

IN THE ARBITRATION UNDER CHAPTER TEN
OF THE UNITED STATES-PERU TRADE PROMOTION AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

THE RENCO GROUP, INC.

Claimant/Investor,

-and-

REPUBLIC OF PERU,

Respondent/Party.

(ICSID Case No. UNCT/13/1)

THIRD SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 10.20.2 of the United States-Peru Trade Promotion Agreement (“U.S.-Peru TPA” or “Agreement”), which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

2. The United States makes this submission to address a question posed to the disputing parties by the Tribunal on September 27, 2015, upon which the Tribunal subsequently invited the United States to comment on October 5, 2015.

Applicability of the “Principle of Severability” to a Waiver Submitted in an Investor-State Arbitration

3. The Tribunal invited the United States to comment on the following question:

The Tribunal notes that neither party has addressed the relevance, if any, of the principle of severability in connection with the question of the legal effect of the reservation contained in Renco's waiver. The Tribunal invites the parties to comment on this point in their reply submissions. The opinions in ICJ cases

Norwegian Loans and Interhandel as well as Loizidou v Turkey refer to the principle.

In particular, could this principle be applied in this case, such as to allow the reservation to be severed from the remainder of Renco's waiver, and, if so, what consequences (if any) might this have?

4. As the United States noted in its Second Submission, while a tribunal may determine whether a waiver complies with the requirements of Article 10.18, a tribunal itself cannot remedy an ineffective waiver.¹ 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 and not with a tribunal.²

5. A tribunal cannot rely on a purported "principle of severability" to alter its lack of authority in this regard. In fact, what the tribunal refers to as the "principle of severability," addressed by Judge Lauterpacht in his opinions in the *Norwegian Loans* and *Interhandel* cases before the International Court of Justice and by the European Court of Human Rights in its decision in *Loizidou v. Turkey*, is not a generally accepted rule of international law or custom.³ For that reason, the proposed "principle of severability" is not an "applicable rule[] of international law" under Article 10.22 of the U.S.-Peru TPA that may serve as a rule of decision in this case.

¹ See *Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Submission of the United States of America ¶ 16 (Sept. 1, 2015) ("*Renco*").

² *Renco*, Second Submission of the United States of America ¶ 16 (Sept. 1, 2015) (citing *Railroad Development Corporation v. Republic of Guatemala*, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5 ¶ 61 (Nov. 17, 2008) (stating that "the Tribunal has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver" and that "[i]t is for the Respondent and not the Tribunal to waive any deficiency under Article 10.18 or to allow a defective waiver to be remedied []").

³ Notably, the Vienna Convention on the Law of Treaties does not address severability of allegedly prohibited or invalid reservations to treaties, and the few cases where severability of a State's reservation has been deemed possible have primarily arisen in the context of human rights treaties, such as *Loizidou v. Turkey*. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 130-31 (3d ed. 2013). In its non-binding Guide to the Practice on Reservations to Treaties ("Guide"), the International Law Commission (ILC) states that guidelines regarding the consequences of an invalid reservation "form part of the cautious progressive development of international law." ILC, Report on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10/Add.1, (2011) (available at <http://legal.un.org/ilc/reports/2011/english/addendum.pdf>). In his article on the topic, Alain Pellet, the Special Rapporteur for the ILC's programme of work on reservations to treaties, stated that the non-binding Guide's guidelines on invalid reservations are "ambiguous and largely impracticable" due to "the deep division between states." Alain Pellet, *The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur*, 24 EUR. J. INT'L L. No. 4 1093-94 (2013). The United States has consistently maintained that "a reserving state . . . cannot be bound without its consent to a treaty without the benefit of its reservation." Remarks on Agenda Item 81 – Report of the ILC on the Work of its 63rd and 65th Sessions: Reservations to Treaties – Part II (Oct. 30, 2013) (available at <http://usun.state.gov/remarks/5845>); see *id.* (noting that guideline 4.5.3 of the ILC's non-binding Guide on the consequences of an invalid reservation "should not be understood to reflect existing law," and "the approach articulated in that section should not be regarded as a desirable rule, since it cannot be reconciled with the fundamental principle of treaty law that a state should only be bound to the extent it expressly accepts a treaty obligation").

