

**The Renco Group, Inc.**

*Claimant*

v.

**The Republic of Peru**

*Respondent*

(UNCT/13/1)

**PERU'S SUBMISSION ON THE SCOPE  
OF PRELIMINARY OBJECTIONS**

23 April 2014



**PERU’S SUBMISSION ON THE SCOPE OF PRELIMINARY OBJECTIONS**

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## ***The Renco Group, Inc. v. The Republic of Peru***

### **PERU'S SUBMISSION ON THE SCOPE OF PRELIMINARY OBJECTIONS**

1. The Republic of Peru hereby provides observations on the scope of the preliminary objections it has notified pursuant to Article 10.20.4 of the Peru-United States Trade Promotion Agreement (the "Treaty"),<sup>1</sup> as requested in the Tribunal's April 8, 2014 communication.<sup>2</sup>

2. This proceeding presents the first investment dispute arising under a Treaty which entered into force in 2009 as one of the steps Peru has taken over many years to facilitate the rule of law, environmental protection, investment and development. The Treaty includes provisions that afford important rights to respondent States as well as to investors, including the right of a State to bring preliminary objections in investor-State proceedings pursuant to Article 10.20.4.

3. Try as it might, Renco cannot rewrite the rules or rob the rights that the Treaty affords to Peru (as well as the United States):

- ***The Treaty provides a procedure for preliminary objections.*** Article 10.20.4 allows "***any objection*** by the 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." The Parties agree that the object and purpose of this right is to provide a respondent State the means to efficiently and quickly dispose of, or curtail, claims that cannot prevail as a matter of law – and thus avoid the unnecessary burden in time and cost of fully adjudicating unmeritorious claims and the facts related thereto.
  - Article 10.20.4 has two basic requirements: (i) provide for dismissal of a claim as a matter of law; and (ii) accept the facts as alleged by the claimant or otherwise rely on facts that are undisputed. Peru's objections meet both requirements.
  - Article 10.20.4(d) confirms Peru's right to raise competence objections by providing that a State does not waive competence objections if it chooses not to raise them at the preliminary stage. Article 10.20.5 is immaterial because it provides expedited procedures that Peru chose not to use, and in no way limits the scope of Peru's rights under Article 10.20.4.
- ***Peru's exercise of its Treaty rights cannot be circumscribed.*** Pursuant to the Treaty, Peru has notified three objections pursuant to the Article 10.20.4. Each may be resolved as a matter of law based on the facts as alleged by Renco or on undisputed facts. Each may extinguish, narrow, or clarify the future of the proceeding, further to the object of the provision and Procedural Order No. 1. Deferring resolution of Peru's objections for a later

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<sup>1</sup> Peru-United States Trade Promotion Agreement, entered into force February 1, 2009 (RLA-1); *see also* Supreme Decree No. 009-2009-MINCETUR, Jan. 18, 2009 (RLA-2).

<sup>2</sup> This submission follows Peru's Letter dated September 9, 2011 in answer to Renco's Amended Notice of Arbitration and Statement of Claim of August 9, 2011. Renco has already demonstrated fundamental failures in its pleading at the outset of the proceeding, filing a Notice of Arbitration dated April 4, 2011, and subsequently filing an Amended Notice of Arbitration dated August 9, 2011, that dropped parties and claims. Peru notified of its intention to make preliminary objections pursuant to Article 10.20.4 dated March 21, 2014, consistent with Procedural Order No. 1.

stage would be highly inefficient and, indeed, highly prejudicial to Peru and its due process rights.<sup>3</sup> The three objections are:

- **(1) Waiver violations as a matter of law.** Peru's consent to arbitrate is subject to Renco's submission of valid waivers under the Treaty. This is a purely legal issue that turns on a narrow set of facts, and will be decided as a matter of law. Renco's waiver is a threshold matter, with significant consequences in this proceeding and beyond. It goes to the heart of Peru's consent and the scope of issues that Renco may raise here, as well as the scope of issues Renco may seek to pursue in alternative fora.
  - **(2) Temporal violations as a matter of law.** The Treaty limits arbitrable disputes to those that arise from facts that took place after the Treaty entered into force in 2009 and precludes adjudication of claims more than three years after a claimant knew of an alleged breach. Renco's claims violate these temporal limitations. This calls for dismissal as a matter of law through the straightforward application of established legal standards to a narrow set of facts which Peru does not dispute for this purpose. Resolution of these temporality violations necessarily will shape the scope of issues in later phases, if any.
  - **(3) Contract claim failures as a matter of law.** Renco raises Treaty claims based on alleged breaches of the Stock Transfer Agreement (the "Contract") in connection with certain U.S. lawsuits. Even assuming the truth of the facts as alleged, Renco's contract claims fail as a matter of law, *inter alia*, because Doe Run Peru S.R.L is not a party to the U.S. lawsuits, and expert procedure requirements under the Contract were not observed. This objection calls for the application of legal standards to a limited set of undisputed facts. Renco cannot cherry-pick the part of this objection, and all objections, that it prefers to address, at grave prejudice to Peru.
- ***The Tribunal duly adopted a procedure to address Article 10.20.4 objections.*** The procedure adopted for the Article 10.20.4 phase was designed to filter out objections that plainly have no place under Article 10.20.4. If there remains any doubt as to the scope of Peru's objections, all of them should be briefed and heard. If, upon consideration, the Tribunal should determine that any objection falls outside the scope, the Tribunal can defer a ruling on that issue, as the procedure provides. There is no harm done following this approach. Peru never would have agreed to the procedural schedule, including with respect to the briefing on liability and jurisdiction, and non-disputing State party submissions and *amicus curiae*, if its rights were limited in the way that Renco now suggests.
  - ***Precedents confirm Peru's rights under the Treaty.*** DR-CAFTA decisions applying a nearly identical treaty provision confirm that preliminary objections include competence objections. ICSID decisions likewise confirm that preliminary objections include competence objections.

