

The Renco Group, Inc.

Claimant

v.

The Republic of Peru

Respondent

(UNCT/13/1)

**PERU'S POST-HEARING REPLY SUBMISSION
ON WAIVER**

30 September 2015



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

PERU'S POST-HEARING REPLY SUBMISSION ON WAIVER

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The Renco Group, Inc. v The Republic of Peru

PERU'S POST-HEARING REPLY SUBMISSION ON WAIVER

1. The Republic of Peru (“Peru”) hereby submits its second submission on the matters arising from the hearing on the waiver requirement (the “Hearing”), including as instructed by the Tribunal (A) preliminary remarks on the applicability of the theory of severability, raised by the Tribunal in its communication of 27 September 2015, and (B) replies to the submission of The Renco Group, Inc. (“Renco”) dated 23 September 2015.

2. The Peru-United States Trade Promotion Agreement (the “Treaty”) is a treaty between two sovereign States that provides, *inter alia*, for the settlement of certain disputes through arbitration, subject to express conditions and limitations on their consent.¹ The waiver requirement is an unambiguous condition of Peru’s consent: “[n]o claim may be submitted to arbitration unless [...] the notice of arbitration is accompanied by” waiver(s) of “any right to initiate or continue [...] any proceeding with respect to any measure alleged to constitute a breach” of the Treaty.² Renco cannot choose to comply partially.

3. Rather than comply with the terms of Peru’s offer, Renco qualified its waiver by “reserv[ing] the right to bring [claims dismissed on jurisdictional or admissibility grounds] in another forum for resolution on the merits.”³ Renco thus failed to waive any right to initiate or continue any future proceedings, and made its waiver contingent on the determinations of the Tribunal in these proceedings. The two Parties to the Treaty agree: “[i]f 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 will lack jurisdiction.”⁴

4. This objection relates to a serious violation at odds with the object and purpose of the Treaty. Indeed, Renco now admits that “Peru objected in writing years ago,” but continues to grossly mischaracterize the factual and procedural record in seeking to escape the consequences of its Treaty violations, as is explained in detail at the conclusion of the brief. Just as Renco’s failure to comply with its environmental undertakings was the origin of this dispute, Renco’s failure to comply with the conditions of the Treaty for accepting Peru’s offer to arbitrate must be its end.

A. RENCO’S RESERVATION OF RIGHTS CANNOT BE SEVERED TO ESTABLISH JURISDICTION

5. The following is a response to the Tribunal’s question on the theory of severability received on 27 September 2015,⁵ which Peru has elaborated in the short time-frame and in the limited space available and with limited opportunity to make consultations. To the extent that the Tribunal is inclined to apply a theory never before addressed by Renco, Peru would expect the opportunity to consider and address this question in detail, and, in particular, respond to Renco’s comments on this issue, in accordance with the principle of due process and its right to be heard. The Tribunal also should also invite the United States to address the issue, in accordance with Article 10.20(2) of the Treaty.

6. To engage a State’s consent, an investor must accept the State’s offer to arbitrate in accordance with the terms and conditions of the relevant treaty, as has been confirmed by numerous

¹ See Treaty, Art. 10.17 (RLA-1).

² See Treaty, Art. 10.18 (RLA-1).

³ See Amended Notice of Arbitration ¶ 67.

⁴ Second Submission of the United States ¶ 7.

⁵ See Tribunal’s communication of 27 September 2015 .

tribunals.⁶ As such, tribunals are not competent to cure defective compliance with the treaty, or to allow the investor to do so. Renco submitted defective waivers on two occasions; the Tribunal cannot make novel use of the theory of severability to unilaterally modify Renco's waiver.

7. The theory of severability has been applied in the significantly different context of a State's reservations to a treaty. Unlike claimants seeking to accept a State's offer to arbitrate, States entering into treaties are entitled to make reservations. Specifically, barring agreement to the contrary, the Vienna Convention provides that States are entitled to make reservations compatible with treaty's object and purpose,⁷ and also establishes the procedure for accepting or objecting to a reservation independent of a dispute.⁸ State reservations to a treaty also have different effects from reservations made by claimants in the investor-State context. Whereas a claimant is incapable of altering the terms of a State's offer to arbitrate, and any attempt to do so will result in the dismissal of the claim for lack of jurisdiction, a State's reservations to a treaty may reciprocally modify the obligations of the counterparty State(s),⁹ or prevent the application of particular provisions to which the reservation relates, leaving the remainder of the treaty unaffected.¹⁰

