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VIA EMAIL

Dr. Michael J. Moser
Mr. Toby L. Landau QC
Hon. L. Yves Fortier, CC, QC
c/o Ms. Natali Sequeira

ICSID – The World Bank Group
MSN J2-200
1818 H Street, N.W.
Washington, D.C. 20433

Re: *The Renco Group, Inc. v. The Republic of Peru*

Dear Members of the Tribunal:

Renco respectfully requests that the Tribunal (i) reinstate that portion of its December 18, 2014 Decision on the scope of Article 10.20(4) which required Peru to bring its preliminary objections on the Tribunal's competence together with its Counter-Memorial on Liability in accordance the timetable set out in Annex A to Procedural Order No. 1, and in doing so, (ii) reconsider that portion of its June 2, 2015 Decision Regarding Respondent's Requests for Relief, in which the Tribunal reversed its prior ruling with respect to Respondent's jurisdictional "waiver" objection.

I. Summary Overview

On December 18, 2014, the Tribunal issued its Decision on the Scope of Article 10.20.4 (the "Scope Decision") in which the Tribunal noted that Respondent sought to bring its jurisdictional objections as a preliminary questions pursuant to Article 10.20.4 of the Treaty, or alternatively, pursuant to Article 23(3) of the UNCITRAL Rules. (*see, e.g.,* Scope Decision, ¶85: "[T]he Respondent requests that the Tribunal determine all of its preliminary objections under the authority granted to it by Article 10.20(4) of the Treaty or, alternatively, pursuant to Article 23(3) of the UNCITRAL Arbitration Rules.").

As addressed in greater detail below, the Tribunal properly rejected Respondent's applications and directed Respondent to bring any competence objections together with its Counter-Memorial on Liability. (Scope Decision, ¶256: “[T]he Respondent’s other preliminary objections, which related to competence, **may be brought by the Respondent together with its Counter-Memorial on Liability in accordance with the timetable set out in Annex A to Procedural Order No. 1.**”) The Tribunal made this ruling after confirming that it had considered each and every issue and argument that the Parties made (Scope Decision, ¶ 239: “[T]he Parties have raised a number of ancillary issues and arguments in their written submission. For the avoidance of doubt, all of these issues and arguments have been carefully considered by the Tribunal in reaching its decisions even if each and every one has not been specifically referred to herein.”) In directing Peru to bring any competence objections with its Counter-Memorial on Liability, the Tribunal was appropriately following the agreement that the Parties had reached earlier, which they reflected in Annex A to Procedural Order No. 1 that the Tribunal accepted and endorsed. This agreement was reached through substantial compromise by both Parties.

Part of the compromise resulting in the agreed-upon schedule and procedure set forth in Annex A to Procedural Order No. 1 was that Renco agreed to file its Memorial and accompanying witness statements and expert reports at an early stage of the case (which it did on February 20, 2014 pursuant to the schedule set forth in the Procedural Order); in return, Peru abandoned its right to bring competence objections as preliminary questions unless those competence objections could be brought pursuant to the Article 10.20.4 process. This is why in its Scope Decision, after finding that Peru's competence objections (including waiver) did not fall within the ambit of Article 10.20(4), the Tribunal rejected Peru’s alternative request to have its competence objections decided as a preliminary question under Article 23(3) of the UNCITRAL Rules. It would have been patently unfair to bifurcate competence questions and decide them as preliminary issues under Article 23(3) of the UNCITRAL Rules, when the Parties and Tribunal had already agreed that competence objections **would not** be addressed as preliminary questions unless they fell within the ambit of Article 10.20(4), as reflected in Annex A to Procedural order No. 1. It was improper for the Respondent to even make the request in light of the agreement reflected in Annex A to Procedural Order No. 1.

Notwithstanding the Tribunal’s ruling in the Scope Decision, by letter dated April 29, 2015, Respondent petitioned the Tribunal, again, to take up Respondent’s competence objection relating to waiver as a preliminary objection under Article 23 of the UNCITRAL Rules. Importantly, Respondent argued, and apparently caused the Tribunal to believe, that the Tribunal “did not address Peru’s alternative request under Article 23(3)” (Respondent’s April 29, 2015 letter, p. 6), when in fact it had. Peru also recycled the waiver arguments it made throughout the lengthy 10.20(4) phase, which were all considered and rejected by the Tribunal in the Scope Decision. As explained more fully below, Peru also sought to create a false sense of urgency by referencing a purported new event that, in reality, is no such thing.

