

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER CHAPTER 10 OF THE UNITED STATES –
PERU TRADE PROMOTION AGREEMENT AND
THE UNCITRAL ARBITRATION RULES (2010)**

In the arbitration proceeding between

THE RENCO GROUP, INC.
Claimant

and

REPUBLIC OF PERU
Respondent

UNCT/13/1

DECISION REGARDING RESPONDENT'S REQUESTS FOR RELIEF

Members of the Tribunal

Dr. Michael J. Moser, Presiding Arbitrator
The Honorable L. Yves Fortier, CC, QC, Arbitrator
Mr. Toby T. Landau, QC, Arbitrator

Tribunal Assistant

Ms. Ruth Stackpool-Moore

Tribunal Secretary

Ms. Natalí Sequeira

Date

June 2, 2015

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I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted on the basis of the United States - Peru Trade Promotion Agreement dated April 12, 2006 (the “Treaty”) and the UNCITRAL Arbitration Rules (2010).
2. The Claimant is The Renco Group, Inc. and is hereinafter referred to as “Renco” or the “Claimant.”
3. The Respondent is the Republic of Peru and is hereinafter referred to as “Peru” or the “Respondent.”
4. The Claimant and the Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. This Decision disposes of the Respondent’s several requests for interlocutory and other relief in relation to the Article 10.20.4 Phase of these proceedings. The background is as follows.
6. On December 19, 2014 the Tribunal issued its Decision as to the Scope of the Respondent’s Preliminary Objections under Article 10.20.4 dated December 18, 2014 (the “Decision on the Scope of Article 10.20.4” or the “Scope Decision”). The Spanish version of the Scope Decision was communicated to the Parties by the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) on February 13, 2015.
7. By communications dated January 2, 2015 the Parties informed the Tribunal of their agreed schedule for submissions relating to the Respondent’s remaining preliminary objection pursuant to Article 10.20.4.
8. On January 27, 2015 a two day hearing regarding the Respondent’s remaining preliminary objection pursuant to Article 10.20.4 was scheduled for September 1 and 2, 2015 in Washington, D.C.
9. On February 21, 2015 the Respondent filed its Preliminary Objection Under Article 10.20.4 dated February 20, 2015 accompanied by Legal Opinions of John B. Bellinger, III and Carlos Cárdenas Quirós.

10. On February 23, 2015 the Claimant notified the Tribunal that it considered that the Respondent's filing raised jurisdictional and other issues beyond the scope of objections permitted per its Decision on the Scope of Article 10.20.4 and that accordingly, the Respondent's submissions should not be posted to the Centre's website. The Claimant reserved its right to address what it described as the Respondent's "overreaching."
11. On March 9, 2015 the Respondent wrote to the Tribunal indicating that its February 23, 2015 submission should be published on the Centre's website in accordance with the transparency provisions of the Treaty and Procedural Order No. 1.
12. On April 17, 2015 the Claimant submitted its Opposition to Peru's 10.20(4) Objection accompanied by the Legal Expert Report of Dr. Fernando de Trazegnies.
13. On April 30, 2015 the Respondent addressed to the Tribunal, in a letter dated April 29, 2015, a request seeking relief from ongoing prejudice caused by the Claimant's conduct within and beyond the pending arbitration.
14. On May 4, 2015, the Tribunal invited the Claimant to comment on the Respondent's April 29, 2015 letter which it did on May 5, 2015.
15. On May 7, 2015 the Respondent wrote to the Tribunal requesting (i) the opportunity to be heard with respect to the Claimant's response of May 5, 2015 and (ii) an immediate (and at least temporary) suspension of the briefing calendar until the procedural implications of the pending issues are resolved. Both the Claimant and the Respondent commented further to the Tribunal on the request for a suspension of the briefing calendar on May 8, 2015.
16. On May 11, 2015 the Tribunal informed the Parties of the temporary suspension of the Respondent's Article 10.20.4 filing deadline and invited the Respondent to submit a full reply to the Claimant's May 5, 2015 letter by May 18, 2015.
17. On May 19, 2015 the Respondent submitted a reply, in a letter dated May 18, 2015, to the Claimant's letter of May 5, 2015, written further to the Respondent's letter of April 29, 2015 requesting relief from ongoing prejudice caused by the Claimant.
18. On May 21, 2015 the Tribunal indicated to the Claimant that if it wished to add anything to its submissions on the issues raised by the Respondent including and following its

submission dated April 29, 2015, it must do so before May 25, 2015. The Claimant indicated by reply that it did not wish to comment further.

