

The Renco Group, Inc.

Claimant

v.

The Republic of Peru

Respondent

(UNCT/13/1)

**PERU'S POST-HEARING SUPPLEMENTAL
SUBMISSION**

16 October 2015



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

PERU'S POST-HEARING SUPPLEMENTAL SUBMISSION

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PERU'S POST-HEARING SUPPLEMENTAL SUBMISSION

1. Further to the Tribunal's instructions, The Republic of Peru ("Peru") hereby provides its third submission on the matters arising from the hearing on the waiver requirement (the "Hearing"), in order to comment on the submission of The Renco Group, Inc. ("Renco") dated 30 September 2015 regarding the applicability of a purported principle of severability in the context of the Peru-United States Trade Promotion Agreement (the "Treaty").

I. INTRODUCTION

2. The ongoing attempt by Renco to evade the waiver requirement reflects a longstanding pattern of disregard for applicable laws and obligations under contract and treaty. The utter weakness of Renco's unsupported submission on severability underscores the legal and factual circumstances before the Tribunal, and their serious consequences:

- The Treaty mandates that claimants provide an absolute waiver at the outset of a proceeding under Chapter 10, requiring compliance in both word and deed.¹ This requirement follows the object and purpose of the waiver requirement, including such objectives as precluding any other proceedings, ensuring legal certainty, and encouraging foreign investors to use local and contractually-agreed dispute settlement mechanisms before internationalizing the dispute.
- The Renco submission concedes again that Renco's written waiver is not absolute, acknowledging that "Renco has included a reservation" to its waiver, as Peru raised long ago.²
- The Renco submission, moreover, does not even attempt to use the severability issue to justify Renco's failure to comply with the Treaty's material obligation upon and after its Notice of Arbitration which included DRP, a party to an ongoing local proceeding at that time, or upon and after its Amended Notice of Arbitration, when its claims remained the same and material violations continued.
- The Parties to the Treaty agree that a breach of the waiver requirement means that "there is no consent from the respondent, which is necessary for a tribunal to assume jurisdiction," as the United States confirmed in its Second Submission.³ An exercise of jurisdiction in these circumstances is impermissible under the Treaty, and the Tribunal must reject Renco's proposal to sever its invalid reservation of rights.

3. In raising the purported severability argument that has been sprung on Peru at this late juncture, long after Peru first raised the waiver issue, Renco requests the Tribunal to hold that "any invalid language in Renco's waiver shall be severed from the rest of Renco's waiver," and that "all of Renco's claims shall be deemed submitted to arbitration on the date when Peru received Renco's Amended Notice of Arbitration."⁴ Peru and the United States agree that such relief may not be granted. As discussed below, the Tribunal cannot apply the purported principle of severability to undo Renco's violations without contravening the plain meaning and object and purpose of the Treaty. Indeed, as further discussed below, the theory of severability has no applicability to investor-State arbitration under in connection with the waiver requirement under the Treaty. The Treaty mandates that the Tribunal reject Renco's belated proposal to sever its invalid reservation of rights.

¹ See Treaty, Art. 10.18 (requiring comprehensive waivers as to "any proceeding with respect to any measure alleged to constitute a breach" of the Treaty,) (RLA-1); see also Third Submission of the United States ¶ 6 ("As to the formal requirements, the waiver must be in writing and must be 'clear, explicit and categorical'").

² See Amended Notice of Arbitration ¶ 67 (making waiver contingent on whether its claims are dismissed on jurisdictional or admissibility grounds by "reserv[ing] the right to bring such claims in another forum for resolution on the merits.")

³ Second Submission of the United States ¶ 6.

⁴ Renco Submission of September 30, 2015, p. 7.