In its June 2, 2015 Decision, based on Respondent's potentially misleading, and certainly inaccurate, submission, the Tribunal ordered the Parties to address Respondent's waiver objection as a preliminary question pursuant to Article 23(3) of the UNCITRAL Rules, on a

separate timetable. (June 2, 2015 Decision, ¶ 73). In doing so, the Tribunal stated, “Peru is invited to note that there will be cost consequences in the event Peru's application does not succeed.” (*Id.* at ¶ 74). With great respect, an award of costs is not sufficient to overcome the Tribunal’s reversal of its Scope Decision on this issue. This goes to the issues of prejudice, fundamental fairness, and the integrity of these arbitral proceedings.

For these reasons, Claimant respectfully requests that the Tribunal reinstate its Scope Decision, which directed Peru to bring any competence objections with its Counter-Memorial on Liability per Annex A to Procedural Order No. 1, and in so doing, reconsider that portion of its June 2, 2015 Decision requiring the Parties to establish a preliminary schedule to brief Respondent's competence objection relating to waiver as a preliminary matter. If Respondent wishes to bring that objection in these proceedings, it should be directed to do so with its Counter-Memorial on Liability, as the Parties agreed, as Procedural Order No. 1 reflects, and as the Tribunal originally directed in its Scope Decision.

II. The Parties Agreed that Peru Will Bring its Competence Objections, if any, with its Counter-Memorial on Liability, and not as a Preliminary Question as Reflected in Procedural Order No. 1

Recalling the discussion that led to the agreement memorialized in Procedural Order No. 1 is important because it puts into context why the Tribunal's decision to reverse its Scope Decision concerning Respondent's jurisdictional waiver objection is so unfair to Claimant. At the First Procedural Meeting in London on July 18, 2013, which laid the foundation for Procedural Order No. 1 that followed shortly thereafter, Peru made it clear that it would not seek to bifurcate the jurisdictional phase of the case from the merits. Claimant had invited such a process, but Respondent rejected it and the Parties went off on a different direction that included Claimant instead filing its Memorial and related submissions early in the case, with confidence that jurisdictional objections would be addressed in the merits stage unless the competence objection fell within the mandatory ambit of Treaty Article 10.20(4). For example, the following exchanges occurred at the hearing, demonstrating that Respondent stated that it had relinquished the right to seek bifurcation of the jurisdictional and liability phases of the case, and this formed part of the basis for the agreement the Parties thereafter reached as reflected in Annex A to Procedural Order No. 1.

In response to a question on this topic by the Honorable Mr. Fortier, counsel for Peru stated:

MS. MENAKER: What I should have said is we are **not seeking to have a separate phase, two separate jurisdictional phases, bifurcation, in other words.** But it is always the case, and the treaty makes very clear, that you are not precluded from raising additional objections, even if they go

to jurisdiction, because the scope of 10.20.4 is itself so limited. (Transcript, p. 143-144)

Later in the hearing, counsel for Peru stated:

MR. HAMILTON: [Interposing] And just to underscore, it was a significant effort, on Respondent's part, that we **gave up** what was in the first version that went to the tribunal, **which was Article 10.20.4 plus reserving the possibility that we may seek bifurcation.**

MR MOSER: Yes.

MR HAMILTON: And that was a long and extensive process that we went through, on our end, with all relevant participants, to reach the **decision to abandon that possibility**, which we have done. **And is reflected in the schedule.** (Transcript, p. 152)

And further:

MR. HAMILTON: [...] The second thing was the possibility of bifurcation. The further possibility, as would not be uncommon, that in a counter memorial, we would raise a jurisdictional objection and then seek bifurcation. In other words, the first draft that went to you, left – we left open to ourselves – Peru left open to itself, to be more precise, because these positions depend on various consultations, the scenario of 10.20.4, **which obviously is a right that Peru has**, and the possibility of seeking bifurcation at the time of the counter memorial, with respect to other types of issues. **We have abandoned that.** That was a long process that we have been through over the past three weeks to get to that point. (Transcript, p. 164-65)

Accordingly, Annex A of Procedural Order No. 1 states that after the Tribunal's Decision on any Article 10.20(4) submission, the next pleading due would be "Respondent's Counter-Memorial on Liability (**including any counter-claims and/or jurisdictional objections**).” In the period leading to the issuance of the Procedural Order, Renco offered to bifurcate the

proceedings between jurisdiction and liability, but Peru instead agreed that it would bring any jurisdictional objections with the merits. This agreement was the subject of extensive discussion and eventual agreement at the First Procedural Meeting, and the Tribunal was privy to that agreement, memorializing it through its issuance of Procedural Order No. 1 and Annex A thereto.

