Republic.”³ In effect, in an acceptance that purported to

¹ In its Counter-Memorial on Waiver, Renco referred to the principle of severability as a basis for requiring the Tribunal not to dismiss an entire arbitration simply because one among multiple measures challenged in arbitration may, *arguendo*, be the subject of parallel domestic proceedings. Renco’s Counter-Memorial Concerning Peru’s Waiver Objections ¶ 118. Renco argued the severability doctrine as applied in the *Abyei* Arbitration, among others, in support of an interpretation of the U.S.-Peru TPA that allowed for the severance from the arbitration of an impropvidently lodged measure in a domestic court. **CLA-117**, *The Government of Sudan v. The Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, Final Award, July 22, 2009 ¶¶ 416-24 (H.E. Judge Awn Al-Khasawneh, Gerhard Hafner, W. Michael Reisman, Stephen M. Schwebel, Pierre-Marie Dupuy (President)). Renco is grateful to the Tribunal for seeking its view on the applicability of the severability principle to the reservation contained in the last sentence of Renco’s waiver.

² **CLA-138**, *Case of Certain Norwegian Loans*, Separate Opinion of Sir Hersch Lauterpacht of Sept. 28, 1956: I.C.J. Reports 1956 at 43 (hereinafter “*Norwegian Loans*, Separate Opinion of Sir Hersch Lauterpacht”).

³ *Id.*

consent to the Court's compulsory jurisdiction, France retained the exclusive authority to decide whether any action could be brought against it before the International Court of Justice.

Judge Lauterpacht opined that this reservation was invalid because it was contrary to the Statute of the Court, in that it deprived the Court of the power to decide its own jurisdiction, and also because the acceptance did not constitute a legal obligation.⁴ Having concluded that France's reservation was invalid, Judge Lauterpacht then addressed whether that holding invalidated France's acceptance of the Court's compulsory jurisdiction or whether the Court could sever the invalid part of France's reservation while also recognizing its acceptance of the Court's compulsory jurisdiction.

To decide between these two options, Judge Lauterpacht began his analysis noting that early scholars of international law considered every provision of a treaty as critical to the validity of the entire instrument such that one invalid provision would invalidate the entire treaty. But he went on to highlight an emerging international practice holding that unimportant and non-essential provisions may be severed without invalidating an entire treaty. Judge Lauterpacht observed that this emerging approach was consistent with a general principle of law as developed in municipal law:

That general principle of law is that it is legitimate—and perhaps obligatory—to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties and the nature of instrument the condition in question does not constitute an essential part of the instrument.⁵

On the issue before him in *Norwegian Loans*, Judge Lauterpacht focused his analysis on whether France considered its reservation essential to its acceptance of the Court's Optional Clause. In stark contrast to Renco's position in this proceeding that the additional language in its waiver is not important or essential, according to Judge Lauterpacht, the history of the reservations like France's to the Court's Optional Clause demonstrated that reserving States, including France, considered this reservation to be "one of the crucial limitations—perhaps the crucial limitation—of the obligation undertaken."⁶ France had steadfastly copied this reservation from one that the United States had included with its acceptance of the Court's Optional Clause, even though many authorities stated publically at the time that it conflicted with the Court's Statute.⁷ India and the Union of South Africa had revoked their prior acceptances of the Optional Clause and included new acceptances with this same reservation.⁸ And the Rapporteur of the Committee for Foreign Affairs of the French Chamber stated defiantly that: "The French sovereignty is not put in issue and its rights are safeguarded in all spheres and in all circumstances" with this reservation.⁹ Thus, Judge Lauterpacht appropriately concluded that this reservation was essential to France in its acceptance of the Court's Optional Clause:

⁴ **CLA-138**, *Norwegian Loans*, Separate Opinion of Sir Hersch Lauterpacht at 55.

⁵ *Id.*, at 56-57

⁶ *Id.*, at 57.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*, at 57-58.