4. Peru's submission is accompanied by a letter from Professor Michael Reisman, a renowned international law professor and investment treaty arbitrator, regarding the scope and purpose of Article 10.20.4. Professor Reisman concludes, *inter alia*, that "'any objection' means any objection"

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<sup>3</sup> See Born, Gary B. International Commercial Arbitration 3223 (2014) ("It is fundamental that an award may be annulled based simply on a violation of mandatory procedural protections imposed by applicable law, regardless of the terms of the parties' agreement regarding the arbitral procedures.") (RLA-4).

under Article 10.20.4, including objections as to competence.<sup>4</sup> Moreover, “it would be troubling to curtail the Treaty rights of a respondent State by limiting the scope of that safeguard [under Article 10.20.4] at the outset of a case of first impression.”<sup>5</sup>

5. The remainder of Peru’s submission is organized as follows: (I) the Treaty provisions; (II) Peru’s preliminary objections; and (III) precedents that confirm Peru’s Treaty rights.

## I. THE TREATY PROVIDES A PROCEDURE FOR PRELIMINARY OBJECTIONS

### A. Article 10.20.4 Is A Procedure For Preliminary Objections Based On Undisputed Facts

6. The Treaty affords Peru the right to make preliminary objections. Peru has chosen to avail itself of that right by raising objections under Article 10.20.4, which states:

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 is not a claim for which an award in favor of the claimant may be made under Article 10.26. (emphasis added)

7. Pursuant to the Vienna Convention, the Treaty is to 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 light of its object and purpose.”<sup>6</sup> Consistent with these principles, Article 10.20.4 broadly establishes Peru’s right to make “*any objection*” as a preliminary matter, as long as it meets two basic elements:

- (i) The objection provides a basis for dismissal of a claim as a matter of law, such that no award in favor Renco could be made on that claim, and
- (ii) The objection assumes the facts as alleged by Renco to be true, or otherwise involves facts not in dispute, per Article 10.20.4(c).<sup>7</sup>

8. Professor Reisman opines that “[t]he ordinary meaning of the words ‘any objection’ is any objection.”<sup>8</sup> Fundamentally, if a tribunal lacks jurisdiction over a claim or if a claim is inadmissible, then, as a matter of law, it is not a claim for which an award in favor the claimant may be made. Thus, if a respondent raises a competence objection under Article 10.20.4, predicated on the facts as alleged or otherwise undisputed, that objection can be decided as a preliminary question. This necessarily follows from the plain meaning of the Treaty text, as further confirmed by both U.S. and Peruvian authorities.<sup>9</sup>

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<sup>4</sup> Letter from Prof. Reisman to J. Hamilton dated April 22, 2014, submitted herewith as Annex A (“Reisman”), at 2, 4.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(1) (RLA-3).

<sup>7</sup> Treaty, Art. 10.20.4(c) (“In deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim . . . . The tribunal may also consider any relevant facts not in dispute”) (RLA-1).

<sup>8</sup> Reisman at 4.

<sup>9</sup> *See, e.g.*, Kundmuller Caminiti, Franz. “El Arbitraje en Inversiones en el Futuro Acuerdo de Promoción Comercial Perú-Estados Unidos” Themis 53 (2007) (Unofficial Translation: “In turn, in Section 10.20.4 we find an additional innovation in the regulation of the preliminary objections formulated by the parties with respect to the arbitrability of the controversy or lack of competence of the Arbitral Tribunal, among others. It is important to note that, for example, in section 10.20.4 (b) it is stated that

Professor Reisman likewise concludes that “[j]urisdictional objections must be within that scope; dismissal of a claim on jurisdictional grounds is dismissal ‘as a matter of law.’”<sup>10</sup>