Procedural Order No. 1 (including its Annex A) is entitled to particular deference, not least because it forms part of the arbitral procedure agreed to by the Parties [*see* New York Convention, art. V(1)(d)], upon which Claimant relied in filing its full Memorial early in the case.

III. The Tribunal's Scope Decision Considered Peru's Request for Bifurcation of competence objections Under Article 23 of the UNCITRAL Rules

In contravention of its statements at the procedural hearing and agreement reflected in Annex A to Procedural Order No. 1, Peru advanced an alternative argument during the 10.20(4) scope phase of this arbitration that asked the Tribunal to address Peru's jurisdictional waiver argument as a preliminary question through its discretionary authority under UNCITRAL Rule Article 23(3).

For example, in its October 3, 2014 submission, Respondent stated:

For the avoidance of any doubt, Peru thus request that the Tribunal determine to decide all of the preliminary objections that Peru has notified under the authority granted it by Article 10.20.4 of the Treaty **or, alternatively, under its authority pursuant to Article 23(3) of the UNCITRAL Arbitration Rules**. Indeed, determining these threshold questions now may serve to resolve certain claims outright – or, in the alternative, to clarify the scope of issues to be decided at a later stage. Delaying resolution of any of the objections will unduly prolong this already drawn-out proceeding, and aggravate the complexity of the dispute. Further to the observations in the Submission, reasons of economy and efficiency weigh heavily in favor of hearing all of the objections during the preliminary phase. (at ¶47)

In its Article 10.20(4) scope submissions, Claimant argued against bifurcation of jurisdictional objections from the merits under UNCITRAL Article 23(3), based on the agreement that the Parties had reached, as reflected in Annex A to Procedural order No. 1, noting that Claimant would not have agreed to the procedural schedule reflected in Annex A if Respondent were permitted to bring competence objections outside the mandatory scope of Article 10.20(4) of the Treaty. And the Tribunal noted Claimant's position in its Scope Decision:

The Claimant asserts that the Parties have agreed, and the Tribunal has endorsed through Procedural Order No. 1 that to the extent one or more of the Respondent's proposed Article 10.20.4 objections [including its waiver objection] fall outside the mandatory scope of Article 10.20.4, the Tribunal will not hear such objection(s) in this preliminary phase. Instead, the Respondent, should it wish to bring objections outside the scope of 10.20.4, would have to pursue them later in these proceedings pursuant to the schedule established by Annex A of Procedural Order No. 1. The Claimant states that it would not have agreed to the Procedural Schedule adopted in Procedural Order No. 1 if the Respondent were permitted to bring preliminary objections outside the mandatory scope of Article 10.20.4, during the 10.20.4 Phase of the proceedings. (Scope Decision, ¶96)

The Tribunal went on to specifically consider Respondent's alternative request for bifurcation of jurisdictional objections under Article 23(3) of the UNCITRAL Rules, and rightly denied it:

[T]he Respondent requests that the Tribunal determine all of its preliminary objections under the authority granted to it by Article 10.20.4 of the Treaty **or, alternatively, pursuant to Article 23(3) of the UNCITRAL Arbitration Rules.** (Scope Decision, ¶85)

[T]he Parties have raised a number of ancillary issues and arguments in their written submission. For the avoidance of doubt, **all of these issues and arguments have been carefully considered by the Tribunal in reaching its decisions even if each and every one has not been specifically referred to herein.** (Scope Decision, ¶239)

[T]he Respondent's other preliminary objections, which related to competence, may be brought by the Respondent **together with its Counter-Memorial on Liability in accordance with the timetable set out in Annex A to Procedural Order No. 1.** (Scope Decision, ¶256)

Thus, after consideration of both Parties' extensive submissions, which were prepared at great cost – both in time and expense – the Tribunal denied Peru's request to hear Peru's waiver objection as a preliminary matter and ordered that all competence objections “be brought by the Respondent together with its Counter-Memorial on Liability in accordance with the timetable set out in Annex A to Procedural Order No. 1.”

Under French law, the law of the seat of this arbitration, the Scope Decision may be considered an award that has, in its definitive disposition of Peru's request that the Tribunal

address Peru's waiver objection as a preliminary matter, acquired either the status of *res judicata* or is at least the law of the case binding upon the Parties as well as the Tribunal itself at all subsequent phases of these proceedings (*see* Code de procédure civile (édition 2012, Dalloz), Ancien art. 1472, p. 1059 ("La qualification de sentence n'est pas fonction des termes retenus par l'arbitre ou les parties"))).

