

April 3, 2014

VIA EMAIL

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Re: *The Renco Group, Inc. v. Republic of Peru (UNCT/13/1)*

Dear Members of the Tribunal:

The Renco Group, Inc. ("Claimant" or "Renco") makes this submission pursuant to Procedural Order No. 1, challenging the scope of preliminary objections that the Republic of Peru ("Respondent" or "Peru") proposes to bring in these proceedings under Article 10.20(4) of the United States/Peru Trade Promotion Agreement (the "Treaty"), because all but one of Peru's preliminary objections are beyond the scope of Article 10.20(4) of the Treaty and thus do not belong in the "Article 10.20(4) Phase" of these proceedings established to Procedural Order No. 1, Annex A.

I. Introduction and Overview

In its March 21, 2014 submission, Respondent raises the following six preliminary objections under Article 10.20(4) of the Treaty:

- (1) Presentation of an invalid waiver (March 21, 2014 letter, at p. 4);
- (2) Violation of the waiver (*id.*);
- (3) Lack of jurisdiction *ratione temporis* (*id.*, at p. 5);
- (4) Violation of the Treaty's three-year limitations period (*id.*);
- (5) Failure to state a claim for breach of the investment agreement (*id.*, at pp. 5-6);
and
- (6) Failure to submit two factual issues for determination by a technical expert prior to commencement of the arbitration (*id.*, at pp. 6-7).

Respondent characterizes objections (1) through (4) above as relating to the Tribunal's "jurisdiction" over this dispute,¹ and Respondent characterizes objections (5) and (6) as objections for "failure of claims under the plain language of the Contract."² As set forth more fully below, Article 10.20(4) of the Treaty does not give Peru the right to bring objection numbers (1) through (4) and (6) as preliminary objections, and for this reason the Tribunal should find that these five objections are outside the scope of the "Article 10.20(4) Phase" established in Procedural Order No. 1. Objection number (5) is a proper objection under Article 10.20(4).

Specifically, a respondent's right to bring preliminary objections as to the Tribunal's competence is governed by Article 10.20(5), not by Article 10.20(4); and perhaps for strategic reasons, Peru has not sought to advance its purported jurisdictional arguments under Article 10.20(5). Allowing Peru to bring preliminary objections as to the Tribunal's alleged lack of competence under Article 10.20(4) would be inconsistent with the terms of the Treaty and would prejudice Claimant unfairly.

The distinction between bringing a preliminary objection for failure to state a claim under Article 10.20(4), and a preliminary challenge to the tribunal's competence under Article 10.20(5) is a meaningful one, because under the former all facts as alleged by a claimant are assumed to be true, whereas under the latter they are not. Thus, a respondent has little, if anything, to lose by bringing an application under 10.20(4) because if the tribunal does not dismiss a particular claim as a matter of law at the outset of the arbitration, the respondent still may seek to prevail in defeating the same claim when the disputed facts are joined with the legal analysis later in the case.

In a preliminary application challenging the tribunal's competence, on the other hand, which by the terms of the Treaty must be brought under Article 10.20(5), the disputed facts and law are joined preliminarily, and after the tribunal conducts a "mini-trial", it may rule in favor of the claimant or respondent as a final matter with respect to the issues of competence that respondent has raised in its preliminary filing.

Here, Respondent improperly proposes to shoehorn what Respondent itself describes as jurisdictional objections into an Article 10.20(4) application, in order to receive two bites at the apple on the issue of the Tribunal's competence, with no risk of loss at the preliminary stage, just as Claimant predicted during the oral hearing in London on July 18, 2013, and its letter to the Tribunal dated July 29, 2013. If Respondent truly wished to receive a preliminary decision on

¹ Respondent's letter dated March 21, 2014, at pp. 4-7. As to preliminary objections (1) and (2) under the heading "Violation of the Treaty's Waiver Provision," Respondent states: "Pursuant to the Treaty, Peru's consent, and therefore the Tribunal's jurisdiction, is subject to the submission of valid waivers by Renco and Doe Run Peru, which are lacking here." (*Id.* at 4). As to preliminary objections (3) and (4) under the heading "Lack of Jurisdiction *Ratione Temporis*," Respondent states: "The Tribunal lacks jurisdiction over these claims." Although Respondent does not expressly state that its preliminary objection number (6) is a "competence" objection, it is one and must be treated as such. In the context of objection number (6), the competence question is one of admissibility.