9. This conclusion follows logically from the object and purpose of Article 10.20.4, which, the parties agree, is to *protect respondent States* by providing an efficient mechanism to dispose, at an early stage, of claims that must fail as a matter of law.<sup>11</sup> Professor Reisman concurs that the procedure is “exceptionally concerned with protecting the respondent state from abusive uses of the extensive procedural powers afforded the putative investor.”<sup>12</sup> This precludes the needless time and expense of adjudicating at length a legally meritless claim. In fact, the origins of the provision may be traced to the NAFTA case of *Methanex v. United States*, where the United States argued that the claims were inadmissible because, even assuming the truth of the allegations, the claims were without legal merit.<sup>13</sup> The tribunal ruled that it could not address admissibility objections in a preliminary phase.<sup>14</sup> After years of costly proceedings, the tribunal ultimately determined that it did not have jurisdiction and, further, that the claims had no legal merit.<sup>15</sup> To ensure that competence issues (covering both jurisdiction and admissibility) could be resolved at a preliminary stage, the United States began incorporating language

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the Arbitral Tribunal shall suspend the arbitral proceedings with respect to the merits while the objection raised by one of the parties is resolved. This rule is of great importance because it allows the orderly development of the arbitration, eliminating the possibility that the discussion on merits issues continue while the objection to arbitration or the competence of the Arbitral Tribunal is pending.”) (RLA-5); Gilbert Gagne and Jean-Frederic Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. Int’l Econ. L., 375-76 (2007) (explaining that “the recent US FTAs and the revised model BIT provide preliminary procedures as a means to deter the filing of frivolous claims,” and were included because the United States “probably experienced the value of preliminary procedures when systematically challenging the claims’ admissibility and the tribunals’ competence under NAFTA”) (RLA-6); Andrew P. Tuck, *United States-Chile FTA Chapter 10: Lessons from NAFTA Chapter 11 Jurisprudence*, 15 Law & Bus. Rev. Am. 575, 597 (2009) (addressing language in Chile-US FTA identical to Article 10.20.4, and explaining that the provision “requires tribunals to decide jurisdictional issues at the outset of the dispute rather than joining them to the merits. A respondent, therefore, may raise an objection that a dispute is not within a tribunal’s competence.”) (RLA-7); Cantuarias, Fernando y Kundmuller, Franz. “Solución de Controversias Inversionista-Estado,” TLC Perú-Estados Unidos: contenido y aplicación (2008) at 489 (Unofficial Translation: “Independent of any other objection against the jurisdiction of the arbitral tribunal, Article 10.20.4 provides that an arbitral tribunal shall decide as a preliminary question any objection of the receiving State of the investment that, as a matter of law, the claim is not one found under the protection of chapter 10 of the TPA.”) (RLA-8).

<sup>10</sup> Reisman at 4.

<sup>11</sup> See Letter from Renco to the Tribunal dated July 29, 2013, at 3; Letter from Renco to the Tribunal dated April 3, 2014, at 7; see also *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 of August 2, 2010, ¶ 116 (“[T]he object and purpose . . . is to create, under CAFTA, an effective and flexible procedure for the swift and fair resolution of disputes between claimant investors and respondent host states.”) (RLA-9).

<sup>12</sup> Reisman at 1-2.

<sup>13</sup> *Methanex Corp. v. United States of America* (UNCITRAL) Partial Award of August 7, 2002, ¶ 109 (“The USA’s challenges to admissibility are based upon the legal submission that, even assuming all the facts alleged by Methanex to be true, there could still never be a breach of the individual provisions pleaded by Methanex; and hence Methanex’s claims are bound to fail, regardless of any factual evidence to be adduced by Methanex.”) (RLA-10).

<sup>14</sup> *Methanex Corp. v. United States of America* (UNCITRAL) Partial Award of August 7, 2002, ¶¶ 107, 126 (RLA-11); Vandevelde, Kenneth J. U.S. International Investment Agreements (2009), at 608 (“The establishment of an expedited preliminary review mechanism was one of the negotiating objectives imposed by the TPA. During the drafting of the TPA, a concern was expressed that certain claims submitted to arbitration under NAFTA Chapter 11 were frivolous. One such claim was *Methanex v. United States* . . . . The absence of a procedure for challenging the legal sufficiency of the claim had meant that the United States was required to participate in an arbitration that lasted for nearly six years and that was so frivolous that the tribunal held that it had no jurisdiction; that, assuming it had jurisdiction, it would have ruled against the claimant on the merits . . . . This was a classic case in which a procedure for challenging the legal sufficiency of a claim could have resulted in a tremendous saving of resources.”) (RLA-10); see also Letter from Peru to the Tribunal dated 29 July 2013, at 4.