Dissatisfied with the Tribunal's Scope Decision, Peru launched an apoplectic series of letters, beginning with its April 29, 2015 demand that the Tribunal decide its waiver objection as a preliminary matter pursuant to Article 23(3) of the UNCITRAL Rules, describing the issue as urgent (which it is not), and then erroneously informing the Tribunal that it "did not address Peru's alternative request under Article 23(3)" in the Scope Decision (Respondent's April 29, 2015 letter, p. 6). As demonstrated above, however, the Tribunal did consider and address Respondent's alternative argument to bifurcate jurisdictional issues and hear them as preliminary questions under UNCITRAL Rule 23, and properly denied it.

Even without regard to legal principles of *res judicata* and law of the case, fundamental notions of fairness and due process should cause the Tribunal to stand by its original determination in the Scope Decision, and not allow Respondent's hyperbolic, baseless claims of "urgency" and questionable briefing strategy to cause the Tribunal to reverse itself and render a new decision that is egregiously unfair to Claimant. The Tribunal is respectfully reminded that, prior to its June 2, 2015 Decision, these proceedings were already trifurcated (10.20(4) phase; liability and jurisdiction phase and quantum phase). With this new decision, the Tribunal would have the Parties undergo **four** stages of proceedings.

IV. The Alleged New Fact, Which Appears to be the Sole Reason for the Tribunal's June 2, 2015 Decision Reversing its Scope Decision, Is Not a New Fact and Does Not Change the *Status Quo*

Even assuming *arguendo* that the Tribunal were inclined to derogate from the Parties' agreement and Procedural Order No. 1, and that the Scope Decision does not form part of the law of the case in respect of the waiver objection, the Tribunal should reverse its Scope Decision only for very good reasons, and Claimant is entitled to know what those reasons are. The **only** new circumstance that has arisen since the Tribunal's Scope Decision, the single act that Peru states is an "aggravation of the dispute" and part of the supposed "ongoing violations of the Treaty", is the following: "[s]pecifically, Peru has recently become aware that, on 26 March 2015, Renco's subsidiary DRC requested a ruling from the Supreme Court of Peru regarding a cassation appeal in the administrative law action 368-2012 ("Action 368-2012"), filed in violation of the Treaty." (Respondent's April 29, 2015 letter, p. 4)

A simple and routine filing in a local litigation that has been ongoing for years cannot be considered sufficient reason to overturn a point that was so vigorously argued for over one year, and decided by this Tribunal just a few months ago. Appended to this letter is the entirety of the March 26, 2015 request that Peru complains of. It is a bare, half-page letter that merely seeks the resolution of a case that was **already pending at the Peruvian Supreme Court at the time the Scope Decision was rendered, and which the Tribunal was aware of through the Parties'**

briefing. Sending letters of this nature is entirely routine in cases pending before the Peruvian Supreme Court, where cases ripe for decision sometimes take many months, even years, to decide. The Tribunal is invited to review the appended letter, and Renco has no doubt that it will conclude that this could not possibly be a reason to disturb the Scope Decision.

Furthermore, while reserving all of Claimant's substantive arguments on the waiver issue, the following points must be made in respect of the cassation appeal itself: *first*, the original case was filed on December 28, 2010 – almost five years ago, and is thus by no means an aggravation of the *status quo*. Peru has known about these bankruptcy matters involving Doe Run Peru Ltda. (“DRP”), as debtor, and Doe Run Cayman Ltd. (“DRC”), as creditor, for years. Accordingly, Peru's feigning urgency or surprise is disingenuous. *Second*, the case was **not** commenced by Renco, the Claimant in this arbitration, such that the Treaty's waiver provision would not even apply. *Third*, in any event, it is a **defensive** action by DRP, the debtor in bankruptcy, to protect the bankruptcy estate, and DRCL, a creditor in that action, to protect its bankruptcy credit. *Fourth*, even if this action was, *quod non*, a violation of Renco's waiver obligation, it would not dispose of the entirety of this arbitration, as any allegations related to MEM's assertion of a \$160 million credit in the bankruptcy proceedings are readily severable from the arbitration.

V. Conclusion

For all the foregoing reasons, Renco respectfully submits that the Tribunal's December 18, 2015 Scope Decision in respect of Peru's waiver objection be reinstated. In that regard, Claimant respectfully requests that the Tribunal reconsider and reverse the portion of its June 2, 2015 Decision requiring full briefing on Peru's objection that Renco violated the waiver provisions of the Treaty, and reaffirm its previous ruling that such objection be brought by Peru together with its Counter-Memorial on Liability in accordance with the timetable set out in Annex A to Procedural Order No. 1. Any other result would be highly unfair and prejudicial to Renco, and would violate fundamental tenets of due process.

Very truly yours,



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