² *Id.*, at 4-7.

issues of the Tribunal's competence that Respondent now raises in its letter of March 21, 2014, Respondent would have (and should have) timely brought its application under Treaty Article 10.20(5), and the Tribunal could have decided the disputed legal and factual issues in favor of one party, or the other. But Peru chose not to pursue that proper course, for its own reasons.

The DR-CAFTA cases upon which Peru relies in its March 21, 2014 submission do not support its proposal to bring competence objections under Article 10.20(4). In fact, they support Claimant's position on this issue, as addressed below.

The parties have agreed — and the Tribunal has ordered in Procedural Order No. 1 — that Respondent may raise any and all jurisdictional objections that it may have later in the proceedings, pursuant to the schedule established by Procedural Order No. 1. Peru's preliminary objections as to the Tribunal's competence (objections 1 through 4, and 6) are beyond the scope of an Article 10.20(4) application alone (*i.e.* without a 10.20(5) application as well), and should not be included in the "Article 10.20(4) Phase" of these proceedings.

The current question before this Tribunal is whether Article 10.20(4) of the Treaty requires the Tribunal to entertain at this preliminary stage five competence objections that Peru has raised as preliminary objections. This is clear from the Procedural Order and it is common ground between the parties.³ The question is *not* whether the Tribunal has the discretion to hear competence objections as a preliminary matter outside the mandatory scope of Art. 10.20(4). The Parties have agreed, and the Tribunal has endorsed through Procedural Order No. 1, Annex A, that to the extent one or more of Peru's proposed Article 10.20(4) objections fall outside the mandatory scope of Article 10.20(4), the Tribunal will not hear such objection(s) in this preliminary "Art. 10.20(4) Phase." Peru may bring objections outside the scope of Art. 10.20(4) later in these proceedings and, importantly, on the schedule established by Procedural Order No. 1, Annex A. As Claimant noted during the first hearing in London, Claimant would not (and did not) agree to the procedural schedule adopted in Procedural Order No. 1 (which includes full merits and jurisdictional submissions later in the proceedings) if Peru were to be permitted to bring preliminary objections outside the mandatory scope of Article 10.20(4), during the "10.20(4) Phase" of these proceedings.

II. Text of Articles 10.20(4) and 10.20(5)

The text of Treaty Articles 10.20(4) and 10.20(5) are set forth immediately below:

Article 10.20(4) provides in its entirety as follows:

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the

³ See *e.g.*, Respondent's March 21, 2014 letter to the Tribunal at 7 ("For the foregoing reasons, the preliminary objections notified herein are within the scope of Article 10.20.4 of the Treaty and this case should proceed to a full briefing of preliminary objections mandated by the Treaty.").

respondent 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 10.26.⁴

- (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).
- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
- (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
- (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

Article 10.20(5) provides in its entirety as follows:

5. 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

⁴ For greater certainty, with respect to a claim submitted under Article 10.16.1(a)(i)(C) or 10.16.1(b)(i)(C), an objection 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 may include, where applicable, an objection provided for under the law of the respondent.

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.

III. Peru's Objections as to the Tribunal's Competence Are Outside the Scope of Article 10.20(4)

A. The Plain Language of the Treaty Places Respondent's Proposed Objections to Competence Outside the Scope of Article 10.20(4)

Article 31(1) of the Vienna Convention on the Law of Treaties (the "Vienna Convention") provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Many tribunals have observed that a treaty should be interpreted first on the basis of its plain language.⁵

A fundamental tenet of treaty interpretation is that provisions of a treaty must be read together, and an interpretation that gives meaning to all of the provisions of a treaty will be favored over an interpretation that renders one or more provisions superfluous or irrelevant.⁶

Reading Articles 10.20(4) and 10.20(5) in isolation, and together as one should, reveals that preliminary objections that a respondent may bring for failure to state a viable legal claim are different than preliminary objections that a respondent may raise as to the competence of the tribunal, and these different types of preliminary questions are treated differently. Preliminary objections as to the Tribunal's competence must be brought under Article 10.20(5), not Article 10.20(4).

The first sentence of Article 10.20(4) provides: "Without prejudice to a tribunal's authority to address *other* objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted

⁵ See, e.g., *Yukos Universal Ltd. v. Fussina Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 227, IIC 416 (2009), Nov. 30, 2009, ¶ 411 ("According to Article 31 of the [Vienna Convention], a treaty must be interpreted first on the basis of its plain language.").