III. SUMMARY OF THE PARTIES' POSITIONS

A. Introduction

19. The Tribunal has had the benefit of a full exchange of correspondence between the Parties, a summary of which is set out by the Tribunal in this section. For the avoidance of doubt, even if not specifically noted in the summary below, all of the issues and arguments raised by the Parties in their correspondence have been carefully considered by the Tribunal in reaching its decisions.
20. The Tribunal's analysis of the issues is reserved to Section IV. below.

B. Submissions on the Respondent's Preliminary Objection under Article 10.20.4 of the Treaty

(1) The Respondent's Notification of its Preliminary Objection under Article 10.20.4 of the Treaty

21. In its Decision on the Scope of Article 10.20.4, the Tribunal determined that, on a proper interpretation, objections relating to the Tribunal's competence fall outside the mandatory scope of Article 10.20.4 and that, accordingly, only one of the preliminary objections noticed by the Respondent, namely, the Claimant's alleged failure to state a claim for breach of the investment agreement, would be considered and decided in the Article 10.20.4 Phase of these proceedings.¹
22. In its 2014 submissions on the meaning and ambit of Article 10.20.4, the Respondent argued that its refusal to assume liability for claims in the St. Louis Lawsuits could not constitute a violation of the Treaty because the Guaranty and Stock Transfer Agreement (the "Contract"), which together allegedly constitute an Investment Agreement, concern third party claims relating to Doe Run Peru, and, because the Plaintiffs in the St Louis Lawsuits chose to sue Doe Run Peru's U.S.-based affiliates in the US courts rather than bringing claims against Centromin's successor, Activos Mineros, or the Republic of Peru,

¹ Decision, ¶¶254-255.

or Doe Run Peru. As a matter of law, the Respondent cannot therefore have breached the Contract. Further, as the Claimant has failed to submit a claim for determination by a technical expert as required by the Contract, it is the Respondent's position that it cannot be deemed to have breached a contractual obligation with respect to the St Louis Lawsuits as the Claimant asserts.²

23. In accordance with the Tribunal's Decision on the Scope of Article 10.20.4 and the schedule established by the Tribunal in its Procedural Order No. 1 dated August 22, 2013, as modified by agreement of the Parties, the Respondent made submissions dated April 29, 2015 in support of its Preliminary Objection under Article 10.20.4 of the Treaty (the "Preliminary Objection").
24. In its Preliminary Objection the Respondent advanced a number of legal arguments to support its position that claims advanced by the Claimant relating to its alleged violation of its investment agreements should be dismissed under Article 10.20.4 of the Treaty including that (1) there is no investment agreement between Peru and Renco within the meaning of the Treaty; (2) even if the Contract constituted a valid investment agreement between Peru and Renco under the Treaty, Peru, as a matter of law, could not have breached any obligations to Renco under it because Peru is not a party to the Contract and because the obligations contained therein run only to Doe Run Peru and DRC Ltd.; and (3) even if the Guaranty constituted a valid investment agreement between Peru and Renco under the Treaty, Peru could not have breached any obligations to Renco thereunder because the Guaranty is void under Peruvian law and because Renco's claims under the Guaranty in any event are not ripe or otherwise fail to state a claim.³

(2) The Claimant's Opposition to the Scope of the Respondent's Preliminary Objection

25. Following its receipt of the Respondent's Preliminary Objection, the Claimant suggested that the Respondent's filing raised "*jurisdictional and other issues that go beyond the*

² Decision, Section III.B.(3) and ¶243(3).

³ Preliminary Objection, ¶3.

scope of what the Tribunal permitted Respondent to file per its Decision concerning 10.20.4 scope objections dated December 18, 2014.”⁴

26. This led the Respondent to complain that the Claimant was behaving in a manner contrary to the Treaty and Procedural Order No. 1.⁵