II. THE TREATY PROHIBITS SEVERING RENCO'S RESERVATION

4. Renco mischaracterizes the nature of the waiver requirement and the fatal consequences its violation entails. Specifically, Renco's latest submission erroneously asserts that "this Tribunal may declare Renco's reservation invalid and at the same time affirm Renco's consent to arbitrate its claims in accordance with the Treaty's conditions and requirements as if the reservation had not been written, under the principle of severability."⁵ In reality, the proposed theory of severability has no application in the instant case given the unambiguous terms of the Treaty. Once the Tribunal finds Renco's reservation invalid, it has no choice but to dismiss all of Renco's claims.⁶ To hold otherwise would be to disregard the unambiguous conditions and limitations on Peru's consent, apparent from the ordinary meaning, as well as the object and purpose of the Treaty.

A. Severability Is Contrary To The Ordinary Meaning Of The Treaty

5. The plain language of the Treaty prevents the Tribunal from selectively severing invalid portions of Renco's waiver to avoid dismissing Renco's claim for lack of jurisdiction. Each of the Contracting Parties to the Treaty agree that the offer to arbitrate is conditioned on the submission of a valid waiver, which the Treaty provides is one of the "Conditions and Limitations."⁷ The Treaty unambiguously provides that "[n]o claims may be submitted to arbitration" absent a comprehensive waiver.⁸ Thus, absent Renco's full compliance with the terms of Peru's offer to arbitrate, Peru's consent is not engaged, and, because the State's consent is essential to any arbitration,⁹ all Renco's claims must be dismissed. Renco's states that it "does not consider its reservation as important or essential to its consent,"¹⁰ but continues to ignore that the reservation constitutes a breach of the terms of Peru's consent.

6. Severing Renco's reservation also would violate the express temporal condition of the Treaty requirement. As the Treaty provides, "[n]o claims may be submitted to arbitration under this Section unless [...] the notice of arbitration is accompanied" by the requisite waivers.¹¹ The requirement that the waiver be submitted with the notice of arbitration, which constitutes the claimant's acceptance of the respondent State's offer to arbitrate, establishes a strict deadline for compliance with the waiver requirement that prevents subsequent and retroactive cure of Renco's defective waiver or severing of the invalid reservation.¹²

7. Accordingly, Renco's latest argument in favor of curing its violation of the Treaty must be rejected. The Tribunal's competence is strictly limited to determining whether or not Renco's waiver is invalid. If it finds that it is, the Tribunal may not selectively sever invalid portions of Renco's waiver. The Parties to the Treaty agree:

[A] *tribunal itself cannot remedy an ineffective waiver.* The discretion whether to permit a claimant to either proceed under or remedy an ineffective

⁵ Renco Submission of September 30, 2015, p. 4.

⁶ 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.").

⁷ See Treaty, Art. 10.18 (RLA-1).

⁸ *Id.*

⁹ Third Submission of the United States ¶ 6 ("A State's consent to arbitration is paramount.").

¹⁰ Renco Submission of September 30, 2015, p. 4.

¹¹ See Treaty, Art. 10.18 (RLA-1).

¹² Third Submission of the United States ¶ 6 ("[W]aiver must be provided *at the time the request for arbitration is made*. 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*. The *post hoc* application of the proposed 'principle of severability' cannot operate to create consent by the respondent retroactively.") (emphasis in original).

waiver lies with the respondent as a function of the respondent's general discretion to consent to arbitration and not with a tribunal.

A tribunal cannot rely on a purported 'principle of severability' to alter its lack of authority in this regard.¹³

8. Renco thus is wrong to conclude that "this Tribunal may declare Renco's reservation invalid and at the same time affirm Renco's consent to arbitrate its claims in accordance with the Treaty's conditions and requirements as if the reservation had not been written."¹⁴ Peru and the United States have confirmed their agreement on this matter of interpretation in the course of these proceedings. As indicated in the Third Submission of the United States:

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. 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. 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.'¹⁵

9. Renco's request that the Tribunal sever its invalid reservation is therefore in opposition to the Treaty and the agreement of the Parties thereto, which must be taken into account by the Tribunal in accordance with Article 31(3) of the Vienna Convention. Renco is not entitled to alter the terms of the Treaty. Were Renco's claims to proceed despite its manifest failure to comply with the waiver requirement at the time of submission of its Notice of Arbitration or Amended Notice of Arbitration, the Treaty would be disregarded and the legitimacy of the arbitral process would be called into question.

