

PCA CASE NO. 2019-46

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

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW 2013**

- between -

THE RENCO GROUP, INC.

CLAIMANT

- and -

THE REPUBLIC OF PERU

RESPONDENT

**CLAIMANT'S COMMENTS ON THE MARCH 6, 2020 SUBMISSION OF THE
UNITED STATES OF AMERICA REGARDING THE INTERPRETATION OF THE
UNITED STATES-PERU TRADE PROMOTION AGREEMENT**

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I. INTRODUCTION

1. In accordance with Procedural Order No. 1, Claimant hereby submits its comments to the United States' Non-Disputing State Party Submission of March 6, 2020 ("Submission") regarding the interpretation of the U.S.-Peru Trade Promotion Agreement (the "Treaty").

2. The United States' Submission broadly supports Renco's position as set forth in Claimant's Counter-Memorial on Peru's 10.20.5 Objections dated February 21, 2020 ("Counter-Memorial"). In particular, the United States agrees with Renco that the Parties to the Treaty are not bound by the Treaty's obligations until after the Treaty enters into effect, which occurred on February 1, 2009, and that this Tribunal may consider facts prior to February 1, 2009 to determine whether Peru's acts after that date constitute breaches of the Treaty. The United States also agrees with Renco that in the context of a claim of denial of justice, the three-year limitations period in Article 10.18.1 begins to run only after local remedies have been exhausted, unless pursuing them would be futile. The United States did not object to Claimant's interpretation of Article 10.20.5 regarding the proper way to trigger the expedited review mechanism or to Claimant's contention that a Party to the Treaty may be prevented from exercising one of its rights thereunder if such exercise constitutes an abuse of rights. Finally, the United States' generic statement that the three-year limitations period in Article 10.18.1 is clear and rigid is not tied to the unique and unusual facts of this case.

3. As a result, Claimant's requests for relief remain unchanged: the Tribunal should hold that Peru failed to invoke the expedited review procedure under Article 10.20.5 of the Treaty (**Section II**); alternatively, the Tribunal should deny Peru's objections on the merits because Claimant's claims do not violate the non-retroactivity principle (**Section III**) and are not time-barred (**Section IV**).

II. RESPONDENT DID NOT TRIGGER THE EXPEDITED REVIEW MECHANISM UNDER ARTICLE 10.20.5

4. Article 10.20.5 of the Treaty provides that "[i]n 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 interpretation of Article 10.20.5 in good faith and in accordance with the ordinary meaning of its terms, in the context of the Treaty as a whole, required Respondent to fully

brief its objections for the Tribunal's and Renco's consideration within forty-five days of the Tribunal's constitution in order to benefit from the Article 10.20.5 expedited review mechanism,¹ which Peru did not do.

5. In its Submission, the United States did not object to Renco's interpretation of Article 10.20.5 set forth above. As Claimant indicated in its Counter-Memorial, Respondent failed to meet the requirements of Article 10.20.5 and, consequently, Peru may not avail itself of the expedited review mechanism thereunder.²

III. RESPONDENT'S TREATY BREACHES ARE BASED ON MISCONDUCT THAT OCCURRED AFTER THE TREATY ENTERED INTO EFFECT

6. Article 10.1.3 of the Treaty provides that the Treaty's substantive obligations, with which each Party to the Treaty undertakes to comply regarding the investments of nationals of the other Party, are not retroactive. In its Submission, the United States agreed with both Renco and Peru that per Article 10.1.3, the Parties to the Treaty are not bound by the Treaty's obligations until after the Treaty enters into effect, which occurred on February 1, 2009, and that, therefore, the conduct of the State that is said to breach the Treaty must take place after February 1, 2009.³ The United States also agreed with Renco that notwithstanding the foregoing, the Tribunal may consider facts prior to February 1, 2009 to determine whether Peru's acts after that date constitute breaches of the Treaty.⁴

7. Renco raises three claims in this arbitration: (i) Peru unfairly and inequitably refused the requests by Renco's investment, Doe Run Peru S.R.LTDA ("DRP"), for a contractually permitted extension to comply with its obligations, and launched a smear campaign against DRP, in breach of Article 10.5 of the Treaty (Renco's FET claim); (ii) Peru barred DRP from restructuring and forced DRP into liquidation, expropriating Renco's investment in breach of Article 10.7 (Renco's expropriation claim); and (iii) Peru committed a denial of justice, in breach of Article 10.5, because the Peruvian courts failed to nullify the patently improper US\$ 163 million credit that the Peruvian

¹ See Claimant's Counter-Memorial on Peru's 10.20.5 Objections, February 21, 2020 ("Counter-Memorial"), ¶ 51.