<sup>15</sup> *Methanex Corp. v. United States of America* (UNCITRAL) Award of August 3, 2005, ¶ 1 (Operative Order) (RLA-12).

similar to Article 10.20.4 in free trade agreements in 2002-2003, and in its Model Bilateral Investment Treaty in 2004.<sup>16</sup>

10. In fact, documents from Peruvian negotiators of the Treaty further confirm that both the United States *and* Peru intended that the Article 10.20.4 procedure must include competence objections. According to documents from Peru's Ministry of Foreign Trade and Tourism (MINCETUR), the need to include competence objections within the scope of Article 10.20.4 was repeatedly raised – and expressly confirmed – over the course of multiple negotiating rounds:

- Sixth round: one of the stated “Objectives” for Article 19.4, the precursor to 10.20.4 in the final Treaty, was to “[s]pecify the possibility of raising preliminary objections regarding the lack of competence of the tribunal to resolve a claim.”<sup>17</sup>
- Seventh round: reiterated the need to “point out specifically that one of the preliminary objections may be that the issue is *not within the competence* of the tribunal.”<sup>18</sup>
- Eighth round: confirmed that the “United States agreed to include in this article, in paragraph 4, an express reference to the possibility to challenge the tribunal’s competence to hear and rule over the complaints,” and further stated that “it has also been expressly achieved that it be recognized that arbitration proceedings . . . have a stage of preliminary considerations, in which States *can question the competence* of arbitral tribunals to hear and rule on the complaint that was raised.”<sup>19</sup>

11. This underscores that the use of the word “competence” in Article 10.20.4 was not intended to exclude competence objections from the scope of Article 10.20.4 objections. Just the opposite. Given the Treaty text itself, along with the stated intent of both Peru and the United States to include competence objections, there can be no doubt that Article 10.20.4 gives a respondent the right to raise competence objections as part of the preliminary procedure.

## **B. The Broad Scope Of Article 10.20.4 Objections Is Confirmed By Other Treaty Provisions**

12. A proper reading of Article 10.20.4, in context, underscores that competence objections may fall within the scope of Article 10.20.4. Article 10.20.4(d), for instance, 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.

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<sup>16</sup> See, e.g., US-Singapore FTA, June 26, 2002, Art. 15.19.4 (RLA-13); US-Chile FTA, June 6, 2003, Art. 10.19.4(RLA-14); U.S. 2004 Model BIT, Art.28.4 (RLA-15); see also Gilbert Gagne and Jean-Frederic Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. Int’l Econ. L. First, 375-76 (2007) (RLA-6).

<sup>17</sup> MINCETUR, 6th Round of Negotiations in Tucson, Arizona, United States, November 29 – December 5, 2004 (unofficial translation) (emphasis added) (RLA-16).

<sup>18</sup> MINCETUR, 7th Round of Negotiations in Cartagena, Colombia, February 7-11, 2005 (unofficial translation) (emphasis added) (RLA-17).

<sup>19</sup> MINCETUR, 8th Round of Negotiations in Washington, United States, March 14-18, 2005 (unofficial translation) (emphasis added) (RLA-18).

13. The necessary corollary of this provision is that a respondent *may* raise an objection as to competence under Article 10.20.4. If all competence objections truly were outside the scope of Article 10.20.4, as Renco argues, it would be superfluous to provide that a respondent does not waive a competence objection by raising (or not) an objection under Article 10.20.4.<sup>20</sup> Professor Reisman confirms that, “[i]f competence objections were excluded from Article 10.20.4, there would be no reason to mention ‘objection as to competence’ in subparagraph (d) of that Article.”<sup>21</sup> Paragraph (d) provides reassurance that, whether or not a respondent raises competence objections under Article 10.20.4 (when it may not rely on disputed facts), it may still raise them later in the proceeding (including when factual issues are in dispute). The provision certainly cannot be read as narrowing the scope of 10.20.4 objections.

14. In addition, Article 10.20.5 states in relevant part:

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.

15. Article 10.20.5 thus offers a respondent the *choice*, at its option, to pursue an expedited procedure for Article 10.20.4 objections. That is, it empowers a respondent to seek faster resolution of preliminary objections; it does not curtail the scope of available objections as provided under other provisions. Indeed, it would be illogical – and contrary to the object and purpose of the right to make preliminary objections – if the shorter procedure under Article 10.20.5 somehow encompassed a broader scope of objections.

### **C. Renco’s Conflicted Efforts To Rewrite the Treaty**

16. The language and negotiating history of the Treaty leave no doubt that Article 10.20(4) encompasses Peru’s preliminary objections. Not even Renco’s invention of a “jurisdictional” dividing line – using a term not found in Article 10.20(4) – can change the Treaty. Indeed, Renco itself has conceded that jurisdictional objections fall within the ambit of Article 10.20.4:

- At the First Session, Renco conceded that Article 10.20(4) *includes jurisdictional objections*. When asked, “You concede that?” Renco’s counsel responded: “Yes.” Renco’s counsel subsequently claimed to have “misspoke[n].”<sup>22</sup>

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<sup>20</sup> Article 10.20.4(d) also provides that a respondent does not waive any arguments on the merits by raising an objection under Article 10.20.4 because, in that instance, the respondent must assume the truth of the claimant’s factual allegations. This does not mean, however, that the respondent waives any right to later challenge those facts in a subsequent merits phase.

<sup>21</sup> Reisman at 8.