B. Severability Is Contrary To The Object And Purpose Of The Treaty

10. In addition to the plain language of the Treaty, the object and purpose of the Treaty demonstrate the inapplicability of the severability theory that has surfaced at this late date. In addressing the object and purpose of the Treaty in its latest pleading, Renco refers to the Treaty's object "to create effective mechanisms to resolve investment disputes."¹⁶ It ignores, however, that this is not an unlimited objective, because the Treaty's object and purpose is not centered around the interests of a claimant (much less one that has failed to comply with applicable law), but rather, as Peru emphasized at hearing, the Treaty includes a broad set of objectives, including establishing express limitations on the scope of consent of a Contracting Party to arbitrate. Accordingly, Renco's invalid reservation cannot be justified by circular vague references to the Treaty's dispute resolution mechanism, particularly where the Parties to the Treaty agree that the consent to arbitrate is subject to an absolute condition.

11. Renco's latest submission again fails to mention any of the specific objectives that Peru and the United States have identified in these proceedings. As Peru has shown, the Treaty's objectives include precluding any other proceedings, concurrent or otherwise, after a notice of

¹³ Third Submission of the United States ¶¶ 4-5 (*emphasis added*).

¹⁴ Renco Submission of September 30, 2015, p. 4.

¹⁵ Third Submission of the United States ¶ 8.

¹⁶ Renco Submission of September 30, 2015, p. 6.

arbitration is filed, seeking to prevent inconsistent results and double recovery, ensuring finality and legal certainty, and encouraging foreign investors to use local and contractually-agreed dispute settlement mechanisms before internationalizing the dispute.¹⁷ In addition, Article 10.18.1 of the Treaty establishes a three-year prescription period, the object and purpose of which clearly is to restrict the availability of the investor-State dispute resolution mechanism established under the Treaty.¹⁸ Renco's awareness of this provision's potential consequences is demonstrated by its request that the Tribunal not only sever its invalid reservation, but do so retroactively so that its claims may be deemed timely.¹⁹

12. Applying the principle of severability would contravene many of the aforementioned objectives. Whereas the Treaty seeks to provide respondent States with legal certainty and to prevent multiple proceedings, applying the principle of severability would contravene these objectives by keeping respondent States in limbo until such time as a tribunal determined whether or not to sever invalid restrictions. Even the possibility that a tribunal might apply the theory of severability could alter potential claimants' risk-benefit analyses, inviting gamesmanship and making them more likely to submit defective waivers. Claimants who otherwise are under pressure to comply with the Treaty within the prescription period could become incentivized to proceed in violation of the Treaty for as long as possible without forfeiting arbitration under the Treaty. Even if tribunals ultimately severed all invalid reservations, it would necessarily be after the notice of arbitration was filed, and at considerable unnecessary cost in time and expense to the State. As the United States explained:

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.²⁰

III. NO LEGAL GROUNDS EXIST FOR SEVERING RENCO'S RESERVATION

13. In addition to being manifestly inconsistent with the Treaty's ordinary meaning and its object and purpose, the application of the principle of severability has no basis in the context of investor-State arbitration, as Peru has shown.²¹ Renco now posits that "international law has continued to evolve over time and now solidifies this practice," a grossly unsubstantiated argument based on limited, inapposite references to cases where the issue of severability has been addressed, without identifying an instance of the practice being endorsed in the context of investor-State arbitration, much less with respect to an absolute waiver requirement.²² Contrary to Renco's assertion, the so-called "principle of severability" is not a generally accepted rule of international law or custom which the Tribunal may apply in these proceedings.²³

¹⁷ See, e.g., Memorial on Waiver ¶¶ 12 *et seq.*; Reply on Waiver ¶¶ 6, 11, 30; Peru's Submission of September 23, 2015, ¶ 24; Peru's Submission of September 30, 2015, ¶ 13; see also Third Submission of the United States ¶¶ 6-7 ("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. [¶] 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).")