(3) The Claimant’s Submission of its Opposition to Peru’s 10.20(4) Objection

27. In addition to submitting that the sole preliminary objection made by the Respondent which properly falls within the Tribunal’s Scope Decision lacks merit, in its Submission of Opposition to Peru’s 10.20(4) Objection (the “Opposition”), the Claimant also objected to the introduction by the Respondent in its Preliminary Objection of what it called “*three additional patently improper objections*” going largely to the competence of the Tribunal.⁶
28. The Claimant submits that because the Respondent did not notify the Claimant or the Tribunal of its intention to raise these three objections, the Parties did not have an opportunity to brief whether these three objections fall within the scope of Article 10.20.4 and the Tribunal did not rule upon them in its Scope Decision. Further, the Claimant submits that by raising objections that were not notified in accordance with Procedural Order No. 1, the Respondent is undermining the integrity of the Article 10.20.4 process and seeking to disadvantage the Claimant in the proceedings.⁷
29. Accordingly, in its Opposition submittal, the Claimant dealt only with the Respondent’s objection that it considered to be authorised by the Scope Decision and reserved its right, should the Tribunal determine that it should address any of the other objections, to request an appropriate revision to the briefing schedule in order to permit it to do so.⁸

⁴ The Claimant’s email to the Centre dated February 23, 2015.

⁵ Letter from the Respondent dated March 9, 2015.

⁶ Claimant’s Opposition, ¶7.

⁷ *Ibid.*

⁸ *Op. Cit.*, ¶23.

C. The Respondent's Request for Relief from the Alleged Ongoing Prejudice Caused by the Claimant's Conduct Within and Beyond the Proceedings

30. By letter dated April 29, 2015, the Respondent complained to the Tribunal of three aspects of the Claimant's behavior within and beyond the arbitration which it claimed was causing it ongoing prejudice (the "Request for Relief"). The Respondent complained that (1) by declining to address most of the arguments in the Respondent's Preliminary Objection, the Claimant is granting itself the right to disregard the Tribunal's procedural orders while prejudicially reserving to itself the right to respond later, all of which violates the Respondent's rights to bring preliminary objections under the Treaty; (2) the Claimant has renewed its acts and is engaged in an ongoing violation of the waiver requirement in Article 10.18 of the Treaty; and (3) by seeking to prevent the Respondent from setting out its serious arguments regarding the Claimant's violations of law, contract, and Treaty, and from rightfully defending itself, the Claimant has systematically infringed the Respondent's procedural and substantive rights.
31. On May 5, 2015 at the Tribunal's invitation, the Claimant submitted its letter in response to the Respondent's April 29, 2015 Request for Relief (the "Response"). The Claimant contends that the Respondent's Request for Relief goes beyond zealous advocacy and in fact seeks to re-litigate decided issues, pushes the Tribunal into a reconsideration of its Scope Decision, and unfairly states that the Claimant has acted in bad faith because the Claimant seeks to follow and enforce the Tribunal's ruling. The Claimant asserts the Respondent has made its Request for Relief for two reasons: first, to expand the scope of the Article 10.20.4 Phase even after the Tribunal explicitly limited it to only one of the various preliminary objections noticed by the Respondent; and second, to further delay the proceedings.
32. In accordance with the Tribunal's direction of May 11, 2015, the Respondent addressed a further letter to the Tribunal in reply to the Claimant's Response regarding its April 29 Request for Relief (the "Reply").
33. Each of the matters raised by the Respondent in its Request for Relief and its Reply as well as those addressed by the Claimant in its Response is addressed below.

(1) The Claimant's Interference with the Respondent's Treaty Right to Bring Preliminary Objections

34. In briefing its Preliminary Objection, the Respondent submits that the three arguments it notified⁹ are not separate objections under Article 10.20.4 as the Claimant contends, but rather are, consistent with the Tribunal's Scope Decision, arguments in support of the Respondent's preliminary objection that, as a matter of law, the Claimant's claims for breach of an investment agreement are not claims for which an award in favor of the Claimant may be made under Article 10.26 of the Treaty.
35. It is the Respondent's position that each of the three legal arguments accord with the parameters set forth in Article 10.20.4 – in other words, they each require the dismissal of claims strictly as a matter of law, and assume the truth of the facts alleged by the Claimant, or otherwise rely on undisputed facts.¹⁰ Further, because the three legal arguments are closely related and intertwined, they should be heard together.¹¹ Finally, the Respondent notes that the Claimant has no basis to complain that the legal arguments were not set out in full in the Respondent's previous filings, as Respondent was under no obligation to brief in full all details of the legal arguments in support of its particular preliminary objection before submitting its Preliminary Objection.¹²
36. The Respondent also argues that the Claimant seeks to restrict its Treaty right to bring preliminary objections which could dispose of or limit the scope of its claims in this case, by dictating which arguments the Respondent can and cannot raise in support of its preliminary objection under Article 10.20.4.¹³ The Respondent submits it would be seriously prejudiced if it were prevented from presenting all of its potentially dispositive arguments at this stage.¹⁴
37. The Respondent further argues that it is in fact the Claimant, through its refusal to respond to the majority of the Respondent's arguments, which is acting in contravention of the Tribunal's Scope Decision. Rather than raising its objections with the Tribunal in good faith

⁹ See *supra*, ¶38.