<sup>22</sup> Transcript of the First Session of the Tribunal dated July 18, 2013 (“First Session Tr.”), 154:1-18 (“MR. KEHOE: I think that there is a fundamental misunderstanding between the parties, as to what 10.20.4 would be and if it includes jurisdictional objections, which it can, if we all agree to a process – THE HONORABLE MR. FORTIER: [Interposing] You concede that? MR. KEHOE: Yes. Then we have to go back to the drawing board, and it wasn’t a concession on bifurcation, it was the way we went – we may not have disagreed with that, if we understood what was being proposed. MR. MOSER: Mr. Landau wants to comment. MR. LANDAU: I’m sorry; I think I may be being a little bit slow on this, but – but when you say that the scope of 10.20.4 can include jurisdiction – MR. KEHOE: [Interposing] I misspoke . . .”). Peru, at its own cost, had a court reporting company prepare a certified transcript based on the audio recording of the First Session.

- After the First Session, Renco again conceded – this time in writing – that “*a jurisdictional objection could fall within the ambit of 10.20(4).*”<sup>23</sup> Similarly, Renco conceded that Article 10.20.4 “provides that the Tribunal has the authority (but is not required) to address other objections as a preliminary matter, such as an objection that a dispute is not within the tribunal’s competence.”<sup>24</sup>
- Having acknowledged that Article 10.20(4) encompasses “jurisdiction,” Renco cannot put the genie back in the bottle for the sake of its own effort to rewrite the rules. Yet, Renco has now changed course (again), and argues that competence objections (including both jurisdiction and admissibility)<sup>25</sup> are excluded entirely from Article 10.20.4, and that such objections can be raised only under Article 10.20.5.<sup>26</sup>

17. Contrary to Renco’s most recent interpretation, nothing in Article 10.20.4 excludes competence objections from its scope. Renco claims to find support for its position in the first phrase of the Article, which states that objections are “[w]ithout 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.”<sup>27</sup> According to Renco, this confirms that a distinction exists between competence objections and objections that may be brought under Article 10.20.4.

18. To the contrary, the “without prejudice” language simply confirms that a tribunal may address other objections, such as competence objections, in a separate phase prior to the merits.<sup>28</sup> Article 10.20.4 objections are “without prejudice” to this “authority.” Indeed, Peru relied on its rights under Article 10.20.4 in choosing to forgo the possibility of bifurcation with respect to issues of competence later in the proceeding. For example, if a respondent raised two competence objections – one that assumed the truth of the facts as alleged, and a second that implicated disputed facts – only the first objection could be heard under Article 10.20.4. A tribunal might nevertheless decide to hear the second objection as a preliminary question, prior to the merits. In other words, the “without prejudice” language in Article 10.20.4 confirms the breadth of the Tribunal’s authority; it does not limit it. At the First Session, Renco agreed with members of the Tribunal that Article 10.20.4 objections are “without prejudice to a tribunal authority, to do what it ordinarily may choose to do.”<sup>29</sup> Professor Reisman confirms that “[t]he express function of the ‘without prejudice’ clause is not to disempower the

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<sup>23</sup> Letter from Renco to the Tribunal dated July 29, 2013, at 4 (emphasis added). Renco claimed that it was “unable to think of one that would be applicable on the facts of the case as pleaded by Renco.” Letter from Renco to the Tribunal dated July 29, 2013, at 4.

<sup>24</sup> *Id.* at 1.

<sup>25</sup> At the hearing and in its letter of July 29, 2013, Renco solely focused on jurisdictional objections. Renco has characterized one of Peru’s objections as an admissibility objection, and argues that it, too, is excluded from Article 10.20.4. *See* Letter from Renco to the Tribunal dated April, 3 2014, at note 1.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 5-6.

<sup>28</sup> *See, e.g.*, UNCITRAL Rules (2010), Art. 23(3) (“The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits.”)

<sup>29</sup> First Session Tr., 148:7-149:8 (MR. LANDAU: “Because the Article 10.20 of the treaty, is drafted in Mandatory terms. . . . MR. MOSER: Yes. MR. LANDAU: It seems to be, it is without prejudice, under here 10.20.4, without prejudice to a tribunal authority, to do what it ordinarily may choose to do, without prejudice to that. It seems to give a right to a Respondent, to raise this kind of objection. . . . MR. KEHOE: I agree with everything you said, with respect to a 10.20.4 application. There is no room for maneuvering.”).

respondent or to further limit its ability to lodge such objections but, as its language makes clear, to preserve the authority *of the tribunal* to address other objections.”<sup>30</sup>

