

PCA CASE N° 2019-46

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE
TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PERÚ AND THE
UNITED STATES OF AMERICA**

- and -

THE UNCITRAL ARBITRATION RULES 2013

-between-

THE RENCO GROUP, INC.

-and-

THE REPUBLIC OF PERU

PROCEDURAL ORDER NO. 9

The Arbitral Tribunal

Judge Bruno Simma (Presiding Arbitrator)
Prof. Horacio Grigera Naón
Mr. J. Christopher Thomas KC

21 December 2023

1 Procedural History

- 1.1 Pursuant to the agreement of the Parties, this arbitration (the “**Treaty Case**”) is being coordinated with *The Renco Group, Inc. and Doe Run Resources Corp. v. Republic of Peru and Activos Mineros S.A.C.*, PCA Case No. 2019-47 (the “**Contract Case**”).
- 1.2 By letter dated 1 September 2023, the Respondent (i) asserted that the Claimant had not responded to the Respondent’s jurisdictional objections in the Claimant’s Reply on Liability and Response on Jurisdiction and, thus, allowing it to do so “for the first time in a subsequent pleading or at the hearing would violate [the Respondent’s] due process rights and would be a manifest and fundamental departure from the rules of procedure”; and (ii) requested the Tribunal to preclude the Claimant “from responding to [the Respondent’s] objections to jurisdiction in [the Claimant’s] final written submission or presenting new arguments at hearing [it] could have raised (but chose not to raise) in [its Reply].”
- 1.3 By letter dated 8 September 2023, the Claimant objected to the Respondent’s request, (i) noting that it had properly responded to all the objections and that any purported absence of an argument was due to the Claimant not considering it necessary to restate the arguments of its Memorial; and (ii) agreeing “conceptually that both sides should not be allowed to wait to make arguments in a later submission that properly should have been made part of an earlier submission” but that this consideration should be made “on a case-by-case basis with the benefit of all the submissions, evidence, and argument that the final hearing will afford.”
- 1.4 By letter dated 14 September 2023, the Tribunal stated the following:
- The Tribunal notes that the Parties agree that a Party cannot make new arguments in a later submission that properly should have been made part of an earlier one. Accordingly, the Tribunal does not consider that any order is required at this stage. The Parties may apply to the Tribunal if and when they consider that the aforementioned rule has been breached, or they may address the timeliness and admissibility of any given submission in oral argument, as necessary, at the hearing.
- 1.5 By letter dated 14 November 2023, the Respondent (i) argued that the Claimant raised, in the Rejoinder on Jurisdiction, “inappropriate and untimely liability arguments and jurisdictional arguments that [it] could have presented earlier but chose not to;” and (ii) requested the Tribunal to strike the “offending paragraphs” of the Claimant’s Rejoinder on Jurisdiction and of the third expert report of Professor Payet submitted in the Contract Case (the “**Third Payet Report**”), and to order “Renco and DRRC to clarify [...] whether Peru remains a Respondent in the Contract Case.”
- 1.6 By letter dated 21 November 2023, the Claimant (i) opposed the Respondent’s request and disputed the assertions raised therein; and (ii) clarified that “Renco continues to pursue claims against Peru in the Treaty [C]ase but is no longer pursuing claims against Peru in the Contract [C]ase.”

2 Analysis

- 2.1 The Respondent asserts that the Rejoinder on Jurisdiction violates the Tribunal’s procedural orders and letters, the UNCITRAL Arbitration Rules, and the Respondent’s due process rights.¹ According to the Respondent, the Claimant raised arguments regarding jurisdictional objections in the Treaty Case that it could have raised before but chose not to, breaching the previously

¹ Respondent’s Letter dated 14 November 2023, pp. 1-2.

agreed rule that “a Party cannot make new arguments in a later submission that properly should have been made part of an earlier one.”² Regarding both cases, the Respondent considers that the Claimant addressed liability when it should have confined its arguments to jurisdiction.³

- 2.2 Accordingly, the Respondent submits five requests, disputed by the Claimant,⁴ which the Tribunal addresses as follows.

Striking of paragraphs 4-27 of the Rejoinder on Jurisdiction

- 2.3 The Respondent requests that the Tribunal strike paragraphs 4-27 of the Rejoinder on Jurisdiction, since they inappropriately address liability in relation to the fair and equitable treatment (“FET”) claim in the Treaty Case without any relation to the Respondent’s jurisdictional objections.⁵ According to the Claimant, those paragraphs simply answer the Respondent’s argument in its Reply on Jurisdiction that the Claimant “had not made its *prima facie* case under the Treaty.”⁶
- 2.4 The Tribunal notes that the Respondent has not raised a jurisdictional objection on the grounds that the Claimant failed to establish a *prima facie* case on its FET claim. Annex A of the Respondent’s letter of 1 September 2023 confirms as much. Moreover, in its Rejoinder on Jurisdiction, the Claimant characterizes the disputed paragraphs not as a reply to any specific objection, but as addressing “jurisdictionally based issues”⁷ to show that “the facts alleged by Renco would be capable of constituting a FET violation of the Treaty.”⁸
- 2.5 Hence, the Tribunal strikes paragraphs 4-27 from the record as they are unrelated and do not respond to any jurisdictional objection raised by the Respondent.