¹⁰ Request for Relief, Section 1.a; Reply, Section 1.b.

¹¹ Reply, Section 1.b.

¹² *Ibid.*

¹³ Reply, Section 1.

¹⁴ *Op. Cit.*, Section 1.b.

immediately after it filed its Preliminary Objection, or addressing all the arguments raised in that Objection in the alternative in its Opposition, the Respondent notes that instead the Claimant waited eight weeks to raise these issues, and attempted to unilaterally reserve the right to request additional time to brief arguments, which it itself had chosen not to address.¹⁵

38. The Respondent submits that the Claimant cannot be permitted to dictate the content of its legal arguments, nor can it be permitted to reframe those arguments unilaterally.¹⁶ Due process now bars the Claimant from benefitting from its own procedural wrongdoing.¹⁷ Having failed to raise its issues with the Tribunal promptly, and having chosen not to address the majority of the Respondent's arguments in its Opposition, the Claimant is now not entitled to and has, in fact, waived its right to respond. The Respondent asserts that Claimant's attempt to reserve its rights and raise arguments in later briefing, or at the hearing, would violate the Respondent's right to due process, the equality of its defense, and the ability to present its case.¹⁸
39. In its Response, the Claimant submits that the Respondent is improperly relying on the reference to the term "*investment agreement*" in ¶ 255 of the Scope Decision in its Preliminary Objection to expand its sole permitted objection into something broader than what it is, to encompass what are quintessentially competence objections within objections that fall within the scope of Article 10.20.4. The Claimant submits that this reference does not justify the Respondent's attempt to raise objections in its Preliminary Objection which it did not notice in the 10.20.4 Phase, even if it may now wish it had.¹⁹
40. The Claimant rejects the Respondent's contention that it has the right to raise the three arguments made in its Preliminary Objection, and underscores that it was the Tribunal in its Scope Decision, and not the Claimant, that set the limitations as to what objections could be raised. The Claimant maintains that as the three objections are patently improper – because they relate to the competence of the Tribunal and were never notified by the

¹⁵ Request for Relief, Section 1.b. In its Reply the Respondent notes that the Claimant has not even attempted to explain or justify in any way its failure to raise these issues with the Tribunal promptly, or to address the Respondent's arguments in the alternative in its Opposition.

¹⁶ Reply, Section 1.

¹⁷ Reply, Section 1.a.

¹⁸ *Ibid.*

¹⁹ Response, pp.2-3.

Respondent as required by Procedural Order No. 1. – the approach it adopted in its Opposition was justified as the Claimant did not want to be complicit in Respondent's violation of the Tribunal's Decision on the Scope of Article 10.20.4. The Claimant argues that the Respondent will suffer no prejudice as a result because, in accordance with ¶ 256 of the Scope Decision, it will have every opportunity to raise its other preliminary objections in its Counter-Memorial and subsequent phases of the proceedings.²⁰

(2) The Claimant's Ongoing Violation of the Treaty

41. The Respondent alleges that the Claimant is using procedural circumstances as an excuse to take additional steps to pursue local actions in Peru by its affiliates in violation of the waiver requirement in Article 10.18 of the Treaty, and that any delay by the Tribunal in ruling on this matter not only facilitates the Claimant's continued violation of the Treaty (and potential rendering of the Tribunal without jurisdiction), it also allows the Claimant to have two bites at the apple. According to the Respondent, either the Claimant will obtain the relief it seeks at the local level, or, if unsuccessful, it will turn to the Tribunal and claim that the decisions of the Peruvian courts constitute or are evidence of an additional Treaty violation.²¹
42. The Respondent submits that, unlike many fork-in-the-road clauses which bar only local actions alleging treaty violations,²² the language of Article 10.18 of the Treaty makes clear that the Parties have conditioned their consent to arbitrate on claimants having waived their "right to initiate or continue [...] any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16."²³ According to the Respondent, the Treaty is thus intended to ensure that there are no proceedings of any nature concerning a measure alleged to constitute a breach of the Treaty in parallel to the arbitration.²⁴

²⁰ *Op. Cit.*, p.4.