8. The theory of severability arises from the need to resolve "the fundamental controversies linked to the procedure of the elaboration of treaties," namely, the State's right to make reservations, and seeks to balance "the interest of States to preserve their sovereignty and the necessity of international cooperation in a world which is at once divided and interdependent."¹¹ No similar concerns are at play in the investor-State context. In particular, balancing of interests is out of place in the context of a claimant's defective acceptance of the State's offer to arbitrate, because investors have no inherent right to arbitration, whereas the State has the absolute right to condition its consent on whatever terms it sees fit. Moreover, even in the context of State reservations to treaties, the theory of severability is controversial.¹² An alternative approach is to find that a reservation contrary to the object and purpose of the treaty may result in "total invalidity" of the treaty as to the State making the reservation.¹³ This approach is most similar to the practice of investor-State arbitration tribunals, which have determined that a claimant's failure to abide by the terms of the offer to arbitrate results in the invalidity of the arbitration agreement.¹⁴

⁶ See, e.g., *Caratube Int'l Oil Co. LLP v. Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶ 331 ("If a tribunal's jurisdiction is based on an investment treaty, claimant does not negotiate an individual agreement with the host State but accepts a non-negotiable offer addressed to persons or entities that fulfil its conditions.") (RLA-139); J. Salacuse, *THE LAW OF INVESTMENT TREATIES* (2015), at 422-423 ("The offer includes the various terms and conditions contained in the applicable investment treaty.") (RLA-137); C. F. Dugan *et al*, *INVESTOR-STATE ARBITRATION* (2008), at 220-221 ("The government's unilateral offer is consummated as a binding obligation to arbitrate only with the investor's acceptance of *that* offer.") (emphasis added) (RLA-100).

⁷ Vienna Convention, May 23, 1969, Art. 19 (RLA-3).

⁸ *Id.* Arts. 20-23.

⁹ *Id.* Art. 21.1.

¹⁰ *Id.* Art. 19.

¹¹ O. Corten and P. Klein, *THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY*, *Commentary on Section 2*, ¶ 27 (RLA-127).

¹² See, e.g., O. Dörr and K. Schmalenbach (eds.), *VIENNA CONVENTION ON THE LAW OF TREATIES*, *Commentary on Section 2*, ¶ 118 ("[T]he Human Rights Committee adopted the severability concept with regard to the ICCPR.... This presumption of severability provoked protest from France, the United Kingdom and the United States.... The Committee has been both praised and criticized for its approach.") (RLA-126).

¹³ See, e.g., *Case of Certain Norwegian Loans* (France v. Norway) Sep. Op. of Judge Lauterpacht, ICJ Reports 1957, at 56 (discussing approach according to which "every single provision of a treaty is indissolubly linked with the fate of the entire instrument which, in their view, lapses as the result of the frustration or nonfulfillment of any particular provision"); O. Dörr and K. Schmalenbach (eds.), *VIENNA CONVENTION ON THE LAW OF TREATIES*, *Commentary on Section 2*, ¶ 115 ("In its 1951 Advisory Opinion to Reservations to the Genocide Convention the ICJ adopted the so-called 'total invalidity' solution, which concludes that the State concerned did not become a party to the treaty in question at all.") (RLA-126).

¹⁴ See, e.g., *Detroit Int'l Bridge Co. v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 April 2015, ¶ 321 (stating that "[t]he 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).

9. Only one of the three cases mentioned by the Tribunal applied the theory of severability. The ICJ did not address the theory of severability in either the *Norwegian Loans* or the *Interhandel* cases. Judge Lauterpacht in separate opinions, however, noted the possibility of severing an invalid reservation, “provided that having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument,”¹⁵ and “based on common sense and equity.”¹⁶ In both cases, Judge Lauterpacht concluded that it would be inappropriate to sever reservations made by France and the United States that he found “essential” to the States’ consent to the corresponding treaties.¹⁷ This reflects the concern that severing reservations would infringe on the States’ sovereignty, because those States would become parties to an international agreement that they otherwise would not have joined absent their reservations. Here, even assuming *arguendo* that Renco’s reservation is deemed to be non-essential to its waiver, severing the invalid portion of that waiver would infringe on *Peru’s* sovereignty, because Peru was not obligated to extend an offer to arbitrate to claimants and did so only on condition that the offer be accepted, without reservation, at the time of the filing of the Notice of Arbitration.

10. In *Loizidou*, the ECHR held that an invalid reservation purporting to restrict the scope of its jurisdiction did not invalidate Turkey’s acceptance of the European Convention of Human Rights.¹⁸ In severing the reservation, the ECHR indicated that it decided the issue with reference to “the special character of the Convention regime,” which “militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured.”¹⁹ No such concern justifies saving Renco’s claims against Peru. In particular, unlike the ECHR, which may have an objective of exercising jurisdiction over as many States as possible, in order to “enforce[] [] human rights and fundamental freedoms,”²⁰ investment tribunals have no mandate to expand the scope of a State’s offer to arbitrate. Indeed, “it is of the utmost importance not to forget that no participant in the international community, be it a State, an international organisation or a physical or a legal person, has an inherent right of access to a jurisdictional recourse. For such right to come into existence, specific consent has to be given [...] [T]he State can shape its consent as it sees fit by providing the conditions under which it is given – in other words, the conditions subject to which an ‘offer to arbitrate’ is made to the foreign investors.”²¹