The Court is therefore confronted with the decisive fact that the Government in question is not prepared to subscribe or to renew its commitment of compulsory judicial settlement unless it safeguarded in that particular way its freedom of action. That particular formulation of the reservation is an essential condition of the Acceptance as a whole. It is not severable from it. The phrase ‘as understood by the Government of the French Republic’ must be regarded as being of the very essence of the undertaking in question. It is not a collateral condition which can be separated, ignored and left on one side while all others are given effect. The Acceptance stands and falls with that particular reservation and that particular formulation of the reservation. Without these words the Government which made that reservation would not have been willing to accept the commitments of the compulsory jurisdiction of this Court.¹⁰

While Judge Lauterpacht declined to apply the principle of severability under the specific facts of the *Norwegian Loans* case, the principle remains undisturbed: Judge Lauterpacht left open the possibility of applying severability to other reservations. “It might perhaps be possible—I express no view on the subject—to disregard and to treat as invalid some other reservation which is contrary to the Statute and thus to maintain the Acceptance as a whole.”¹¹ According to Judge Lauterpacht, the Court “should not allow its jurisdiction to be defeated as the result of remediable defects of expression which are not of an essential character.”¹²

The *Interhandel* Case concerned a similar reservation that the United States had included with its acceptance of the Court’s Optional Clause. In that case, the International Court of Justice found that the United States had accepted the compulsory jurisdiction of the Court without considering the validity of the United States’ reservation. In a dissenting opinion, Judge Lauterpacht again reiterated that severability is “a maxim based on common sense and equity,”¹³ but, like the reservation in *Norwegian Loans*, Judge Lauterpacht considered that the United States’ reservation was “essential” and thus not severable from its acceptance of the Court’s compulsory jurisdiction.¹⁴

Judge Lauterpacht’s opinions articulated and endorsed the principle of severability and noted it as an emerging international practice. Since then, international law has continued to evolve over time and now solidifies this practice. For example, several human rights tribunals have applied the principle to invalidate particular reservations without otherwise invalidating a State’s consent to a treaty. In *Belilos v. Switzerland*, *Weber v. Switzerland*, and *Loizidou v. Turkey*, the European Court of Human Rights held that certain reservations to the European Convention on Human Rights formulated by Switzerland and Turkey were invalid. After reaching these conclusions, the Court then applied the treaty as if the reservations had not been formulated and thus was of no object and produced no effect. The European Court of Human Rights justified this result as being *consistent with the intent of the State whose reservation the Court had invalidated*. For instance, in *Belilos v. Switzerland*, the Court re-characterized Switzerland’s interpretative declaration as a reservation and held that this reservation

¹⁰ **CLA-138**, *Norwegian Loans*, Separate Opinion of Sir Hersch Lauterpacht at 58.

¹¹ *Id.*, at 59.

¹² *Id.*, at 57.

¹³ **CLA-139**, *Interhandel Case*, Dissenting Opinion of Judge Lauterpacht of Mar. 21, 1959: I.C.J. Reports 1959 at 116-17.

¹⁴ *Id.*

was invalid. After invalidating Switzerland's reservation, the Court held, "[a]t the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration."¹⁵ Similarly, in *Hilaire v. Trinidad and Tobago*, the Inter-American Court of Human Rights held that Trinidad and Tobago could not benefit from a reservation included in its acceptance of the Court's jurisdiction, but that it was still bound by its acceptance of compulsory jurisdiction.¹⁶

In 2011, the International Law Commission issued an extensive report setting forth a Guide to the Practice of Reservations to Treaties. In that report, the Commission analyzed the authorities above and articulated the following important guidelines:

- 1) impermissible reservations are null and void and devoid of any legal effect;
- 2) whether the State that authored an invalid reservation is still bound by the treaty without the benefit of its reservation depends on that reserving State's intention; and
- 3) there is a *rebuttable presumption* that a State intends to remain bound by a treaty it ratified even if its reservation is found to be invalid.¹⁷

In the circumstances of the present case, Renco has included a reservation with its consent to arbitration under an international instrument. Peru has objected arguing that Renco's reservation is impermissible under that international instrument. Renco disagrees with Peru. But even if Peru were correct, Renco has stated clearly and emphatically that Renco does not consider its reservation as important or essential to its consent, and that it was not Renco's intent to expand its rights under the Treaty or narrow the waiver requirement under Article 10.18 of the Treaty.

Thus, if this Tribunal were to hold that Renco's reservation is improper under the Treaty, this Tribunal may declare Renco's reservation invalid and at the same time affirm Renco's consent to arbitrate its claims in accordance with the Treaty's conditions and requirements as if the reservation had not been written, under the principle of severability.

II. Renco's Reply to Peru's Answers to the Tribunal's Post-Hearing Questions on Waiver

Most of Peru's answers repeat arguments made in its written and oral submissions, which Renco already has addressed. Nevertheless, Renco briefly responds to three points in Peru's submission.