19. Renco also argues that Article 10.20.4(d) is not intended to reassure respondent States that their rights cannot be waived, but rather that its sole purpose is to distinguish the procedure under the Treaty from the preliminary objections regime under Rule 12 of the U.S. Federal Rules of Civil Procedure, under which a failure to raise jurisdictional objections as part of a preliminary objections filing constitutes a waiver of those objections.<sup>31</sup> Renco claims 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.’”<sup>32</sup> Peru rejects Renco’s suggestion that Article 10.20.4 is simply a Treaty version of the U.S. Rule 12(b)(6) for failure to state a claim.<sup>33</sup> As explained above, the Text and negotiating history demonstrate that the Article is not limited to “frivolous” claims, and indeed the parties to Treaty contemplated competence objections. In any event, Renco’s comparisons are misplaced. As the *Pac Rim v. El Salvador* tribunal noted, however, there is “no reason to equate such common law court procedures to provisions in [the Treaty] agreed by Contracting Parties with different legal traditions and national court procedures.”<sup>34</sup> Renco’s U.S.-centric vision here is not unlike its earlier insistence on an English-only arbitration with the Republic of Peru.<sup>35</sup>

20. Renco’s argument as to Article 10.20.4(d) also fails on its own terms. The reason that certain objections are waived in U.S. court if they are not raised along with other preliminary objections under Rule 12 is because Rule 12(h) expressly states that such defenses shall be waived.<sup>36</sup> The waiver under Rule 12 is explicit. Thus, the Treaty could have been silent on the waiver issue without creating any of the confusion for U.S. practitioners that Renco suggests. Indeed, under Renco’s interpretation, paragraph (d) is superfluous. This cannot be what the Treaty drafters intended.

21. With respect to Article 10.20.5, Renco now argues that this is the *only* provision under which preliminary objections as to competence may be brought.<sup>37</sup> Moreover, Renco argues, “under the former [*i.e.*, Article 10.20.4] all facts as alleged by a claimant are assumed to be true, whereas under the latter [*i.e.*, Article 10.20.5] they are not.”<sup>38</sup> Renco erroneously conflates the concept of disputed facts and

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<sup>30</sup> Reisman at 5 (emphasis in original); *see also id.* at 4 (“But the subordinate clause commences with the words ‘Without prejudice to’; these words not only cannot be read as intended to limit the scope of the primary clause but, on the contrary, must be read as intending to preserve, out of an abundance of drafting caution, what could, otherwise, have been presumed to have been excluded from the primary clause.”).

<sup>31</sup> Letter from Renco to the Tribunal dated April 3, 2014, at 7-8.

<sup>32</sup> *Id.* at 7.

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *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 of August 2, 2010, ¶ 117 (RLA-9).

<sup>35</sup> *See* First Session Tr., 61:1-63:12.

<sup>36</sup> Federal Rules of Civil Procedures, Rule 12(h) (“Waiving and Preserving Certain Defenses. (1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by: (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or (B) failing to either: (i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.”) (RLA-19).

<sup>37</sup> Letter from Renco to the Tribunal dated April 3, 2014, at 2.

<sup>38</sup> *Id.*

the ability to bring competence objections, as it also did at the First Session.<sup>39</sup> Renco offers no support for this line of argument – which departs from its arguments earlier in the case and, in fact, runs counter to the plain language of both Articles.

- On its own terms, Article 10.20.4 encompasses competence objections, as discussed above.
- Article 10.20.5 plainly establishes an expedited procedure for “an objection under paragraph 4” – which, by definition, must assume the truth of the claimant’s allegations or rely on undisputed facts. Renco’s efforts to assign entirely separate scopes and evidentiary standards to Articles 10.20.4 and 10.20.5 must fail.
- This is further confirmed by Article 10.20.4(d), which refers to “an objection under this paragraph [4] or . . . the expedited procedure set out in paragraph 5” – reinforcing that Article 10.20.5 establishes an alternative, faster procedure for preliminary objections, not a mechanism to raise a broader scope of objections.

22. As a matter both of Treaty interpretation and practice, Professor Reisman explains that “[i]t would be illogical to contend, as Renco now does, that the scope of objections for Article 10.20.5’s expedited procedure is somehow broader than that of Article 10.20.4, which does not contain a fast-track procedure.”<sup>40</sup> Indeed, Renco’s misreading of Article 10.20.5 raises serious problems that the Treaty drafters clearly did not intend:

- If the Article 10.20.5 procedure “is not confined to accepting the facts as stated in the Notice of Arbitration, the expedited procedure would perforce include objections to competence that also involved disputes about facts. But objections that included disputes about facts, with all that entails procedurally, would hardly lend themselves to an expedited procedure.”<sup>41</sup>
- “[T]his interpretation would *compel* a respondent to always use the expedited procedure for any objection to competence, as this would be its only opportunity to do so. . . . Thus instead of creating an efficient and economical procedure, this interpretation of Article 10.20.5 would actually incentivize trifurcation, which is hardly consistent with efficiency and economy.”<sup>42</sup>

23. Renco attempts to reinforce its flawed reading of these Treaty provisions by arguing that “[t]here 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;” one objection is that a claim is “legally hopeless,” while the other is that a claim is “unhearable.”<sup>43</sup> In fact, the Treaty makes no such distinction, or otherwise limits Article 10.20.4 objections to issues of “viability.” To the contrary, as discussed, the Treaty permits “any objection” as long as (i) it demonstrates, as a matter of law, that a claimant is not entitled to relief; and (ii) it turns on the facts as alleged or otherwise undisputed facts. To the extent that a competence objection is made on the basis of undisputed facts, thus providing a basis for outright dismissal as a matter of law, the objection

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<sup>39</sup> First Session Tr., 147:9-11 (“MR. KEHOE: Once you start getting into facts, and jurisdictional objections, we are into jurisdiction.”).

