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VIA EMAIL

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Re: PCA Case No. 2019-46 - *The Renco Group, Inc. v. The Republic of Peru* (Treaty Case)

Dear Members of the Tribunal:

Thank you for your letter of December 6, 2019, inviting Claimant to provide comments concerning Respondent's communication to the Tribunal of December 3, 2019.

Claimant respectfully submits that Respondent's December 3, 2019 communication does not satisfy the pleading requirements necessary to trigger the application of Article 10.20.5 of the United States-Peru Trade Promotion Agreement (the "Treaty"). Accordingly, Claimant respectfully requests that the Tribunal find that Peru has failed to—and can no longer—invoke the expedited review procedure under Article 10.20.5 of the Treaty.

Alternatively, in the event that the Tribunal allows Respondent to rely on Article 10.20.5 (which Claimant submits it should not), Claimant requests only one round of briefing followed by a hearing. This is what fairness and due process require in light of the extremely compressed schedule brought about by Respondent's inappropriate failure to fully brief its objections within the forty five (45) day period that the Treaty establishes.

Article 10.20.5 of the Treaty provides as follows:

> In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The Tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

Article 10.20.5 thus establishes an expedited procedure that the respondent may trigger for the tribunal's review and disposition of both (1) an objection by the respondent under Article 10.20.4 that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26, and (2) any objection by the respondent that the dispute is not within the tribunal's competence. If the respondent submits one or more objections falling into either of these two categories, and if it requests expedited review of the objection(s) within 45 days of the tribunal's constitution, then Article 10.20.5 **requires** the tribunal to issue a decision or award on the objection(s) within a short period of 150 days from the date of the request (subject to an extension not exceeding 60 days). Obviously, this strict time limit for the issuance of a decision or award on the objection(s) may impose a substantial procedural burden both on the claimant and on the tribunal, particularly when the respondent asserts objections to the tribunal's competence requiring the tribunal to make findings of fact.

Article 10.20.5, interpreted in good faith and in accordance with the ordinary meaning of its terms, in the context of the Treaty as a whole, requires the respondent to submit and fully plead its objections within the 45-day time limit for requesting the tribunal's expedited review of the objections—and not merely to give vague notice of objections within that time limit, as Respondent has done here.

First, Article 10.20.5 requires the respondent to request expedited review of an "objection" within 45 days of the constitution of the tribunal; it does not establish a procedure by which the respondent may give notice of an objection before submitting it to the tribunal, much less provide that the respondent can satisfy the Treaty's 45-day time limit by giving such notice.

Second, if the respondent could trigger the expedited review procedure without actually submitting its objections to the tribunal for decision, the claimant would be severely prejudiced, as its time to respond to the objections necessarily would be curtailed. This Tribunal should not

presume that the drafters of the Treaty intended to give the respondent such an unfair procedural advantage, particularly because the expedited review procedure can result in the dismissal of the claimant's entire case.

The object and purpose of Article 10.20.5 further supports Claimant's position regarding its proper interpretation. In a non-disputing party submission in *Jin Hae Seo v. Republic of Korea*, the United States explained that it included expedited review mechanisms identical to Article 10.20.5 in all of the trade agreements that it concluded to date after the North American Free Trade Agreement to efficiently and cost-effectively address certain preliminary objections.[1] The Tribunal should infer from the efficiency and cost-effectiveness considerations underlying Article 10.20.5, and from the extreme time constraints that the provision imposes, that the respondent is meant to submit and fully brief all of its objections within the 45-day deadline.