² See *id.*, ¶¶ 49 *et seq.*

³ See Submission of the United States of America, March 6, 2020 ("U.S. Submission"), ¶ 9; Counter-Memorial, ¶ 55; and Peru's Memorial on Preliminary Objections, December 20, 2019 ("Memorial"), ¶ 26.

⁴ See U.S. Submission, ¶ 9; and Counter-Memorial, ¶ 74.

Ministry of Energy and Mines asserted during DRP’s bankruptcy proceedings (Renco’s denial of justice claim).

8. Those three claims are all grounded in, and based upon, acts of Peru that occurred after the Treaty entered into effect, on February 1, 2009,⁵ which Respondent concedes.⁶ Accordingly, none of Renco’s claims violate the non-retroactivity principle.⁷

IV. CLAIMANT’S CLAIMS ARE NOT TIME-BARRED

9. Under Article 10.18.1 of the Treaty, a claimant may submit a claim within three years of when that claimant becomes aware of a breach of the Treaty and that the breach caused it harm. All of Claimant’s claims in this arbitration satisfy the requirements of Article 10.18.1.

Renco’s FET and expropriation claims

10. Renco initiated the *Renco I* arbitration, and raised its FET and expropriation claims, within three years of becoming aware of Respondent’s corresponding Treaty breaches, in compliance with Article 10.18.1.⁸ *Renco I* lasted five years because Peru waited for three and one half years to raise its waiver objection.⁹ Renco promptly initiated this second arbitration, and raised the same FET and expropriation claims, after a majority of the *Renco I* tribunal declined jurisdiction over Claimant’s claims on the basis of Peru’s belated waiver objection, and after Peru ended the consultations in which the parties were engaged.¹⁰ Claimant’s timely initiation of *Renco I* satisfied the three-year limitations period in Article 10.18.1, such that Claimant’s resubmission of its FET and expropriation claims in *this* arbitration also is timely—thus, there is no violation of Article 10.18.1.¹¹

⁵ See Counter-Memorial, ¶¶ 57 *et seq.*

⁶ See Memorial, ¶ 66 (acknowledging that DRP sought the PAMA extension after the Treaty came into effect), ¶ 72 (acknowledging that the bankruptcy-related conduct occurred after the Treaty came into effect).

⁷ Renco also reiterates that Peru’s “deep roots” allegation is incorrect, both on the facts and the law (*see* Counter-Memorial, ¶¶ 60 *et seq.*).

⁸ See Counter-Memorial, ¶¶ 79 *et seq.*

⁹ See *id.*, ¶¶ 84 *et seq.*

¹⁰ See *id.*, ¶¶ 102-104.

¹¹ See *id.*, ¶¶ 102 *et seq.*

11. The United States did not address any of these specific facts in its Submission. In fact, the United States expressly noted that it “does not take a position on how the interpretation applies to the facts of this case.”¹² Instead, the United States argued, generically, that the three-year limitations period in Article 10.18.1 is “a ‘clear and rigid’ requirement that is not subject to any ‘suspension,’ ‘prolongation,’ or ‘other qualification’” by citing just three cases (*Grand River v. United States of America*, *Resolute Forest Products v. Canada*, and *Marvin Feldman v. Mexico*) in which the claimants all failed to begin any arbitration proceeding within the three-year window.¹³ That is not the case of Renco in this arbitration.

12. For example, the *Grand River* tribunal held that because the claimants had submitted their notice of arbitration on March 12, 2004, some of their claims were time-barred as they should have known about the respondent’s corresponding treaty breaches and of the resulting loss or damage that they had incurred prior to March 12, 2001, the date of the three-year cutoff for purposes of the limitations provision under NAFTA Articles 1116(2) and 1117(2).¹⁴ The *Resolute Forest* and *Feldman* tribunals reached identical conclusions (that they did not have jurisdiction over certain claims) on the basis of similar facts.¹⁵ Claimant’s circumstances are materially different, as noted above, because it timely initiated *Renco I* and because Peru then delayed raising its waiver objection in that arbitration.

13. Moreover, the *Feldman* case actually supports Renco’s position that its timely initiation of *Renco I* satisfied the three-year limitations period in Article 10.18.1. The *Feldman* tribunal noted that “an acknowledgment of the claim under dispute by the organ competent to that effect and in the form prescribed by law would probably interrupt the running of the period of limitation.”¹⁶

¹² See U.S. Submission, ¶ 1.

¹³ See *id.*, ¶ 4.

¹⁴ **RLA-10**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 (James Anaya, John R. Crook, Fali S. Nariman (President)), ¶ 83.