<sup>40</sup> Reisman at 10.

<sup>41</sup> *Id.* at 6.

<sup>42</sup> *Id.* (emphasis in original).

<sup>43</sup> Letter from Renco to the Tribunal dated April 3, 2014, at 6.

is properly within the scope of Article 10.20.4. Ultimately, Renco simply wants to rewrite the rules of the Treaty to suit its own ends – in this instance, so that they can cherry-pick the issue they want to address at grave prejudice to the rights of Peru.

## **II. PERU’S EXERCISE OF ITS TREATY RIGHTS CANNOT BE CIRCUMSCRIBED**

### **A. Peru’s Objections Arise Under Article 10.20.4**

24. In its efforts to cast the objection procedure as unwieldy, or the objections themselves as impermissible, Renco argues that Peru has raised six preliminary objections.<sup>44</sup> Renco’s count is wrong – and irrelevant. Its attempt to rewrite Peru’s objections, just like its effort to rewrite Peru’s rights under the Treaty, should be rejected. Peru has raised three Article 10.20.4 objections. Further to the standards articulated above and in Peru’s prior submissions, each objection expressly (i) provides for dismissal of claims strictly as a matter of law; and (ii) assumes the truth of the facts Renco has alleged or relies on undisputed facts. No further factual development or adjudication is needed to decide any of these objections. These are precisely the types of objections that Article 10.20.4 is meant to address. All should be addressed in the Article 10.20.4 phase.

#### **1. Waiver Violations As A Matter of Law**

25. Under Article 10.18 of the Treaty, Peru’s consent to arbitrate with Renco under the Treaty is subject to the submission of valid waivers. Renco’s violation of the Treaty’s waiver requirement is a purely legal issue, and warrants dismissal as a matter of law. Moreover, it turns on a narrow set of facts involving a single paragraph in Claimant’s original April 2011 Notice of Arbitration, a single paragraph in Claimant’s August 2011 Amended Notice of Arbitration, a one-page August 2011 letter from Doe Run Peru purporting to withdraw a prior waiver, and certain limited undisputed facts. Renco’s waiver violation is a preliminary – indeed, a threshold – issue that goes to the heart of Peru’s consent, with significant consequences for this proceeding and potentially others. A waiver violation is grounds for dismissal as a matter of law.<sup>45</sup> Even if dismissal were not ordered at this stage, a decision on Renco’s waiver could clarify the scope of issues that Renco may pursue here, with corresponding scope implications throughout the case (including, *e.g.*, discovery and later briefing). It also impacts the scope of issues that Renco may seek to pursue in alternative fora.

#### **2. Temporal Violations As A Matter of Law**

26. The Treaty limits arbitrable disputes to those that arise from facts that took place after the Treaty entered into force in 2009. The Treaty also precludes adjudication of claims more than three years after a claimant knew, or should have known, of facts giving rise to an alleged breach. Renco’s claims violate both limitations: they turn on alleged facts that pre-date the entry into force of the Treaty, as well as alleged facts that occurred more than three years after Renco acquired knowledge, or should have first acquired knowledge, of them. This violation, too, warrants dismissal as a matter of law – through the straightforward application of established legal standards to a narrow set of facts which Peru does not

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<sup>44</sup> *Id.* at 1.

<sup>45</sup> See, *e.g.*, *Commerce Group Corp. v. El Salvador* (ICSID Case No. ARB/09/17) Award of March 14, 2011, ¶ 115 (dismissing claims because the claimant’s “waiver is invalid,” and “[i]f the waiver is invalid, there is no consent”).

dispute for these purposes.<sup>46</sup> Even if dismissal were not ordered at this stage, resolution of the temporality violations as a threshold matter is critical because it will clarify the scope of issues that can be contested and adjudicated in subsequent phases.

### 3. Contract Claim Failures As A Matter of Law

27. Renco raises Treaty claims based on alleged breaches of, *inter alia*, third-party claim provisions in the Contract in connection with certain U.S. lawsuits. Even assuming the truth of the facts as Renco has alleged, the claims fail under the plain language of the Contract, and thus warrant dismissal as a matter of law because, *inter alia*, Doe Run Peru S.R.L is not a party to the St. Louis Lawsuits, and expert procedure requirements under the Contract were not observed. As with the other two objections, this objection calls for the application of legal standards, including as provided under the Contract, to a limited set of facts, all assumed to be true or otherwise undisputed for these purposes. Likewise, resolution of this issue as matter of law has significant implications for the scope of Renco's claims, if any, that remain after the preliminary phase. In fact, Renco concedes that part of this objection is "proper" and must be addressed in the Article 10.20.4 procedure, yet objects that a fundamental admissibility issue stemming from the Contract should be excluded.<sup>47</sup> It is no surprise that Renco has cherry-picked this one objection (in part) for preliminary resolution, because it relates to lawsuits that have been brought against Renco in U.S. courts. Renco's concession on the one objection that it deems convenient for its own case has no bearing on the full scope of preliminary objections that Peru has a right to bring under the Treaty.