⁶ See, e.g., *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Opinion of Professor Don Wallace, Jr., August 2, 2010, ¶ 4 ("[I]mplicit in . . . Article 31(1) [of the Vienna Convention] is the principle of effectiveness in treaty interpretation (*effet utile*), which requires that every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or *inutile*). These fundamental rules guide any interpretation of CAFTA . . ."). See also Oppenheim's International Law 1280-81 (R. Jennings & A. Watts eds., 9th ed. 1996) ("The parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless: the maxim is *ut res magis valeat quam pereat*. Therefore, an interpretation is not admissible which would make a provision meaningless, or ineffective.").

is not a claim for which an award in favor of the claimant may be made under Article 10.26.” This sentence confirms that an objection by a respondent that a dispute is not within the tribunal’s competence is different than an objection 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. If an objection for failure to state a claim upon which relief may be granted were the same as an objection as to the tribunal’s competence, as Peru argues in its letter of March 21, 2014, Article 10.20(4) would not describe preliminary objections concerning the tribunal’s competence as “other” objections.

Similarly, the first sentence of Article 10.20(5) states: “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.” This sentence also confirms that an objection under paragraph 4 of Article 10.20 is different than an objection alleging that the dispute is not within the tribunal’s competence. Any other reading would render the words “and any objection that the dispute is not within the tribunal’s competence” superfluous.

More generally, the parallel structure of Articles 10.20(4) and 10.20(5) establishes that Peru and the United States intended to allow a respondent to bring a competence objection under Article 10.20(5) but not under Article 10.20(4). Had they intended to allow a respondent to bring a competence objection under Article 10.20(4), the introductory paragraph of that article would have concluded with the phrase “. . . and any objection that the dispute is not within the tribunal’s competence,” just as the first sentence of Article 10.20(5) concludes with that phrase. The only reasonable conclusion is that Peru and the United States deliberately used different language in these two provisions because they intended for the scope of the objections that could be brought under Articles 10.20(4) and 10.20(5) to be different.

There is a significant difference between objecting to the viability of a particular claim as a matter of law (assuming all facts asserted by claimant to be true), and objecting to a tribunal’s competence to hear and decide a claim. The inquiry under Article 10.20(4) is whether the facts as alleged by the claimant are capable of constituting a breach of a legal right protected by the Treaty, whereas an objection to the tribunal’s competence does not concern itself with the underlying right, but rather with the question whether the tribunal is competent to hear the claim irrespective of the claim’s legal merit.

As Professor Paulsson describes it, an objection for failure to state a claim, sometimes called a “strike-out” application (*i.e.* that a claim is “*legally hopeless*”), is distinct from a challenge of inadmissibility (*i.e.* that a claim is “*unhearable*”) (emphases in original).⁷ Using Professor Paulsson’s terminology, Article 10.20(4) allows a respondent to bring preliminary objections as to claims that are “legally hopeless.” Whereas, Article 10.20(5) allows a respondent to bring preliminary objections as to claims that are legally hopeless, as well as to claims that are “unhearable.” In this case, Peru inappropriately attempts to bring five preliminary objections on the ground that Renco’s claims are purportedly “unhearable” (*i.e.*

⁷ Jan Paulsson, *Jurisdiction and Admissibility*, in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (2005), at 607.

jurisdictional and admissibility objections) under the guise that Renco's claims are "legally hopeless."

B. Respondent's Interpretation of Article 10.20(4) Lacks Any Merit

In its letter to the Tribunal of March 21, 2014, Respondent argues that it may bring any objection of its choosing under Article 10.20(4) of the Treaty. In advancing this argument, Peru quotes out of context the words "any objection" in the first sentence of Article 10.20(4), by ignoring the language that follow the words "any objection." Specifically, at page 2 of its letter, Peru states:

Peru has the right to make 'any objection' under Article 10.20.4:
The Treaty provides that Peru has the right to make *any* objection under Article 10.20.4, including jurisdictional and other objections.
(Emphasis in original.)

Peru's statement is incorrect. As stated above, and as the clear text of the Treaty provides, Article 10.20(4) does not authorize Peru to raise "any" objection as a preliminary question, rather it only allows Peru to raise as a preliminary question "any objection . . . 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" (emphasis added). Under Peru's reading, the underlined language would be superfluous. Peru's reading thus violates the *effet utile* principle and must be rejected.