First, the Tribunal asked the parties: "What is the real effect, in the circumstances of this case, of the additional language in Renco's waiver?" In response to this question, Peru argues that it does

¹⁵ **CLA-140**, *Belilos v. Switzerland*, Application No. 10323/83, Judgment of Apr. 29, 1988, footnote 2462 above at ¶ 60.

¹⁶ **CLA-141**, *Hilaire v. Trinidad and Tobago*, Inter-American Court of Human Rights, Judgment of Sept. 1, 2001, *Series C*, No. 80 at ¶ 98.

¹⁷ **CLA-142**, *Report of the International Law Commission*, UNGAOR, 63rd Sess, Supp No. 10, UN Doc A/63/10, Guideline 4.5.1, 4.5.3 (2011).

not have to demonstrate any prejudice or any other effect of this additional language.¹⁸ Renco disagrees.

In *RDC*, the claimant included the following, additional language with its waiver: “provided, however, that RDC, on its own behalf and on behalf of FVG, reserves the right to pursue any and all local remedies which the ICSID arbitration panel requires in order for RDC to avoid any contention by the Government of Guatemala that RDC has failed to exhaust local remedies....”¹⁹ Guatemala, like Peru here, argued that this language invalidated RDC’s waiver.²⁰ The Tribunal rejected Guatemala’s argument because this language had no object or real effect in the circumstances of that case.

Respondent has argued that [this additional language in RDC and FVG’s waivers] constitute[s] by [itself] a repudiation of the waivers. The Tribunal disagrees. The Tribunal has no authority under CAFTA or the ICSID Convention to order the Claimant to pursue domestic proceedings in order to satisfy consent requirements of the Respondent in this arbitration. *In these circumstances*, the express reservation in the waivers is without any possible object and it does not deprive the Tribunal of jurisdiction.²¹

As in *RDC*, if this Tribunal determines that the additional language in Renco’s waiver has no real effect, which it does not in light of Renco’s subsequent statements as to its intent concerning the reservation, the Tribunal should hold that this language does not deprive this Tribunal of jurisdiction.

Second, Peru argues that Renco’s additional language would preclude Peru from invoking the waiver in a future proceeding.²² As Renco explained in its answers to the Tribunal’s post-hearing questions, Renco is bound by its statements in this proceeding that the additional language in its waiver was not intended to—and does not—reserve any rights concerning the waiver that the Treaty does not already allow. Thus, Renco would be estopped in a future proceeding from arguing to the contrary or otherwise relying on this additional language. Therefore this language should not and will not have any effect in a future proceeding.²³ Peru may invoke its waiver in a future, hypothetical proceeding, and the additional language in Renco’s waiver will not undermine any waiver argument that Peru wishes to advance in that future proceeding. In addition, Peru also would be able to rely on a finding by this Tribunal that an invalid reservation is severable in presenting Renco’s waiver before any domestic court or other forum in the future.

Further, as Renco also explained in its answers to the Tribunal’s post-hearing questions, if invoking the waiver in a future, hypothetical proceeding were Peru’s actual concern, it would accept Renco’s offer to strike the language.²⁴ Peru responded that the Treaty does not obligate Peru to accept

¹⁸ Peru’s Submission on Matters Arising from the Hearing on Waiver, Sept. 23, 2015 ¶ 10.

¹⁹ **RLA-20**, *Railroad Development Corp. v. Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, Nov. 17, 2008 ¶ 43 (Judge James Crawford, the Honorable Stuart E. Eizenstat, Dr. Andres Rigo Sureda (President)).

²⁰ *Id.* ¶ 45.

²¹ *Id.* (emphasis added).

²² Peru’s Submission on Matters Arising from the Hearing on Waiver, Sept. 23, 2015 ¶ 25.

²³ Renco’s Letter regarding the Tribunal’s Post-Hearing Questions, Sept. 23, 2015 at p. 6-8.

²⁴ *Id.* at p. 8-9.

such offers.²⁵ Peru misses the point. Peru's choice not to accept Renco's offer illustrates that Peru is not really concerned about being able to assert a waiver defense in a future proceeding. Rather, Peru's real objective is to attempt to create and exploit a hyper-technicality in this arbitration to prevent this Tribunal from hearing Renco's claims against Peru on the merits, notwithstanding the fact that the reservation is severable.