Striking of paragraphs 28-29 of the Rejoinder on Jurisdiction

- 2.6 The Respondent requests that the Tribunal strike paragraphs 28-29 of the Rejoinder on Jurisdiction, since they present arguments that the Claimant could have made before but did not regarding the Respondent’s jurisdictional objection grounded on the Claimant’s failure to establish a *prima facie* case on its expropriation claim.⁹ The Claimant makes the same argument that these paragraphs reply to the Respondent’s objection that the Claimant “had not made its *prima facie* case under the Treaty.”¹⁰
- 2.7 The Tribunal observes that paragraphs 28-29 directly address the Respondent’s jurisdictional objection that the Claimant failed to establish a *prima facie* case on its expropriation claim, citing facts, exhibits, and legal authorities already on the record and elaborating on arguments concerning the indirect expropriation claim already submitted in the Memorial. The Respondent has not explained how this constitutes a “new argument” or indicated any prejudice that would justify striking these submissions, especially considering that it may still respond to them at the

² Respondent’s Letter dated 14 November 2023, p. 2, *citing* the Tribunal’s Letter to the Parties dated 14 September 2023.

³ *See generally* Respondent’s Letter dated 14 November 2023.

⁴ *See generally* Claimant’s Letter dated 21 November 2023.

⁵ Respondent’s Letter dated 14 November 2023, pp. 3, 5.

⁶ Claimant’s Letter dated 21 November 2023, p. 2.

⁷ Rejoinder on Jurisdiction, ¶ 2.

⁸ Rejoinder on Jurisdiction, ¶ 4.

⁹ Respondent’s Letter dated 14 November 2023, pp. 3, 5.

¹⁰ Claimant’s Letter dated 21 November 2023, p. 2.

hearing or in post-hearing submissions (if any are requested by the Tribunal). The Tribunal thus admits paragraphs 28-29.

Striking of paragraphs 55-77 of the Rejoinder on Jurisdiction

- 2.8 The Respondent requests that the Tribunal strike paragraphs 55-77 of the Claimant's Rejoinder on Jurisdiction as they inappropriately address issues of liability in the Contract Case.¹¹ In response, the Claimant submits that "the line between jurisdiction and merits is reasonably debatable" and, therefore, if the Tribunal deems that any of the Claimant's arguments are related to merits more than jurisdiction, the Tribunal may treat such arguments accordingly.¹²
- 2.9 The Tribunal finds that paragraphs 55-65 and 74-77 of the Rejoinder on Jurisdiction deal with the merits of the case, as they relate to questions of contract interpretation concerning liability. The Tribunal therefore decides to strike these paragraphs.
- 2.10 The same is not true for paragraphs 66-73, as they relate to issues of admissibility. There is nothing on the record to show that the Parties agreed or the Tribunal decided to treat matters concerning admissibility as an issue of liability. While the Tribunal's orders have spoken of a division to be observed between issues of "jurisdiction" and "liability", it has never been clarified where issues of admissibility fall as between the two. The Claimant cannot therefore be regarded as having been on notice that it was precluded from raising any arguments on admissibility in its Rejoinder on Jurisdiction. Paragraphs 66-73 of the Rejoinder on Jurisdiction are therefore admitted.

Striking of paragraphs 7, 9, 10(vii-x), and 98-126 of the Third Payet Report

- 2.11 The Respondent requests that the Tribunal strike paragraphs 7, 9, 10(vii-x), and 98-126 of the Third Payet Report submitted by the Claimant as they address liability in the Contract Case.¹³ The Claimant did not advance any further argument on this matter beyond those set forth above in relation to paragraphs 55-77 of the Rejoinder on Jurisdiction where those portions of the Third Payet Report are cited.
- 2.12 The Tribunal notes that the disputed paragraphs of the Third Payet Report relate to the issues raised in paragraphs 66-73 of the Rejoinder on Jurisdiction, which concern admissibility. Thus, having admitted paragraphs 66-73 of the Rejoinder on Jurisdiction, the Tribunal also admits paragraphs paragraphs 7, 9, 10(vii-x), and 98-126 of the Third Payet Report.

Clarification regarding the Contract Case

- 2.13 The Respondent requests that the Tribunal order Renco and DRRC "to clarify whether they have dropped their minimum standard of treatment claim in the Contract Case, and as a corollary whether Peru remains a Respondent in the Contract Case."¹⁴ Given that the Claimant confirmed that it is "no longer pursuing claims against Peru in the Contract [C]ase,"¹⁵ the Tribunal considers that the issue has been resolved and makes no determination on the matter.

¹¹ Respondent's Letter dated 14 November 2023, p 3.

¹² Claimant's Letter dated 21 November 2023, p. 3.

¹³ Respondent's Letter dated 14 November 2023, p 3.

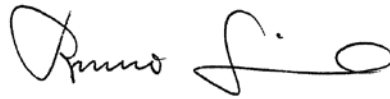
¹⁴ Respondent's Letter dated 14 November 2023, p 5.

¹⁵ Claimant's Letter dated 21 November 2023, p. 3.

3 Decision

- 3.1 Having considered the views expressed by the Parties and for the reasons given above, the Tribunal hereby decides to:
- 3.1.1. strike paragraphs 4-27 of the Rejoinder on Jurisdiction;
 - 3.1.2. admit paragraphs 28-29 of the Rejoinder on Jurisdiction;
 - 3.1.3. strike paragraphs 55-65 and 74-77 of the Rejoinder on Jurisdiction;
 - 3.1.4. admit paragraphs 66-73 of the Rejoinder on Jurisdiction; and
 - 3.1.5. admit paragraphs 7, 9, 10(vii-x), and 98-126 of the Third Payet Report.
- 3.2 Given the confirmation that claims are no longer pursued against the Republic of Peru in the Contract Case, the Contract Case shall henceforth be referred to as “PCA Case N° 2019-47 – The Renco Group, Inc. & Doe Run Resources, Corp. v. Activos Mineros S.A.C.”.

So ordered by the Tribunal.



Judge Bruno Simma
(Presiding Arbitrator)