²¹ Request for Relief, Section 2. The Respondent also relies on the decisions in *Commerce Group v. El Salvador*; *Waste Management, Inc. v. Mexico* and *Detroit International Bridge Company v. Canada* as evidence of the impact that an early resolution of waiver objections may have. It also notes that the Respondent's request is in line with Article 17.1 of the UNCITRAL Arbitration Rules and the requirement that the Tribunal "*conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.*"

²² See cases referenced in Request for Relief, FN 22.

²³ Reply; Section 2 (the Respondent's emphasis included). See Article 10.18.2 of the Treaty.

²⁴ Request for Relief, Section 2.a; Reply, Section 2.

43. The Respondent points to Action 368-2012 and the Constitutional *Amparo* Action as examples of local proceedings pursued by the Claimant, through its subsidiaries, concerning measures alleged to constitute a breach of the Treaty being conducted in parallel to the arbitration in breach of Article 10.18.²⁵ It is the Respondent's submission that, in this way, the Claimant has taken steps intended to deliberately render the Tribunal's ultimate decision without effect and urges the Tribunal to take action. It emphasises that it is not requesting the Tribunal to reconsider its decision with respect to Article 10.20.4,²⁶ but rather asks the Tribunal, pursuant to its independent authority under Article 23(3) of the UNCITRAL Arbitration Rules (which the Tribunal did not rule on in its Scope Decision), to decide as a preliminary question the Respondent's objection²⁷ and put a halt to the Claimant's opportunistic behavior.
44. In its Reply, the Respondent notes that the Claimant does not deny or even dispute that the local proceedings it continues to pursue in the Peruvian courts concern measures at issue in this arbitration; that it is using facts from those local proceedings in this arbitration; or that, through its subsidiary, it recently requested a ruling in one of those proceedings, which would directly impact this arbitration.²⁸
45. The Respondent submits that no prejudice to the Claimant will be occasioned by the Tribunal hearing this issue now. On the contrary, it suggests that if the waiver objection is not heard and decided now, the result will be an extraordinary waste of resources for the Parties and the Tribunal in having to brief and to decide all of the complex legal and factual issues pertaining to the Claimant's claims for tantamount to US\$ 1 billion, if those claims are ultimately dismissed for failure to comply with the Treaty's waiver requirement.²⁹
46. It is the Claimant's position that the Tribunal has considered and already rejected the Respondent's arguments on why the waiver issue should be heard during the 10.20.4 Phase. As it has stated in the past, the Claimant maintains its position that the conduct being complained of does not violate the Treaty's waiver provisions, but that, in any event, the Tribunal will be the ultimate judge of the issue at a further stage in the proceedings. The Claimant suggests that the Respondent understands this, thus explaining why the

²⁵ *Ibid.*

²⁶ Reply, Section 2.

²⁷ Request for Relief, Section 2.b.

²⁸ Reply, Section 2.

²⁹ *Ibid.*

Respondent is seeking reconsideration of the issue through a ‘backdoor’ of supposed improper recent conduct.³⁰

47. Specifically in relation to the Respondent’s request that the Tribunal decide its waiver objection as a preliminary matter under Article 23(3) of the UNCITRAL Arbitration Rules, the Claimant argues that the Tribunal has, following thorough briefing and consideration over many months, already rejected that request in its Scope Decision.³¹

(3) The Claimant’s Violation of the Respondent’s Due Process Rights

48. It is the Respondent’s position that the Claimant has infringed the Respondent’s right to due process by preventing the Respondent from setting out its arguments regarding the Claimant’s violations of law, contract, and Treaty, and from rightfully submitting its preliminary objections to defend itself in this case. It alleges that the Claimant has done this through its disregard for due process and the arbitral process; as well as its disregard for transparency.³²
49. The Respondent points to the Claimant’s opposition to transparency provisions and its resistance to the conduct of the proceedings on a dual language basis, even though Spanish is the official language of Peru. The Respondent highlights that even after the Tribunal ruled in Procedural Order No. 1 that the “*procedural languages of the arbitration shall be English and Spanish*” and that translations of key documents should be submitted, the Claimant has nevertheless failed to submit Spanish translations of its Article 10.20.4 pleadings.³³ The Respondent also points out that by opposing that the hearing be open to the public and objecting to the publication of the Respondent’s Preliminary Objection on the Centre’s website, the Claimant continues to interfere with and control the public’s access to information despite the transparency provisions in the Treaty.³⁴
50. The Respondent also complains of the Claimant’s continued resort to methods outside the arbitral process (and beyond its aforementioned breaches of the waiver provisions of the

³⁰ Response, p.4.