11. Were severability to be used to remedy a claimant’s defective acceptance of an offer to arbitrate under an investment treaty, it would have radically different consequences than in the context of treaty formation. The application of the theory of severability in the context of State reservations to treaties benefits the party against the interests of the party making the reservation, by preventing that party from escaping jurisdiction as a result of its invalid reservation. Were severability to be applied in this context, by contrast, it would benefit Renco and any other investor, which is the party making the reservation, and would contravene the unambiguous terms of the Treaty that conditioned the respondent’s State’s consent on the submission of a valid waiver with the notice of arbitration. Accordingly, the Tribunal cannot sever Renco’s reservation of rights from the rest of the waiver. To attempt to import the theory of severability into the investor-State context would be unprecedented,²² contrary to the express terms of the Treaty, and a manifest excess of power.

¹⁵ *Case of Certain Norwegian Loans* (France v. Norway) Sep. Op. Judge Lauterpacht, ICJ Reports 1957, at 56-7.

¹⁶ *Interhandel Case* (Switzerland v. United States of America) Dissenting Op. Judge Lauterpacht, ICJ Reports 1959, at 116.

¹⁷ *Case of Certain Norwegian Loans* (France v. Norway) Sep. Op. Judge Lauterpacht, ICJ Reports 1957, at 58; *Interhandel Case* (Switzerland v. United States of America) Dissenting Op. Judge Lauterpacht, ICJ Reports 1959, at 116.

¹⁸ *Case of Loizidou v. Turkey* (Preliminary Objections) Judgment dated 23 March 1995, ¶¶ 97-98.

¹⁹ *Id.* ¶ 96.

²⁰ *Id.* ¶ 70 (noting that the ECHR “must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms.”).

²¹ *ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, ¶ 337 (RLA-135).

²² See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29)

B. PERU'S REPLY TO RENCO'S SUBMISSION OF 23 SEPTEMBER 2015

Q 1. Renco's Reservation Defeats The Object And Purpose Of The Treaty

12. Although there is no “effects test” to determine whether Renco has violated the waiver requirement,²³ it is apparent that Renco's reservation is not superfluous. During the Hearing, Peru identified various situations in which such a reservation might defeat the object and purpose of the Treaty. Renco twice failed to rebut Peru's argument during the Hearing,²⁴ and the Tribunal gave it another opportunity.²⁵ Renco's latest effort is no more successful.

13. *First*, Renco's statement of the Treaty's object and purpose is unduly restrictive. According to Renco, “[t]he object and purpose of the Treaty's waiver provision is to prevent concurrent domestic and international proceedings, inconsistent results, and double recovery.”²⁶ These are not the sole objectives of the Treaty's waiver provision, however. The waiver requirement seeks to prevent *any* other proceedings, concurrent or otherwise, after a notice of arbitration is filed. In addition, while the Treaty certainly seeks to prevent inconsistent results and double recovery, other objectives include ensuring finality and legal certainty, and encouraging foreign investors to use local and contractually-agreed dispute settlement mechanisms before internationalizing the dispute.²⁷

14. *Second*, Renco fails to distinguish the examples of cases dismissed on jurisdictional or admissibility grounds where allowing the claimant to file another claim in another forum would contravene the object and purpose of the waiver requirement. Specifically, Peru showed that certain illegal acts by a claimant may result in dismissal of a claimant's claims on jurisdictional or admissibility grounds, as illustrated by the *Metal-Tech*, *Plama*, and *World Duty Free* cases.²⁸ Under the Treaty, a proper waiver would prevent claimants implicated in illegality from initiating subsequent proceedings as to the same measures, even where claims are dismissed for lack of jurisdiction or inadmissibility. A reservation allowing claimants a second bite at the apple would defeat the Treaty's objectives of preventing multiple proceedings and risk inconsistent results. Renco misses the point by arguing that “no suggestion of corruption or fraud has been made against Renco.”²⁹ The waiver requirement must be met at the time of the notice of arbitration, and it may not be possible to know at that time whether a defense of illegality will be raised. In *Metal-Tech*, for instance, the facts of claimant's corruption “came to light” at the hearing on jurisdiction and liability two years after the

Award dated 27 Aug. 2009, ¶ 145 (observing that investment treaty tribunals “should pay due regard to earlier decisions of such tribunals,” and “unless there are compelling reasons to the contrary, [they] ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case” in order to “meet [their] duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.”) (RLA-140).

²³ See Peru's Submission On The Matters Arising From The Hearing On The Waiver Requirement (“Peru's Submission of September 23, 2015”) ¶¶ 11-15.

²⁴ See Hearing on Waiver, Tr. 150:16-159:8; 262:10-267:17.

²⁵ See Tribunal's communication of 16 September 2015.