¹⁸ See Treaty, Art. 10.18.1 (RLA-1).

¹⁹ Renco Submission of September 30, 2015, p. 7.

²⁰ Third Submission of the United States ¶ 7.

²¹ See Peru's Submission of September 30, 2015, ¶¶ 5-11.

²² Renco Submission of September 30, 2015, p. 3.

²³ Third Submission of the United States ¶ 5 ("[W]hat the tribunal refers to as the '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.").

14. To the extent that severability has been applied, it has been in the context of State reservations to treaties, not investor-State disputes.²⁴ Indeed, Renco acknowledges that the theory of severability “has arisen in the context of invalid reservations in treaties,”²⁵ but does not explain why the theory should be imported into investment arbitrations. Yet the contexts are critically distinct. Whereas States typically are allowed to make reservations when entering into a treaty as a matter of international law, claimants are obliged to accept the terms of the State’s offer to arbitrate without reservation.²⁶ Notably, in each of the cases cited by Renco, the treaties in question expressly allowed for certain reservations.²⁷ The Peru-US FTA, by contrast, makes no such provision for reservations by claimants in their acceptance of the State’s offer to arbitrate. Indeed, the Treaty provides a single exception to the requirement of a clear, explicit, and categorical waiver at Article 10.18.3, which Renco does not allege is applicable.

15. In practice, application of the theory of severability generally has been limited to the context of human rights matters.²⁸ Renco itself only refers to “human rights tribunals [that] have applied the principle to invalidate particular reservations without otherwise invalidating a State’s consent to a treaty.”²⁹ Not only did the ECHR specifically mention “the special character of the Convention regime” as a justification for applying severability in *Loizidou*,³⁰ the concurring opinion of Judge de Meyer in *Belios* explained that “[t]he object and purpose of the European Convention on Human Rights is not to create, but to recognize, rights which must be respected and protected even in the absence of any instrument of positive law. It is difficult to see how reservations can be accepted in respect of provisions recognizing rights of this kind”.³¹ The IACHR similarly relied on the unique nature of the human rights regime in *Hilaire*, noting that accepting a reservation by Trinidad “would cause a fragmentation of the international legal order for the protection of human rights,” and highlighting that “the American Convention and the other human right treaties are inspired by a set of higher common values (centered around the protection of the human being) [...] and have a special character that sets them apart from other treaties”.³² Renco has made no effort to show that the Treaty has a similar character or that the Tribunal should be informed by similar concerns. In this respect, human rights treaties are not comparable to the investment chapter in a free trade agreement like the Treaty, which has myriad objectives beyond creating jurisdiction for investor-State arbitration.

16. There is simply no circumstance under which some principle of severability would apply to justify severing Renco’s invalid reservation of rights, thereby altering the conditions of State consent to arbitration. Renco cannot now claim that its reservation of rights is non-essential, when in fact it included the reservation in both its Notice of Arbitration and Amended Notice of Arbitration and admits, as noted, that it “has included a reservation.”³³ Indeed, Renco cites no instance where the

²⁴ See Peru’s Submission of September 30, 2015, ¶ 7.

²⁵ Renco Submission of September 30, 2015, p. 1.

²⁶ See Peru’s Submission of September 30, 2015, ¶ 7.

²⁷ In the *Norwegian Loans* and *Interhandel* cases, Article 36 (2-5) of the ICJ Statute—known as the Optional Clause—allows States to make reservations to the declarations under which they submit to the compulsory jurisdiction of the ICJ. Likewise, Article 64 of the European Convention on Human Rights, at issue in *Belios* and *Loizidou*, and Article 75 of the American Convention on Human Rights, at issue in *Hilaire*, provide for reservations subject to certain constraints.