At the first procedural hearing on July 18, 2013, Respondent claimed that subparagraph (d) of Article 10.20(4) supports its argument that competence objections fall within the scope of that article. But again, the express language of the Treaty does not support Respondent's interpretation. Subparagraph (d) provides:

The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

Far from suggesting that competence objections fall within the scope of Article 10.20(4), paragraph (d) merely ensures and confirms that a respondent's decision to bring a preliminary objection for failure to state a claim (under Article 10.20(4)) will not result in the Respondent waiving any objection as to competence or on the merits. This language was important to include in the Treaty to avoid confusion that undoubtedly would have arisen without it (at least in the United States).

This is because the U.S. legislation implementing the Treaty states that Article 10 of the Treaty includes "provisions similar to those used in the U.S. courts to dispose quickly of claims a tribunal finds to be frivolous."⁸ Under the applicable Federal Rules of Civil Procedure, a

⁸ United States-Peru Trade Promotion Agreement Implementation Act, p. 22 (Dec. 14, 2007). In its letter to the Tribunal dated March 21, 2014, Respondent agrees with Claimant that "This is similar to the

defendant is not obligated to bring a preliminary motion at the outset of the case to seek dismissal of one or more claims for failure to state a claim upon which relief may be granted. The defendant has the option to either make such a preliminary motion under Fed. Rule Civ. P. 12(b)(6) (in which case all of the plaintiff's facts will be assumed to be true and the court will decide whether the claim can survive as a matter of law), or the defendant can choose not to do so.

However, if the plaintiff chooses to bring a Rule 12(b)(6) motion for failure to state a claim, then the defendant also must simultaneously bring a preliminary motion challenging, *inter alia*, the court's personal jurisdiction over the defendant should the defendant wish to make such an objection. Failure to do so will constitute a waiver of the personal jurisdictional objections that the defendant may have wished to raise.⁹

This is not the case with preliminary objections under the Treaty, as paragraph (d) of Article 10.20(4) confirms. Respondent does not waive its jurisdictional objections under the Treaty by bringing an Article 10.20(4) objection without simultaneously bringing jurisdictional objections. But because the implementing legislation in the United States analogizes a preliminary objection under Article 10.20(4) of the Treaty to a motion for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, United States practitioners might argue that a Respondent who brought an Article 10.20(4) was obligated to simultaneously bring objections to jurisdiction or other objections. This clarifying language in paragraph (d) avoids that potential confusion, and it in no way converts a preliminary objection for failure to state a claim into a preliminary objection to competence, as Peru argued in London and advances in its instant application.

C. The Cases to Which Respondents Cite Under DR-CAFTA Do Not Support Respondent's Argument

In its letter of March 21, 2014, Peru notes that the language in Article 10.20(4) of the Treaty is nearly identical to the Article 10.20(4) provision included in the Dominican Republic-Central American Free Trade Agreement ("DR-CAFTA").¹⁰ This is correct. Respondent goes on to state, however, that Article 10.20(4) of the DR-CAFTA treaty "has been considered by at least three tribunals, each of these cases gives support to the position of Peru set forth herein." This is incorrect. In fact, the *Pac Rim v. El Salvador* and *Commerce Group v. El Salvador*

motion to dismiss a claim for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the U.S. Federal Rules of Civil Procedure." See Respondent's March 21, 2014 Letter at n. 20.

⁹ See *Federal Civil Rules Handbook*, Baicker-McKee, Janssen, Corr (2014), at 431 ("If a party chooses to assert Rule 12 motion, the party must join all Rule 12 defenses and objections in that motion. If the party makes a Rule 12 motion but omits a potential Rule 12 objection to (2) personal jurisdiction, (3) venue, (4) process, or (5) service, the objection is waived and cannot be asserted later in the responsive pleading or in a subsequent motions or trial objection." Citing Fed. Rule Civ. Pro. 12(h)).