²⁶ Renco Submission of September 23, 2015, p. 1.

²⁷ See, e.g., Memorial on Waiver ¶¶ 12 *et seq.*; Reply on Waiver ¶¶ 6, 11, 30; Peru's Submission of September 23, 2015, ¶ 24; Second Submission of the United States ¶¶ 4-5.

²⁸ See *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, Oct. 4, 2013 ¶¶ 372, 423 (RLA-125) (dismissing for lack of jurisdiction where the claimant had engaged in corruption in the making of its investment); *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008 ¶ 135 (RLA-124) (dismissing claimant's claims as inadmissible, because the claimant had engaged in fraud by deliberately concealing its financial capacity); *World Duty Free Co. Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Award, Oct. 4, 2006 ¶ 157 (RLA-123) (holding that “claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”). Renco's argument that *World Duty Free* was decided on the merits is irrelevant, because it is undisputed that claims may be dismissed for lack of jurisdiction or admissibility because of illegality. Renco's argument is also incorrect, as the tribunal held that “there can be no successful party on the merits in the traditional sense.” See *id.* ¶ 190 (RLA-123).

²⁹ Renco Submission of Sept. 23, 2015, p. 2.

notice of arbitration.³⁰ Accordingly, Renco is not entitled to presume that certain defenses will not be made or that its claim will not ultimately be dismissed on certain grounds.

15. Similarly, Renco's argument that "because the *Metal-Tech* tribunal found that it lacked jurisdiction, it held that there was no arbitration agreement," and, thus, a waiver could not operate to preclude it from challenging the same measures in another forum, is flawed for the reasons laid out in Peru's first submission.³¹ In addition, even assuming *arguendo* that Renco's argument were correct (which it is not), a dismissal on admissibility grounds, such as in *Plama*, would not result in there being no arbitration agreement. Likewise, there is no basis for Renco's argument that its reservation is superfluous, because "[e]ven without the waiver, the *res judicata* that attached to the finding of bribery or some other finding of illegality would bar re-litigation of that finding."³² *Res judicata* is not an alternative to waiver, and the Treaty does not make an exception to the waiver requirement in cases where *res judicata* might apply.³³ Moreover, contrary to Renco's vague assertions, *res judicata* might not apply to a finding of illegality, for example, if a subsequent proceeding has a different cause of action.³⁴

16. Renco also fails to distinguish the examples of cases where dismissals on jurisdictional or admissibility grounds were accompanied by detailed discussions and findings on the merits, as illustrated in the *Loewen*, *Methanex*, and *Occidental* cases.³⁵ Under the Treaty, a proper waiver would prevent a claimant from taking advantage of a dismissal on jurisdictional or admissibility grounds to force a respondent State into a second proceeding after the State has participated in potentially lengthy arbitration proceedings and succeeded in convincing a tribunal that it should prevail on the merits. Renco's criticism of the *Loewen* tribunal's comments on the merits as *obiter dicta*, without any "binding effect on future tribunals or indeed on the parties themselves,"³⁶ misses the point. The undisputed fact remains that there have been instances where tribunals have engaged in lengthy discussions of the merits of a case, and even made determinations that the claim would fail on the merits, when they have dismissed the claim for lack of jurisdiction. In such instances, a waiver should preclude the claimant from re-litigating that claim, and, yet, Renco's reservation would not do so. Similarly misguided is Renco's observation that, because the *Occidental* tribunal decided the claimant's national treatment and FET claims on the merits, that claimant would be precluded from challenging the same measures in another forum, notwithstanding that its expropriation claim was deemed inadmissible. The relevant fact is that the tribunal dismissed the claimant's expropriation claim as inadmissible after determining that it was "so evident" that the claim had no chance of success.³⁷ Surely the claimant in that instance ought to be barred by its waiver from filing another claim in another forum challenging the same measure. In a scenario where expropriation was the only claim brought, a waiver with Renco's reservation would not have the effect of barring such a claim.

17. Finally, Renco has no adequate response to Peru's observation that its waiver would not preclude Renco from challenging the same measures at issue in this arbitration in another forum in

³⁰ *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, Oct. 4, 2013 ¶¶ 85-86 (RLA-125).

³¹ Peru's Submission of September 23, 2015 ¶ 18 n. 20.

³² Renco Submission of September 23, 2015, p. 2.

³³ See Peru's Submission of September 23, 2015 ¶ 25.

³⁴ See *infra* ¶¶ 20-21.

³⁵ See *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, June 26, 2003 ¶¶ 137, 240 (RLA-122); *Methanex Corp. v. United States of America* (UNCITRAL) Final Award on Jurisdiction and Merits dated 3 Aug. 2005, Part IV – Ch. F ¶¶ 5-6 (RLA-12); *Occidental Exploration & Production Co. v. The Republic of Ecuador* (LCIA Case No. UN3467) Final Award dated 1 July 2004 ¶¶ 80, 92 (CLA-21).