¹⁵ **CLA-24**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 (Ronald A. Cass, Céline Lévesque, James R. Crawford (President)), ¶ 155; and **CLA-25**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶¶ 55-58.

¹⁶ **CLA-25**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶ 63. In its Submission, the United States cited this very paragraph in support of its characterization of Article 10.18.1.

Peru acknowledged Renco’s claims by participating in *Renco I*, never questioning that it was aware of the dispute and of its obligations to retain documents and defend itself (among other things), and, after *Renco I* concluded, negotiating and entering into several agreements with Renco between 2016 and 2018 to attempt to settle the dispute.¹⁷

14. Thus, the United States in its Submission did not endeavor to tie its interpretation of Article 10.18.1 of the Treaty to the unique and unusual facts of this case and expressly noted that it “does not take a position on how the interpretation applies to the facts of this case.”¹⁸ The United States added that it is up to Claimant to “prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period” in Article 10.18.1,¹⁹ which Renco has done. As a result, this Tribunal should find that Renco’s FET and expropriation claims are timely notwithstanding the generic statement of the United States that the three-year limitations period in Article 10.18.1 is clear and rigid.

15. Separately, the United States did not object in its Submission to Claimant’s contention that a Party to the Treaty may be prevented from exercising one of its rights thereunder if such exercise constitutes an abuse of rights. As Renco indicated in its Counter-Memorial, Peru should be precluded from invoking Article 10.18.1 in relation to Renco’s FET and expropriation claims because Peru’s Article 10.18.1 objection constitutes an abuse of rights.²⁰

Renco’s denial of justice claim

16. Claimant’s denial of justice claim complies with Article 10.18.1 of the Treaty because it is well settled that a denial of justice claim—and thus a breach of the Treaty—only arises once local remedies are exhausted, unless pursuing them would be futile. Claimant properly exhausted all local remedies through the Peruvian Courts, which ultimately occurred on November 3, 2015, when the Peruvian Supreme Court rejected DRP’s appeal on the issue of the patently improper US\$ 163 million credit that the Peruvian Ministry of Energy and Mines asserted during DRP’s bankruptcy proceedings. Claimant initiated this arbitration on October 23, 2018, less than three

¹⁷ See Counter-Memorial, ¶ 130.

¹⁸ See U.S. Submission, ¶ 1.

¹⁹ See U.S. Submission, ¶ 3.

²⁰ See *id.*, ¶¶ 132 *et seq.*

years after the Supreme Court’s decision. Accordingly, Renco’s denial of justice claim is not time-barred.²¹

17. The United States agrees with Claimant on this point, and disagrees with Peru. In its Submission, the United States argued that “non-final judicial acts have not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless further recourse is obviously futile or manifestly ineffective. In the context of a claim of denial of justice, therefore, the three-year limitations period set out in Article 10.18.1 will not begin to run until the date on which the investor or enterprise first acquired, or should have first acquired, knowledge that either the breach has occurred—*i.e.*, when all available domestic remedies have been exhausted, unless obviously futile or manifestly ineffective—or the claimant or enterprise has incurred loss or damage, whichever is later.”²²

18. The United States’ Submission confirms that Claimant’s denial of justice claim complies with Article 10.18.1, and undermines Peru’s novel argument that Renco’s denial of justice claim is time-barred because Claimant “should have known, and indeed knew” that it had a denial of justice claim “since 2010,” and in any event no later than 2012, when “Renco’s affiliate(s) initiated and pursued the contentious administrative challenge.”²³ It is unclear whether Peru is arguing that Claimant should have abandoned the pursuit of its local remedies on the basis that pursuing them up to the Supreme Court was futile. If this is Peru’s argument, it is an odd argument for a State to be making, and Renco rejects it. Renco did not believe that it was futile to pursue local remedies and for that reason, Renco diligently pursued them as the law required.

²¹ See *id.*, ¶¶ 161 *et seq.*

²² U.S. Submission, ¶¶ 6-7 (emphasis added).

²³ See Counter-Memorial, ¶ 164.

V. RELIEF SOUGHT

19. For the foregoing reasons, Claimant respectfully requests that the Tribunal issue an interim award ordering the following relief:

- 19.1. Declare that Peru's 10.20.5 objections are not admissible, and permit Renco to submit its full Memorial in this case.
- 19.2. In the alternative, deny Peru's 10.20.5 objections, and permit Renco to submit its full Memorial in this case.
- 19.3. In all cases, order Peru to pay for Renco's costs in connection with this phase of the proceeding, including legal fees.

March 20, 2020

Respectfully submitted,



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