²⁸ See Peru’s Submission of September 30, 2015, ¶ 10.

²⁹ Renco Submission of September 30, 2015, p. 3.

³⁰ *Case of Loizidou v. Turkey* (Preliminary Objections) Judgment dated 23 March 1995, ¶ 96.

³¹ *Belios v. Switzerland*, Application No. 10323/83, Judgment of Apr. 29, 1988, footnote 2462 above at ¶ 60 (concurring opinion of Judge de Meyer) (CLA-141).

³² *Hilaire v. Trinidad and Tobago*, Inter-American Court of Human Rights, Judgment of Sept. 1, 2001, Series C, No. 80 at ¶¶ 93-94 (CLA-141); see also *id.* ¶ 95 (noting that “modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type [...] [I]n concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.”) (internal citations omitted).

³³ Renco Submission of September 30, 2015, p. 4.

reserving party has invoked severability or where severability has ever been used to give the reserving party *the benefit* of jurisdiction.

IV. CONCLUSION

17. Following its longstanding pattern of questionable conduct, Renco's latest submissions ends with a contorted range of requests, underscoring how far afield it is from the plain meaning and object and purpose of the Treaty. The Treaty mandates a finding that Renco failed to comply with the terms of Peru's offer to arbitrate, and prohibits the Tribunal from preserving Renco's claims by severing Renco's violative reservation or otherwise intervening to retroactively 'fix' or invite Renco to fix its breach. Renco, moreover, cannot use the newly emerged theory of severability (or any other theory) to remedy its formal and material violations of the waiver requirement, each of which is independently sufficient to vitiate consent and requires dismissal of Renco's claims.³⁴

18. Nor is Peru under any obligation to accept Renco's offer to strike its invalid reservation, and Renco's criticism of Peru for not altering the terms of its consent to arbitrate to suit Renco merely demonstrates its continuing disregard of the Treaty and the agreement of the State Parties thereto that established the waiver requirement.³⁵ ³⁶ It would work a grave prejudice on the Treaty and specifically on Peru if Renco were allowed to evade the Treaty and its consequences through the theory of severability or otherwise.

19. Peru's consent to arbitrate is conditioned on claimants' compliance with the waiver requirement from the outset, in word and deed. Renco has breached the Treaty. Accordingly, the Treaty mandates that the Tribunal render an award dismissing Renco's claims in their entirety. Correspondingly, Peru respectfully requests an award of costs in its favor.³⁷

Respectfully submitted,

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³⁴ Severability cannot change the fact that DRP violated the Treaty by continuing legal proceedings in Peru during the four months between the submission of its waiver with the Notice of Arbitration and the purported, unilateral withdrawal of that waiver. It cannot change the fact that since the Amended Notice of Arbitration, DRP has initiated and continued legal proceedings. Nor can it excuse Renco for failing to submit a waiver on behalf of DRP with its Amended Notice of Arbitration, despite the Treaty claims remaining identical, in all relevant respects, to those it previously had asserted, and which it previously had described as being on behalf of DRP. *See, e.g.*, Notice of Intent, p. 2 ("Pursuant to Article 10.16(2) of the [Treaty], [Renco] on its own behalf and on behalf of its affiliate [DRP], hereby provides this Notice of intent"); Notice of Arbitration ¶ 1 ("Pursuant to Article 10.16 of the [Treaty] ... [Renco], on its own behalf and on behalf of its affiliate [DRP], submits this Notice of Arbitration"); *id.* ¶ 74 (referring to "Renco's claims (on its behalf and on behalf of DRP)").

³⁵ Renco Submission of September 30, 2015, p. 6.

³⁶ *Id.*

³⁷ Indeed, Peru is entitled to an award of costs even if the Tribunal finds that Renco submitted an invalid waiver but nevertheless applies the theory of severability or allows Renco's claims to proceed on other grounds.