¹⁰ Respondent's letter dated March 21, 2014, at 2.

cases¹¹ support Claimant's interpretation of the Treaty, while the tribunal in *Railroad Development Corp. v. Guatemala* clearly misapplied Article 10.20(4) of the DR-CAFTA treaty.¹²

The key distinction between the *Pac Rim v. El Salvador* and *Commerce Group v. El Salvador* cases and the instant arbitration is that the Respondents in those cases brought preliminary objections to the tribunal's competence under Article 10.20(5). Peru has not done that here. It is unlikely that Peru's decision to proceed only under Article 10.20(4), forgoing Article 10.20(5) altogether, was an oversight. First, when counsel for both parties were attempting to reach agreement on a procedural schedule in advance of the first hearing, Counsel for Claimant repeatedly objected to Peru's proposal to reach an "agreement" that Peru would bring jurisdictional objections under Article 10.20(4), noting that the Treaty did not allow it. Second, Counsel for Peru referred to the DR-CAFTA cases in those conversations, at the hearing in London, and in its subsequent letter dated March 21, 2014, and as mentioned above all of these cases involved Article 10.20(5). Finally, Peru is represented by experienced counsel who are unlikely to have overlooked Article 10.20(5).

In *Pac Rim v. El Salvador*, the respondent raised objections under both Article 10.20(4) and Article 10.20(5) of DR-CAFTA.¹³ In particular, the respondent objected under Article 10.20(4) to the claimant's claims for breach of the substantive obligations of DR-CAFTA, contending that the claimant had failed to state these claims adequately because it did not allege essential facts in support of the claims.¹⁴ In addition, the respondent objected separately under Article 10.20(5) to the claimant's claims under El Salvador's investment law, contending that the claimant had violated DR-CAFTA's waiver provision by introducing these claims into the arbitration.¹⁵ Unlike Peru, the respondent in *Pac Rim* thus properly asserted its objection predicated on waiver (*i.e.* competence) under Article 10.20(5).

Also, the analysis of the tribunal in *Pac Rim* of Articles 10.20(4) and 10.20(5) squarely supports Renco's interpretation of the scope of these provisions, not Peru's proffered interpretation. In particular, the tribunal noted that "[a]s regards the expedited procedure under Article 10.20.5, it is twinned with the procedure under Article 10.20.4 with an additional ground

¹¹ *Pac Rim Cayman LLC v. 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 (V.V. Veeder (President); Brigitte Stern; Guido Santiago Tawil); *Commerce Group Corp v. El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011 (Albert Jan van den Berg (President); Horacio Grigera Naón; J. Christopher Thomas).

¹² *Railroad Development Corp. (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010 (Andrés Rigo Sureda (President); Stuart Eizenstat; James Crawford).

¹³ *Pac Rim Cayman LLC v. El Salvador*, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, at ¶¶ 58-65.

¹⁴ *Id.* at ¶¶ 61-64.

¹⁵ *Id.* at ¶¶ 65.

of objection as to competence” (emphasis added).¹⁶ The *Pac Rim* tribunal thus recognized and noted that competence is an additional ground for preliminary objections afforded by Article 10.20(5), not found in Article 10.20(4). No other reading of the tribunal’s analysis quoted above would make sense.

In *Commerce Group v. El Salvador*, the respondent only raised objections predicated on waiver under Article 10.20(5) of DR-CAFTA.¹⁷ The *Commerce Group* tribunal never had to address the scope of these provisions because it dismissed the entire dispute for lack of jurisdiction in the Article 10.20(5) phase.

In *Railroad Development Corporation (RDC) v. Guatemala*, the respondent first raised a competence objection predicated on waiver under Article 10.20(5) of DR-CAFTA.¹⁸ After the tribunal rejected this objection, the respondent raised two further preliminary competence objections (*ratione temporis* and *ratione materiae*) under Article 10.20(4). The claimant apparently failed to point out that these objections fell outside the scope of Article 10.20(4). In any event, the tribunal did not address the scope of Article 10.20(4) objections anywhere in its decision. Moreover, contrary to Peru’s assertion that the tribunal assumed the facts as pleaded by claimant to be true, the tribunal in that case, in addressing the *ratione temporis* argument, considered, reviewed and adjudicated disputed facts.¹⁹

In fact, Guatemala argued that “its jurisdictional objections are inextricably intertwined with certain facts and thus the legal issues involved can only be evaluated with reference to those facts.”²⁰ Accordingly, the tribunal in *RDC v. Guatemala* did not and could not assume the facts as alleged by claimant to be true. Quite the contrary, the tribunal considered evidence with respect to the relevant date, weighed that evidence and reached a conclusion as to the proper date based on that evidence.²¹ The tribunal’s approach to disputed facts in the RDC case was thus directly contrary to Article 10.20(4)(c) of the Treaty, and inconsistent with the other two DR-CAFTA decisions addressed above which recognized that preliminary jurisdictional objections must be brought within the ambit of Article 10.20(5). It is unclear why the claimant in the RDC case did not object to the improper process of deciding disputed facts in an Article 10.20(4) application. In any event, Peru has chosen not to seek an adjudication of disputed facts in a preliminary objection on competence under Article 10.20(5), as it should have done on a timely basis if it had wished to do so. And nothing in the *RDC v. Guatemala* case changes that reality.