³⁶ Renco Submission of September 23, 2015, p. 3.

³⁷ *Occidental Exploration & Production Co. v. The Republic of Ecuador* (LCIA Case No. UN3467) Final Award dated 1 July 2004 ¶¶ 80, 89, 92 (CLA-21); see also Hearing, Tr. 52:15-54:4.

the event that one or more of Peru's Article 10.20.4 objections were deemed jurisdictional, as Renco urges, and its claim was dismissed on that ground.³⁸ Renco's *res judicata* arguments are baseless, as Peru has shown. Likewise, whether Renco could initiate a new proceeding with respect to a measure not at issue in this arbitration is irrelevant.

Q 2. The Effect of Renco's Reservation Of Rights Mandated By The Treaty

18. Because a comprehensive waiver is a condition of Peru's consent, the Treaty mandates that Renco's reservation of rights in violation of the waiver requirement does not engage Peru's consent. Accordingly, the Tribunal must dismiss Renco's claims. Renco errs in arguing that the effect of its reservation of rights depends on how the Tribunal rules on jurisdiction.³⁹ By requiring the submission of a comprehensive waiver at the time of the notice of arbitration, the waiver requirement seeks to give the respondent State certainty, from the very start of the proceedings, that its measures will be challenged in international arbitration and not elsewhere. The issue as to whether or not the claimant may again sue the State for the same measures in another forum cannot be contingent upon an ultimately unknowable determination by a tribunal made potentially years in the future. Similarly, Renco is wrong to assert that "if the Tribunal asserts jurisdiction over all of Renco's claims, the additional language will have no object and no real effect."⁴⁰ Even in such circumstances, Renco's waiver defeats the Treaty's objective of encouraging recourse to arbitration as a last resort, because Renco is not foreclosing its right to pursue remedies in other fora when it files for arbitration. Renco also is wrong to assert that "if the Tribunal dismisses claims on jurisdictional or admissibility grounds ... the waiver does not apply and the Treaty permits Renco to attempt to have the merits of those claims heard in a different forum irrespective of the additional language contained in Renco's waiver."⁴¹ There is no language in the Treaty to this effect. To the contrary, the Treaty bars Renco from initiating any proceeding with respect to such claims, because its sole exception is inapplicable.

19. Renco's reliance on the *Nuclear Test* case for the proposition that it is bound by declarations made in these proceedings, which Peru may use in subsequent proceedings,⁴² does not assist it. As Peru has explained, the validity of Renco's waiver cannot be made contingent upon whether there are alternative defenses to waiver that Peru might invoke, either as a matter of international law or otherwise, should Renco's arbitration claim be dismissed for lack of jurisdiction or admissibility and should Renco then file a claim elsewhere challenging the same measures.⁴³ Moreover, the potential defenses mentioned by Renco, namely, estoppel and *res judicata*, are not interchangeable with waiver and would not necessarily act to preclude claims in all of the same circumstances. A defense of estoppel, for instance, is not a substitute for a waiver defense and would impose a significantly higher burden on Peru. Rather than being able to rely on the four corners of Renco's waiver to bar a future proceeding, Renco's position would require Peru to submit to a future decision maker the record of this arbitration (correspondence, pleadings, transcripts, etc) and convince that decision maker that Renco should be estopped from relying on its waiver, as written.

20. Similarly, as the ILA has observed, "*res judicata* notions differ significantly as between jurisdictions."⁴⁴ The *Luchetti ad hoc* committee thus noted that, "a clear distinction must be made between *res judicata* at international and at national level [*sic*]."⁴⁵ The standard for *res judicata*

³⁸ Renco Submission of September 23, 2015, p. 6.

³⁹ *Id.* p. 2.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* p. 7 (citing *Nuclear Tests Case* (New Zealand v. France) Judgment 1974 ICJ Rep. ¶ 46).

⁴³ See Peru's Submission of September 23, 2015 ¶ 25.

⁴⁴ ILA Final Report on Res Judicata and Arbitration, 72nd International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4-8 June 2006 ("ILA Report"), ¶ 15 (RLA-130).

⁴⁵ *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. ("Luchetti") v. Republic of Peru* (ICSID Case No.

often requires a “triple identity test (identity of claims, of the causes of action and of the parties),”⁴⁶ and tribunals have refused to apply *res judicata* where such factors are not strictly met.⁴⁷ In determining that *res judicata* did not apply, the *CME* tribunal, for instance, found that two arbitrations did not have an identical cause of action, because they were “based on differing bilateral investment treaties, which grant comparable investment protection, which, however, is not identical.”⁴⁸ Tribunals also may refuse to give preclusive effect to prior proceedings based on intervening factors,⁴⁹ and to determinations outside the *dispositif*,⁵⁰ such as the *Loewen* tribunal’s findings on the merits.