³¹ Response, p. 3. The Claimant relies on ¶256 of the Decision where it states the Tribunal decided the Respondent could only bring its competence objections “*together with its Counter-Memorial on Liability in accordance with the timetable set out in Annex A to Procedural Order No. 1*” and refers also to ¶85 in support.

³² Request for Relief, Section 3.

³³ *Op. Cit.*, Sections 3.a. and b; Reply, Section 3.

³⁴ *Op. Cit.*, Section 3.b.

Treaty) to pursue its objectives, and, in particular, the lobbying of U.S. officials and the U.S. Government in connection with this dispute.³⁵ According to the Respondent, official reports indicate that the Claimant has continued to lobby the U.S. Government with respect to this dispute, including lobbying the State Department and the U.S. Congress during the period covering the Article 10.20.4 scope phase and beyond, all the way through the last reporting date of March 31, 2015.³⁶

51. The Claimant rejects the Respondent's allegations. While the Claimant apologises in its Response for its belated translation into Spanish of certain previous submissions and undertakes to do better in this respect in the future, it objects to the Respondent's characterisation of these shortcomings as a deliberate "*disregard of due process*."³⁷
52. The Claimant denies all allegations regarding its supposed lobbying of U.S. officials concerning the Article 10.20(4) process, and refers the Tribunal to the confirmation provided by the U.S. government itself that no such lobbying occurred.³⁸
53. Finally, the Claimant submits that the allegation that it is interfering with the transparency of the proceedings is baseless. While recognizing the importance of the transparency of the proceedings, the Claimant submits that the Respondent should not be permitted to use transparency for its own ends in insisting that its Preliminary Objection be posted on the Centre's website in its entirety, despite its containing objections that are not remotely part of the Article 10.20.4 Phase, were not addressed in the Tribunal's Decision, and will not be considered, if at all, until months from now should Respondent raise them in its Counter-Memorial.³⁹

³⁵ *Op. Cit.*, Section 3.a.

³⁶ Reply, Section 3.

³⁷ Response, p.5. The Respondent takes issue with the Claimant's suggestion it has in fact submitted the required Spanish translations in Section 3 of its Reply.

³⁸ The Claimant relies on the Letter of U.S. Assistant Secretary of State Lisa J. Grosh to the Tribunal dated September 10, 2014. The Respondent asserts in Section 3 of its Reply that the limited statement of the U.S. State Department that there had been no meetings with the parties concerning the interpretation of Article 10.20.4 does not undermine its position, as lobbying activities may be conducted in various ways.

³⁹ Response, p.5.

(4) Request for Relief

54. In light of the ongoing prejudice suffered by the Respondent as a result of the conduct of the Claimant complained of in the preceding sections, the Respondent has requested that the Tribunal rule:
- (a) that the Claimant has waived its right to respond to the Respondent's arguments which it has chosen not to address in its Opposition;⁴⁰ or if the Tribunal is to revise the briefing schedule and allow the Claimant to address the Respondent's arguments, (i) the Respondent must be granted an equal opportunity to respond; and (ii) the Claimant should not be permitted to address any of the Respondent's arguments for the first time at the Hearing;⁴¹
 - (b) that it be permitted to brief, and that the Tribunal decide as a preliminary question in accordance with the Tribunal's authority under Article 23(3) of the UNCITRAL Arbitration Rules, its objection pertaining to the waiver requirement;⁴²
 - (c) that the Claimant comply with the provisions of the Tribunal's Procedural Order No. 1 with respect to the translations of documents; that it comply with the transparency provisions of the Treaty and the Tribunal's Procedural Order No. 1; and that the Claimant avoid other actions which unduly interfere with the arbitral procedure.⁴³
55. Regarding the Respondent's Request set out in (a) above, the Claimant submits that the granting by the Tribunal of the request will amount to "*due process*" and "*equality of the parties*" violations because the orderly resolution of Respondent's preliminary objections in accordance with the Scope Decision and the schedule set out in Procedural Order No. 1 (as amended), will be disrupted to the Respondent's benefit at the expense of the Claimant. The Claimant urges the Tribunal to reject the request on the basis that the Respondent has no right to raise the arguments at this stage of the proceedings, and it

⁴⁰ Request for Relief, Section 1.c., Reply.

⁴¹ Reply, Section 1.a.

⁴² Request for Relief, Section 2.c.; Reply.