6. A State's consent to arbitration is paramount.⁴ Here, Article 10.18 is titled "Conditions and Limitations on Consent of Each Party" to reinforce the point that the requirements that follow, including the waiver requirement, must be met by the claimant in order to engage the respondent State's consent to arbitrate.⁵ To determine whether a waiver complies with the requirements of Article 10.18 and thus may be considered effective, a tribunal must evaluate whether a claimant's waiver meets *both* the formal and material requirements.⁶ As to the formal requirements, the waiver must be in writing and must be "clear, explicit and categorical."⁷ All that a claimant needs to do is provide a waiver that, for example, recites the words contained in Article 10.18.2(b). But, this waiver must be provided *at the time the request for arbitration is made*.⁸ 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 Agreement, and the tribunal will lack jurisdiction *ab initio*.⁹ The *post hoc* application of the proposed "principle of severability" cannot operate to create consent by the respondent retroactively. The waiver requirement seeks to give the respondent certainty, from the very start of arbitration under the treaty, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration.¹⁰

⁴ See ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 74 (1st ed. 2009) ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); see also ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 87 (3d ed. 2013) ("To consent to be bound is, therefore, the most significant, positive act by which consent can be expressed"); THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, Vol. I 670 (Olivier Corten & Pierre Klein eds., 2011) (noting under the heading "Consent as foundation" that "[t]he draft Convention by the Harvard Law School already considered that 'treaties are binding only because the parties to them have freely consented to be bound by them and not because of any obligation resulting from some superior law'").

⁵ See *Renco*, Second Submission of the United States of America ¶ 6 (Sept. 1, 2015).

⁶ See *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award § 20 at 230 (stating that "[a]ny waiver . . . implies a **formal and material act** on the part of the person tendering same") (emphasis in original) ("*Waste Management I*"); *Commerce Group Corp and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award ¶¶ 79-80 (agreeing with respondent that "any waiver must comply with both a formal and material element" and noting that "to understand the concept of waiver in any other way would render it devoid of meaning") ("*Commerce Group*"). *Renco*, Second Submission of the United States of America ¶ 7 (Sept. 1, 2015).

⁷ See *Renco*, Second Submission of the United States of America ¶ 8 (Sept. 1, 2015) (citing *Waste Management I*, Award § 18 at 229).

⁸ U.S.-Peru TPA, art. 10.18.2(b)(i) (stating that "the notice of arbitration is accompanied, for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver"); *id.*, art. 10.18.2(b)(ii) (stating that "the notice of arbitration is accompanied, for claims submitted under Article 10.16.1(b), by the claimant's and the enterprise's written waivers"). See *Renco*, Second Submission of the United States of America ¶ 8 (Sept. 1, 2015).

⁹ See *Commerce Group*, Award ¶¶ 79-80; *id.* ¶ 115 (noting that the waiver was invalid and lacked "effectiveness" because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction); see also *Waste Management I*, Award § 31 at 239 (stating that the tribunal is "compelled to hold that it lacks jurisdiction to judge the issue in dispute now brought before it, owing to breach by the Claimant of one of the requisites laid down by [the waiver provision] and deemed essential in order to proceed with submission of a claim to arbitration, namely, waiver of the right to initiate or continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the [Agreement]").

¹⁰ See *Renco*, Second Submission of the United States of America ¶¶ 7, 9 (Sept. 1, 2015).

7. The waiver provision is designed to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of “conflicting outcomes (and thus legal uncertainty).”¹¹ To apply the proposed “principle of severability” in order to sever an invalid reservation of rights in a claimant’s waiver would defeat the purpose of the Agreement’s arbitration provisions. It would alter the conditions of the respondent’s offer to arbitrate and deprive the waiver provision of its intended purpose, thereby exposing the respondent to the risk of having to litigate, even temporarily, concurrently in multiple fora.

8. In summary, the United States and the Republic of Peru agree that the proposed “principle of severability” is not relevant and that 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 arbitration and not with a tribunal.¹² In addition, the Parties to the U.S.-Peru TPA agree that 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 to the Agreement, and the tribunal will lack jurisdiction.¹³ The Parties’ common, concordant, and consistent positions constitute the authentic interpretation of Article 10.18 and, under the Vienna Convention on the Law of Treaties, “shall be taken into account, together with the context.”¹⁴

Respectfully submitted,



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¹¹ *Renco*, Second Submission of the United States of America ¶ 5 (Sept. 1, 2015).

¹² *See Renco*, Second Submission of the United States of America ¶ 16 (Sept. 1, 2015).

¹³ *See Renco*, Second Submission of the United States of America ¶ 7 (Sept. 1, 2015).

¹⁴ Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(a), (b) (“There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]”).