21. Consequently, a defense based on international law principles of estoppel or other defenses such as *res judicata* may not be as effective as a waiver defense under the Treaty, given that the waiver would bar *any* subsequent proceedings with respect to a measure alleged to constitute a Treaty breach, regardless of whether Peru has relied on Renco’s statements or whether Renco eventually asserts different legal grounds or causes of actions in subsequent proceedings or any intervening factors. Neither Peru nor the Tribunal can anticipate how the effects of such defenses might compare with those of a waiver defense, because the relevant standards may vary by forum. Renco is not entitled to rely on the mere possibility that such defenses may exist to excuse its violation of the Treaty.

22. Finally, Renco conflates the effect that a future court or tribunal might give to the reservation of rights to the certain consequences that must follow in the instant proceeding. There can be no doubt that this Tribunal is competent to determine its own competence, including, in particular, whether Renco complied with the waiver requirement. It is not competent, however to prejudge the effects of Renco’s waiver in other fora.

Q 3. Renco Has No Right To An Undertaking By Peru To Avoid The Consequences Of Its Treaty Violations

23. In an effort to avoid the consequences of its Treaty violations, Renco seeks to impose an obligation on Peru that is not required by the Treaty and is at odds with the Treaty. Asked to clarify what it meant when it stated during the Hearing that it would strike its reservation of rights if Peru undertook that there would be “no harm/foul, no statute of limitations issue,”⁵¹ Renco indicated that it is willing to “manually strike” the reservation in its waiver, but is concerned that “Peru would argue that the arbitration was not even commenced until that ministerial act takes place, thus implicating the statute of limitations,” and “that if Peru truly were concerned about the potential

ARB/03/4) Decision on Annulment, 5 September 2007, ¶ 87 (RLA-131).

⁴⁶ See ILA Report, ¶ 41 (RLA-130); cf. *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL) Final Award of 14 March 2003, ¶ 435 (“The principle of *res judicata* requires, for the ‘same’ dispute, identical parties, the same subject matter and the same cause of action.”) (RLA-128); *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award of 25 August 2014, ¶ 7.15 (“Whilst the triple identity test is often referred to in describing the requirements for *res judicata* to operate, certain international tribunals and scholars have questioned its division between *petitum* and *causa petendi*; and many cases have used a simpler analysis.”) (RLA-136).

⁴⁷ See, e.g., *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL) Final Award of 14 March 2003, ¶ 436 (not applying *res judicata* upon finding no identity of parties or cause of action) (RLA-128); *EDF Int’l S.A. SAUR Int’l S.A. et al. v. Argentina* (ICSID Case No. ARB/03/23) Award of 11 June 2012, ¶¶ 1134-36 (rejecting application of *res judicata* where the two proceedings were distinct and the causes of action were not the same) (RLA-134); *Helnan Int’l Hotels A/S v. Egypt* (ICSID Case No. ARB/05/19) Award of 3 July 2008, ¶ 130 (“[E]ven if the subject matter of the disputes is the same, i.e. the Management Contract, the relief is not identical Furthermore, those reliefs are not based on the same legal grounds or the same causes of action”) (RLA-132).

⁴⁸ *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL) Final Award of 14 March 2003, ¶¶ 432-433 (RLA-128).

⁴⁹ See, e.g., *Petrobart Ltd. v. Kyrgyz Republic* (ICSID Case No. ARB No. 126/2003), Arbitral Award, 29 March 2005, ¶ VIII.4.3 (“There may however be special reasons, such as the appearance of new evidence, which justify a new examination”) (RLA-129).

⁵⁰ *Chevron Corp. (U.S.A.) and Texaco Petroleum Corp. (U.S.A.) v. Republic of Ecuador* [I] (PCA Case No. AA 277) Final Award, 31 August 2011 ¶¶ 272-273 (questioning whether the reasoning of an award outside the *dispositif* meets the finality element for *res judicata*) (RLA-133).

⁵¹ See Tribunal’s communication of 16 September 2015.

future effect of this language in a proceeding that may never take place, Peru would invite Renco to simply strike the additional language.”⁵² Any effect on any future claim filed by Renco as a result of the dismissal of this claim for lack of jurisdiction as a result of Renco’s failure to file a compliant waiver has no bearing on the decision before this Tribunal, namely, whether Renco has complied with the Treaty and the result of that non-compliance. Renco is neither entitled to presume nor to demand that a sovereign State modify the terms of the Treaty or waive potential defenses that it may have to any future claim in exchange for receiving a waiver that complies with the Treaty and, thus, a valid acceptance to Peru’s offer to arbitrate.⁵³

24. In any event, Renco incorrectly asserts that Peru “raised its objection regarding this language for the first time only recently,” decrying its inability to submit a new notice of arbitration after the expiry of the Treaty’s three-year prescription period, despite the established record to the contrary. Renco’s current position, moreover, is at odds with its prior complaints that Peru’s objection as to waiver should have been submitted with Peru’s Counter-Memorial (and the Tribunal’s questioning as to the supposed urgency underlying Peru’s objection).⁵⁴ Renco cannot both complain that Peru did not raise its concerns on waiver until too recently and, at the same time, protest that Peru raised its objection, and urged the Tribunal to determine its objection, prematurely. In any event, it is undisputed that Peru raised its objection in a timely manner, well within the time allotted by the Treaty and Arbitration Rules. Peru thus cannot be sanctioned for having acted accordingly.