⁴³ *Op. Cit.*, Section 3.c.; Reply.

should in fact do so, in accordance with the Tribunal's Decision, at the appropriate time later in the arbitration.⁴⁴

56. Regarding the Respondent's Request set out in (b), the Claimant suggests this request is essentially an interlocutory appeal, and that the Tribunal must treat it as such. The Claimant refers to a recent decision in *Perenco v. Ecuador*⁴⁵ where the tribunal refused to entertain what was essentially the appeal of an interlocutory order on the basis that such decisions are *res judicata*, and suggests the same approach should be followed here.⁴⁶ The Claimant encourages the Tribunal to see the Request for Relief as an attempt to second-guess the Scope Decision through purported new events and the Claimant's alleged misconduct.
57. The Claimant insists that it has not engaged in any deliberate "disregard of due process" and that the allegation that it is interfering with the transparency of the proceedings is baseless. It does however acknowledge that will submit to any directive the Tribunal may make in this regard.⁴⁷

IV. THE TRIBUNAL'S ANALYSIS AND DECISIONS

58. The Tribunal has been presented with three issues to deal with, each of which is addressed in turn below.

A. The Claimant's Interference with the Respondent's Treaty Right to Bring Preliminary Objections

59. As noted in Section III.C.(1) above, Peru alleges that Renco has "*interfered*" with Peru's Treaty rights to bring its Preliminary Objection.

⁴⁴ Response, pp.4-5.

⁴⁵ *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion, April 10, 2015. The Claimant also refers to *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration, March 10, 2014.

⁴⁶ Response, p 3. In its Reply, the Respondent submits that the Claimant's reliance on the tribunal's decisions in *Perenco v. Ecuador* and *ConocoPhillips v. Venezuela* is misplaced. In those cases, Ecuador and Venezuela expressly requested the tribunals to reconsider their holdings on jurisdiction and liability, which is not the case here where the request is grounded on the Tribunal's independent authority under Article 23(3) of the UNCITRAL Arbitration Rules.

⁴⁷ Response, p.5.

60. The Tribunal recalls that in its Decision on the Scope of Article 10.20.4, it decided that only one of Peru's objections, namely "*the Claimant's alleged failure to state a claim for breach of the investment agreement*",⁴⁸ fell within the scope of Article 10.20.4.
61. Peru's argument in this regard was referred to in the Tribunal's Scope Decision at ¶ 54. The argument was that the Contract concerns third-party claims relating to Doe Run Peru. Because Doe Run Peru is not a party to the St Louis lawsuits, then even assuming the facts alleged by Renco are true, Peru claims that, as a matter of law, it could not have breached the Contract.
62. In its subsequent submissions in support of its Preliminary Objection, Peru has now advanced a number of legal arguments including that (1) "*there is no investment agreement between Peru and Renco within the meaning of the Treaty*";⁴⁹ (2) "[n]either the Contract nor the Guaranty was executed by both Peru and Renco";⁵⁰ and (3) "*the Guaranty is void.*"⁵¹
63. Renco's position is that, consistent with the Tribunal's Scope Decision, the only argument that Peru should be permitted to make in support of its objection is that Peru, as a matter of law, could not have breached any obligation to Renco under the Contract, and hence under the Treaty, because the obligations contained in the Contract run only to Doe Run Peru and DRC, and not to Renco.
64. Renco further argues that the other three arguments raised by Peru were never set out in Peru's previous filings, and that these matters in any event go to competence and fall outside the 10.20.4 procedure. Therefore, Renco has refused to respond to these three arguments in its April 17, 2015 Opposition. Instead, Renco has reserved "*the right to request an appropriate revision to the briefing schedule in order to permit it to do so*"⁵² at a later stage.
65. For its part, Peru contends that the three legal arguments in issue are not separate objections under Article 10.20.4 but arguments in support of Peru's preliminary objection

⁴⁸ Decision, ¶255.

⁴⁹ Preliminary Objection, p.9.

⁵⁰ *Op. Cit.*, ¶29.

⁵¹ *Op. Cit.*, ¶74.

⁵² Opposition, ¶23.

that none of Renco's claims can be sustained as a matter of law. Peru argues that, by refusing to engage on these issues, Renco is "*dictating*" what arguments Peru can and cannot make in support of its case and thus "*interfering*" with the exercise of its Treaty rights.