Whatever its reasons, Peru chose to proceed with preliminary objections only under Article 10.20(4). If the Tribunal entertains under Article 10.20(4) Peru’s preliminary objections

¹⁶ *Id.* at ¶ 106.

¹⁷ *Commerce Group Corp. v. El Salvador*, Award, ¶ 3.

¹⁸ *RDC v. Guatemala*, Decision on Objection to Jurisdiction Under CAFTA Article 10.20.5, November 17, 2008 (Andrés Rigo Sureda (President); Stuart Eizenstat; James Crawford).

¹⁹ *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction, ¶ 48.

²⁰ *Id.* at ¶ 11.

²¹ *Id.* at ¶¶ 120, 125, 135 & 136.

as to competence, Peru unfairly will succeed in injecting an inefficient and iniquitous process into these proceedings that would allow Respondent to advance competence objections in a piecemeal fashion with no risk of an adverse ruling (because all of Claimant's facts are assumed to be true), enabling Respondent to alter course in its later submissions to account for the Tribunal's rulings on arguments advanced at the early stage. Respondent's strategy is inconsistent with the Treaty language and with the schedule to which the parties agreed and the Tribunal ordered in Procedural No. 1, and should not be countenanced.

IV. Conclusion

For the reasons explained above, the Tribunal should decide that Peru's objections (1), (2), (3), (4) and (6) fall outside the mandatory scope of Article 10.20(4), and should be raised, if at all, when Peru files its "Counter-Memorial on Liability (including any counter-claims and/or jurisdictional objections)," as Procedural Order No. 1, Annex A provides. Claimant believes that Respondent's Article 10.20(4) application with respect to preliminary objection number (5) is substantively meritless and will fail, but Claimant recognizes that the Treaty allows Peru to bring this objection as a preliminary question.

Claimant notes that Respondent states in the last paragraph of its March 21, 2014 submission: "Should Renco nonetheless challenge the scope of these objections, Peru reserves all rights necessary to ensure an equal opportunity to be heard, consistent with due process."

Peru's right to be heard further on this matter will occur, if at all, during the "Optional hearing regarding the scope of submission," as provided by Procedural Order No. 1, Annex A. If such an optional hearing is to occur, the Procedural Schedule provides that it shall take place on April 17, 2014 (which is two weeks from this submission challenging the scope of Peru's 10.20(4) objections), and Peru should not be permitted to raise new arguments or issues at any such optional hearing, as that would be quite unfair to Claimant.

To the extent that Respondent envisions yet more written submissions on this issue, as the quoted language above potentially suggests, this would be inconsistent with the Procedural Schedule, and Claimant respectfully opposes it. Because the Procedural Schedule does not call for Peru to be heard further on this issue (other than perhaps at an optional hearing), there are no "rights" for Peru to reserve in this regard. Peru's seeming proposal to make the last filing on this topic, or raise arguments that it has not raised previously, rings particularly hollow considering that (i) Peru argued this issue at the first session on July 18, 2013, (ii) Peru submitted a five page letter to the Tribunal on July 29, 2013 with its "comments with respect to the possible Article 10.20.4 phase and its corresponding right to make preliminary objections under the Treaty," and (iii) Peru submitted its fulsome March 21, 2014 letter to the Tribunal setting forth its case as to why the preliminary objections it proposes to make are "mandatory" within the scope of Article

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10.20(4), and (iv) under customary practice, the moving party (here Peru) is not entitled to the last word on its application. Moreover, at the hearing in London the Tribunal asked both parties to propose a procedural schedule for this Article 10.20(4) phase of the case, and the Tribunal subsequently adopted Peru's proposal *verbatim*. Peru cannot now oppose, and seek to alter the very schedule that it proposed and that the Tribunal accepted.

Respectfully submitted,



Edward G. Kehoe

cc: Ms. Natalí Sequeira, Secretary of the Tribunal
Mr. Jonathan C. Hamilton
Ms. Andrea J. Menaker
Mr. Guillermo Aguilar-Alvarez
Mr. Henry G. Burnett
Mr. Thomas C.C. Childs