25. Renco continues to mislead the Tribunal as to the Treaty requirements and the factual and procedural records, despite the established record and at serious prejudice to Peru and the Treaty.⁵⁵ With respect to the Treaty, it imposes a waiver obligation on Renco, which Renco has breached in both word and deed, as discussed herein. With respect to the factual and procedural records, it is clear that Peru promptly raised its concerns and filed its objections pursuant to the procedural schedule. Indeed, Renco now acknowledges that “Peru objected in writing years ago.”⁵⁶

- At the outset of the proceeding, Peru expressed its concerns regarding Renco's waiver years ago, contemporaneously with the Notice of Arbitration and the Amended Notice of Arbitration.⁵⁷ This has been stated and restated in the pleadings.⁵⁸
- Prior to the constitution of the Tribunal, Peru continued to express concern, even while it agreed in good faith with Renco to suspend the constitution of the Tribunal in order to address matters attendant to the procedure and claims associated with the arbitration. Renco did not disclose this procedural fact or other material facts to the Tribunal in its incomplete and inaccurate Memorial.⁵⁹
- At the same time, on January 18, 2012, Renco’s subsidiary, Doe Run Cayman and the Ministry of Energy and Mines (“MEM”), as recognized creditors of DRP, each voted with the majority of the creditors’ committee to seek a restructuring of DRP.⁶⁰ It later came to light for Peru that, at the

⁵² Renco Submission of September 23, 2015, pp. 8-9.

⁵³ See *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, Nov. 17, 2008 ¶ 61 (“It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied, as the United States did in *Methanex*.”) (citation omitted) (RLA-20).

⁵⁴ See Hearing, Tr. 117:15-118:15.

⁵⁵ Peru reserves the right to amplify on this matter, including in connection with the baseless assertions and mischaracterizations in Renco’s Memorial and witness statements.

⁵⁶ Renco Submission of September 23, 2015, p. 9.

⁵⁷ See, e.g., Letter from Peru to Renco dated 9 September 2011 (transmitted to ICSID and the Tribunal on 10 May 2013).

⁵⁸ See, e.g., Peru’s Notification of Preliminary Objections dated 21 Mar. 2014, at 4; Peru’s Submission on the Scope of Preliminary Objections dated 23 Apr. 2014, at 10; Peru’s Comments on the Non-Disputing Party Submission dated 3 Oct. 2014, at 12-13.

⁵⁹ See e.g., Memorial ¶¶ 200-203; see also Sadlowski ¶¶ 93-94.

⁶⁰ Again, Renco's Memorial and witness statement repeatedly mischaracterize the facts. Peru reserves all its rights to the fullest extent to amplify on these and other prejudicial errors. In any event, Peru has acted cooperatively in seeking sustainable solutions related to La Oroya.

exact same time that Peru was attempting to cooperate on a solution for the operation of La Oroya, Renco subsidiary DRP filed a complaint against the MEM in Peruvian court. When this came to light, Peru strongly encouraged Renco to withdraw its complaint, but Renco did not do so and stated it was free to proceed with the latest local proceeding.⁶¹

- After the Tribunal was constituted, Peru diligently negotiated a procedural schedule culminating in Procedural Order No. 1 in 2013. Further to the schedule, and completely in line with the Treaty, Peru diligently raised its objection to waiver in its Notification of Preliminary Objections dated 21 March 2014.⁶² It has continued to raise the issue repeatedly in the face of Renco's intransigence.

26. Indeed, the real issue of timing and due process presented is that Peru raised this issue long ago, and now, as a procedural matter, has been seeking to be heard and have this serious Treaty violation resolved for some 18 months, as Renco seeks to deny Peru the opportunity to do so as it continues in violation of the Treaty.