66. Peru requests the Tribunal to rule that Renco has waived its right to respond to the three arguments it has chosen not to address in its briefs.
67. Renco requests the Tribunal to rule that Peru's "*additional objections*" go to competence and should be dealt with later (presumably at the Counter-Memorial stage, in accordance with Procedural Order No. 1). Alternatively, if the Tribunal decides the additional objections are properly within the Article 10.20.4 Phase, then a new briefing schedule will need to be fixed to allow Renco to respond.
68. Having carefully considered the arguments addressed by both Parties, the Tribunal has decided to reject Peru's request that the Tribunal find Renco has waived its right to respond to the three arguments raised by Peru in its Preliminary Objection but which were not addressed by Renco. In the Tribunal's view, the proper approach, both as a matter of fairness and procedural efficiency, is to require that all of the relevant legal arguments be addressed at the same time.
69. Accordingly, the Tribunal directs the Parties to consult and agree a new briefing schedule which includes Renco's responsive submissions on the three arguments raised by Peru. The Parties are directed to bear in mind the hearing dates already fixed for September 1 and 2, 2015 and are requested to ensure that the new briefing schedule does not put the hearing dates in jeopardy. The Tribunal invites the Parties to notify the Tribunal of the new briefing schedule on or before **June 5, 2015**.

B. The Claimant's Ongoing Violation of the Treaty

70. As noted in Section III.C.(2) above, Peru alleges that Renco has violated the waiver requirement in Article 10.18 of the Treaty and that the violation is ongoing. In particular, Peru says that Renco has used or is using one of its subsidiaries to pursue proceedings before the courts in Peru and that the proceedings concern the measures at issue in this arbitration. Renco denies this is a Treaty violation.

71. Peru requests the Tribunal decide this issue now as a preliminary issue. Peru makes its application based on Article 23(3) of the UNCITRAL Rules, not as part of the Article 10.20.4 procedure.
72. Renco requests that Peru's application be dismissed. Renco says that the time to raise this issue is when Peru files its Counter-Memorial in accordance with Procedural Order No. 1.
73. The Tribunal has carefully considered the positions of both Parties. Given the importance of this issue, and the urgency with which it has been pressed by Peru, the Tribunal has decided in accordance with Article 23(3) of the UNCITRAL Rules to grant Peru's request to hear and decide as a preliminary issue in the arbitration the question of whether Renco has violated the waiver requirement contained in Article 10.18 of the Treaty.
74. The Tribunal invites the Parties to consult and agree on a separate and streamlined timetable to dispose of this discrete issue in a way which does not disrupt the ongoing Article 10.20.4 procedure.
75. Peru is invited to note that there will be cost consequences in the event Peru's application does not succeed.

C. The Claimant's Violation of the Respondent's Due Process Rights

76. As noted in Section III.C.(3) above, Peru states that (i) ICSID is not publishing all of the case materials on its website due to objections from Renco; (ii) that Renco has not always complied with the requirement to submit materials in Spanish and English; and (iii) that Renco is continuing its alleged lobbying activities.
77. Peru requests an order from the Tribunal that Renco comply with Procedural Order No. 1 and its other Treaty obligations regarding transparency and dual language texts and that it not "interfere" with the arbitration.
78. Renco rejects the allegations but has stated that "*Renco will submit to any directive the Tribunal may make in this regard.*"⁵³

⁵³ Claimant's Response, p.5.

79. The Tribunal notes the allegations made by Peru. Without reaching any judgement on the allegations themselves, the Tribunal wishes to state, in the strongest possible terms, that it will not tolerate any breach of the rules of procedure and accordingly directs both Parties to fully comply with their obligations under the Treaty, the UNCITRAL Rules and Procedural Order No. 1. Any disputes in this regard which remain unresolved, shall be referred immediately to the Tribunal for resolution.
80. Save insofar as the Parties' applications have been dealt with herein, the same are dismissed.

V. COSTS

81. The Tribunal notes the Claimant's reservation of its right to apply for recovery of the full costs of Peru's application.⁵⁴ The Tribunal has decided to make no order as to costs at this stage under Article 10.20.6 of the Treaty but to reserve its decision to the final stage of these arbitration proceedings.

VI. OTHER MATTERS

82. As to all other matters, the Tribunal retains its full power to decide any further matters in these arbitration proceedings, whether by order, decision or award.

Made in Paris, France

Date: June 2, 2015

⁵⁴ Claimant's Response p.4.

[Signature]

The Honorable L. Yves Fortier, CC, QC
Arbitrator

[Signature]

Mr. Toby T. Landau, QC
Arbitrator

[Signature]

Dr. Michael J. Moser
Presiding Arbitrator