Third, Renco argued that an object and purpose of the Treaty is to create effective mechanisms to resolve investment disputes, and that Peru's interpretation of the waiver's scope as including claims dismissed on jurisdictional grounds conflicts with that object and purpose because in many instances a claimant would not have access to any forum. As Renco noted in its Counter-Memorial on Waiver, "Peru repeatedly complains that Renco should not be allowed 'two bites at the apple' yet, under Peru's interpretation, Renco would not even be allowed one."²⁶ In its most recent submission, Peru characterizes this argument as a "novel appeal to equity."²⁷ Peru agrees that an object and purpose of the Treaty is to create effective means of resolving investment disputes, and Peru does not dispute that its interpretation would deprive some claimants of access to any forum. Instead, Peru argues that "[e]ven if this were true, it is not a basis for challenging the scope of Peru's consent."²⁸

Renco's argument is neither novel nor an appeal to equity. First, Renco relied on *Waste Management II's* articulation of this very point as one of three reasons to reject Mexico's claim that Waste Management's waiver barred its re-filed claims.²⁹ "The Claimant has not had its NAFTA claim heard on the merits before any tribunal, national or international; and if Respondent is right, that situation is now irrevocable. Such a situation should be avoided if possible."³⁰ Second, Renco's argument is not an appeal to equity. Peru's interpretation of the waiver's scope conflicts with the object and purpose of the Treaty. That is a proper argument under the customary rules of treaty interpretation.

If, as Peru concedes, an object and purpose of the Treaty is to provide effective means to resolve investment disputes, then the Vienna Convention on the Law of Treaties directs the Tribunal to interpret the Treaty's waiver provision in accordance with that object and purpose.³¹ But instead of explaining why its interpretation comports with that object and purpose even though it would deprive some claimants of any forum, Peru simply states that this inquiry is irrelevant to its consent. That is not a valid argument. It is a conclusory assertion that assumes the issue in dispute.

In conclusion, the additional language in Renco's waiver comports with the Treaty's waiver requirement. In any event, that language has no real effect in the circumstances of this arbitration because Renco is bound by its statement that the additional language is not intended to—and does not—reserve any rights concerning the waiver that the Treaty does not already allow and that this

²⁵ Peru's Submission on Matters Arising from the Hearing on Waiver, Sept. 23, 2015 ¶ 7 ("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.").

²⁶ Renco's Counter-Memorial on Waiver, Aug. 10, 2015 ¶ 58.

²⁷ Peru's Submission on Matters Arising from the Hearing on Waiver, Sept. 23, 2015 ¶ 21.

²⁸ *Id.*

²⁹ **RLA-103**, *Waste Management Inc. v. Mexico II*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal concerning Mexico's Preliminary Objections concerning the Previous Proceedings, June 26, 2002 ¶ 15.

³⁰ *Id.*

³¹ **CLA-83**, Vienna Convention on the Law of Treaties, art. 31.

Members of the Tribunal
September 30, 2015

additional language will not bar Peru from advancing a waiver defense in any future, hypothetical proceeding.

In the alternative, should this Tribunal conclude that any aspect of the additional language in Renco's waiver is problematic, there are several options to address and resolve such issues. Under the principle of severability as set forth above, this Tribunal has the power to declare the additional language in Renco's waiver invalid and proceed with the arbitration as if it were not written. And, this Tribunal also has the power to allow Renco to cure any formal defect in its waiver.

As Judge Lauterpacht stated, an international tribunal "should not allow its jurisdiction to be defeated as the result of remediable defects of expression which are not of an essential character."³²

Thus, Renco requests that the Tribunal issue a Partial Award holding that Renco has complied with the Treaty's waiver requirement and that the additional language in Renco's waiver does not violate the Treaty's waiver requirement.

In the alternative, Renco requests the Tribunal to issue a Partial Award holding that: a) any invalid language in Renco's waiver shall be severed from the rest of Renco's waiver, b) Renco has otherwise complied with the Treaty's waiver requirement, and c) all of Renco's claims shall be deemed submitted to arbitration on the date when Peru received Renco's Amended Notice of Arbitration.

As a second alternative, Renco requests the Tribunal to issue an interim order outlining steps that Renco should take to comply fully with the Treaty's waiver requirement. Once Renco has taken those steps, Renco requests the Tribunal to 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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³² CLA-138, Norwegian Loans, Separate Opinion of Sir Hersch Lauterpacht at 57.