Q 4. Neither Renco Nor The Tribunal Can “Cure” Renco’s Treaty Violations

27. In response to the question as to how Renco would propose to “cure” the defects in its written waiver,⁶³ Renco proposes “to strike the additional language from its existing waiver or provide a new waiver that does not contain the additional language,” and states that it would take “the steps that this Tribunal deems necessary to cure any formal defect.”⁶⁴ The Tribunal is required to apply the Treaty, however, and just as the Treaty does not allow Renco to unilaterally “cure” its Treaty violations, neither is the Tribunal competent to provide Renco an opportunity to do so.⁶⁵

28. Renco’s reliance on NAFTA cases to suggest otherwise is misplaced. The *Ethyl* tribunal, for example, indicated that the language in the NAFTA did not make compliance with the waiver requirement a condition of the respondent State’s consent to arbitrate, and noted specific changes to the language that could have been made to ensure this result.⁶⁶ Unlike the NAFTA, the Treaty explicitly makes the waiver requirement a condition of consent,⁶⁷ as Peru and the United States have confirmed.⁶⁸ The *Thunderbird* tribunal, moreover, excused the untimely filing of certain waivers on behalf of the claimant’s enterprises that had been “inadvertently missing from earlier filings” and submitted with the Particularized Statement of Claim, well before Mexico raised any objection to jurisdiction and years before the hearing.⁶⁹ Unlike in that case, Renco did not inadvertently submit its waiver in an untimely manner; indeed, to date, it has failed to submit a waiver that conforms with the

⁶¹ Renco was also encouraged to reign in its press statements and to manage discussions with Peru in a consistent manner due to a pattern fragmented and inconsistent conduct. Peru has refrained from introducing further documents, but stands ready to do so if requested. given the items raised by Renco.

⁶² Notification of Preliminary Objections, p. 4. Peru diligently raised its objections in conformity with its understanding of its rights under the Treaty including based on its express and documented understandings from the negotiating history and in conformity with the UNICTRAL Rules.

⁶³ See Tribunal’s communication of 16 September 2015.

⁶⁴ Renco Submission of September 23, 2015, p. 9.

⁶⁵ See Memorial on Waiver ¶¶ 9-11, 15-16; Reply on Waiver ¶ 58.

⁶⁶ *Ethyl Corp. v. Canada* (UNCITRAL) Award on Jurisdiction dated 24 June 1998, ¶ 91 (“While Article 1121’s title characterizes its requirements as ‘Conditions Precedent’ it does not say to what they are precedent. Canada’s contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the rest of Article 1121, which must govern. Article 1121(3), instead of saying ‘shall be included in the submission of a claim to arbitration’ – in itself a broadly encompassing concept –, could have said ‘shall be included with the Notice of Arbitration’ if the drastically preclusive effect for which Canada argues truly were intended.”) (CLA-103).

⁶⁷ Unlike the NAFTA, Article 10.18 does refer to the “Conditions and Limitations on Consent of Each Party,” and specifies that “[n]o claim may be submitted to arbitration under this Section unless [...] the notice of arbitration is accompanied [by the waiver].” Treaty, Art. 10.18 (RLA-1).

⁶⁸ Second Submission of the United States ¶ 7 (“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 will lack jurisdiction”).

⁶⁹ *International Thunderbird Corp. v. Mexico*, Award, Jan. 26, 2006 ¶ 113 (CLA-19).

Treaty's requirements. In any event, to the extent that the *Thunderbird* tribunal regarded the waiver requirement as "over[ly] formalistic" and determined that to dismiss the claim would be "excessively technical,"⁷⁰ the Treaty does not accord this Tribunal any discretion to disregard the terms of Peru's consent to arbitrate.

29. Finally, Renco is wrong to assert that "Renco will not have, and never has, committed any material breach."⁷¹ As Peru has shown, Renco was required to submit a waiver on behalf of its enterprise, DRP with the Amended Notice of Arbitration, as it had with the Notice of Arbitration. Not only did Renco fail to do so, but DRP meanwhile has initiated and continued proceedings in Peru, both of which concern a measure that Renco alleges constitutes a breach of the Treaty in the arbitration proceedings.⁷² In any event, the existence of a material breach of the waiver requirement is independent of Renco's formal violation, either one of which alone is fatal to Renco's claims. Contrary to Renco's suggestion, the formal requirement is as important, if not more important, than its material counterpart. In fact, it is the formal requirement that is expressed in the language of the Treaty itself: while the Treaty expressly provides in what form a waiver must be submitted, and specifically provides for the sole reservation that may be made by a claimant, the Treaty does not expressly state that the State's consent is conditioned upon the claimant's *compliance with* the terms of the waiver. Rather, that condition can be discerned from reading the language of the waiver requirement in context and in light of the Treaty's object and purpose and, thus, tribunals consistently have so interpreted the requirement, as reflected in the jurisprudence. Accordingly, there is no basis to construe the so-called "formal" requirement of the waiver any less strictly than the "material" requirement; if a violation of the latter requires dismissal, as tribunals unanimously have found, then a violation of the former does as well, as the Treaty expressly states and as both Parties to the Treaty have confirmed.⁷³

C. CONCLUSION

30. The Republic of Peru respectfully requests 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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30 September 2015

⁷⁰ *Id.* ¶ 117 (CLA-19).

⁷¹ Renco Submission of September 23, 2015, p. 9.

⁷² See Memorial on Waiver, Annex A.

⁷³ 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.").