On at least five occasions, under other U.S. trade agreements, respondents have triggered an expedited review mechanism that is identical to Article 10.20.5 of the Treaty. On each of those five occasions, the respondent did so by submitting and fully briefing its objections within the 45-day deadline. This occurred in (1) *Railroad Development Corporation v. Republic of Guatemala*,[2] (2) *Pac Rim Cayman LLC v. The Republic of El Salvador*,[3] and (3) *Corona Materials, LLC v. Dominican Republic*,[4] pursuant to Article 10.20.5 of the Dominican Republic-Central America-United States of America Free Trade Agreement; (4) *Bridgestone Licensing Services, Inc. et al. v. Republic of Panama*,[5] pursuant to Article 10.20.5 of the United States-Panama Trade Promotion Agreement; and (5) *Jin Hae Seo v. Republic of Korea*,[6] pursuant to the United States-Korea Free Trade Agreement. Thus, five States—Guatemala, El Salvador, the Dominican Republic, Panama, and the Republic of Korea—interpreted language identical to Article 10.20.5 of the Treaty and determined that they were required to submit and fully brief all of their objections within the 45-day deadline to benefit from the expedited review mechanism.

Respondent failed to comply with the requirements of Article 10.20.5. Respondent should have submitted and **fully briefed** its objections to the Tribunal's competence within the 45-day time limit for requesting expedited review under Article 10.20.5, and not merely "give[n] notice

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[1] **Exhibit A**, *Jin Hae Seo v. The Republic of Korea*, HKIAC Case No. 18117, Submission of the United States of America, June 19, 2019, ¶¶ 2-5.

[2] **Exhibit B**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008, ¶¶ 3-5.

[3] **Exhibit C**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010, ¶¶ 37-39.

[4] **Exhibit D**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016, ¶¶ 17-20.

[5] **Exhibit E**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, December 13, 2017, ¶¶ 13-17.

[6] **Exhibit F**, *Jin Hae Seo v. The Republic of Korea*, HKIAC Case No. 18117, Final Award, September 24, 2019, ¶¶ 2, 10-11.

regarding [the] objections" on the 45th day after the Tribunal's constitution, as it did in its communication of December 3, 2019. Nor can Respondent's communication now be considered to constitute a full briefing of the objections. It is vague and unclear, and does not even state the factual bases for the objections, let alone include any legal analysis. As a result, Claimant cannot respond or defend itself properly.

Thus, Claimant respectfully requests that the Tribunal find that Peru has failed to—and can no longer—invoke the expedited review mechanism under Article 10.20.5 of the Treaty. That decision does not prejudice Respondent because Respondent retains all of its rights to raise any and all objections, either under Article 10.20.4 or pursuant to Article 23 of the UNCITRAL Arbitration Rules.

Alternatively, in the event that the Tribunal allows Respondent to rely on Article 10.20.5 (which Claimant respectfully submits it should not), Claimant respectfully requests only one round of briefing, followed by a hearing, and proposes the following procedural schedule:

- Respondent to submit its 10.20.5 Objections by Friday, January 3, 2020.
- Claimant to submit its Response by Friday, March 6, 2020.
- One-day hearing in April 2020.
- Tribunal to rule on 10.20.5 Objections by Sunday May 31, 2020.

Although two rounds of briefing may be appropriate under normal circumstances, these circumstances are not normal. Claimant submitted its Notice of Arbitration and Statement of Claim more than a year ago, on October 23, 2018, and Respondent has had more than ample time to prepare and submit a full briefing of its objections within 45 days of the Tribunal's constitution. But Respondent chose to send a vague, two-page letter to the Tribunal on the 45th day. Respondent's tactics should have consequences—in this case, one round of briefing only for its Article 10.20.5 objections, assuming the Tribunal allows Respondent's alleged Article 10.20.5 filing to go forward (which it should not).

It would be unfair and prejudicial to Claimant for the Tribunal now to allow two rounds of submissions in the extremely compressed schedule that Respondent has brought about by failing to timely submit its objections. If this were to occur, Claimant would have insufficient time to respond and defend itself properly against Respondent's objections, which, if successful, may result in the dismissal of the case. The Tribunal should not sanction such serious procedural prejudice, which also would constitute a breach of the equality of arms principle.

Sincerely,

Edward G. Kehoe

cc: Jonathan C. Hamilton, White & Case LLP

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