28. The Treaty establishes Peru's rights to raise each of these objections in the preliminary phase. Each objection involves a limited factual universe – not disputed for these purposes – and application of legal standards demonstrating that, as a matter of law, Renco is not entitled to an award in its favor on the claims made. Renco cannot rewrite the Treaty for its own purposes, nor can it cherry-pick the objections that it chooses to address now. Limiting at the outset Peru's right to raise these objections would be contrary to the Treaty, highly inefficient and, indeed, highly prejudicial to Peru and its due process rights.

29. Peru's preliminary objections expressly assume Renco's factual allegations to be true, as Article 10.20.4 provides. This assumption is made solely for purposes of Peru's Article 10.20.4 objections. Peru, in fact, strongly rejects Renco's distortions, omissions, and evolving version of alleged facts. Renco's factual allegations are not only inaccurate and incomplete, they are also insufficient to prove its claims. The assumption of Renco's factual allegations for purposes of Article 10.20.4 objections should in no way be deemed an acceptance of the truth of any of those allegations. Peru continues to reserve all rights.

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<sup>46</sup> See, e.g., *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru* (ICSID Case No. ARB/03/4) Award of February 7, 2005, ¶ 59 (dismissing claims based on temporality objections) (RLA-29).

<sup>47</sup> See, e.g., Letter from Renco to the Tribunal dated April 3, 2014, at 2 ("Objection Number (5) is a proper objection under Article 10.20(4).").

## B. The Tribunal Adopted A Procedure To Duly Address Article 10.20.4 Objections

30. The Procedural Schedule adopted by the Tribunal in Procedural Order No. 1 reflects efforts by Peru to facilitate agreement on a schedule consistent with the provisions of the Treaty. Peru was under no obligation to propose an Article 10.20.4 phase; in fact, the Parties could have fixed the entire procedural schedule, and Peru still could have raised Article 10.20.4 objections prior to its Counter-Memorial.<sup>48</sup> Peru's approach instead promoted efficiency and transparency with respect to its Treaty rights, which Renco now seeks to exploit contrary to the Treaty. At the same time, Peru agreed to forgo seeking bifurcation of jurisdiction (including as to disputed facts) from the merits, based on its right to present objections under Article 10.20.4 based on undisputed facts. Peru also agreed to reserve third-party State and *amicus* submissions for the end of the briefing calendar. Peru would not have agreed to these procedures if its Article 10.20.4 rights at the outset were circumscribed in the manner that Renco suggests.

31. Renco stated at the First Session that "there is a fundamental misunderstanding between the parties, as to what 10.20.4 would be and if it includes jurisdictional objections, which it can, if we all agree to a process."<sup>49</sup> Renco also stated that, "if you want to make jurisdictional objections, then we need to talk about that."<sup>50</sup> The Parties talked about it, and then submitted nearly identical proposals to the Tribunal for an Article 10.20.4 process, though Renco's proposal attempted to shoehorn additional self-serving interpretive language. The Tribunal adopted these proposals in the Procedural Schedule, which established an organized procedure for Peru's Article 10.20.4 objections accounting for the procedural concerns and due process rights of both Parties. Significantly, the procedure includes:

- ***Preliminary notice procedure.*** The Schedule provides for an optional two-week process commencing with a simple "notice of any intention to make a submission pursuant to Article 10.20(4)." This was certainly not conceived as an opportunity to curtail Treaty rights, but rather to give notice and address the scope, including further procedural implications. Peru certainly did not agree that this limited initial phase could be used to summarily circumscribe its Treaty rights or undo due process.
- ***Procedure for possible scheduling adjustments.*** Further to comments by Renco, the Schedule already provides for a "Tribunal decision on scheduling for remainder of phase" addressing any scheduling implications arising from the scope of objections, to ensure procedural safeguards.
- ***Deferral of decision to allow for due process.*** Further to the limited nature of the initial phase to confirm scope, the Procedural Schedule provides that the Tribunal may make a "full or partial deferral of [the scope] decision." Indeed, if there is any doubt, all of Peru's preliminary objections should be heard and briefed. Even then, if the Tribunal chooses to defer a ruling on an objection, that issue can be joined to the issues addressed later in the proceeding.

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<sup>48</sup> Treaty, Article 10.20.4(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") (RLA-1).

<sup>49</sup> First Session Tr., 154:1-5.

<sup>50</sup> *Id.* at 155:16-17.

32. The Procedural Schedule thus reflects an agreement of the Parties and order of the Tribunal that takes procedural concerns by Renco into account. To curtail Treaty rights now, as Renco wants, would be in plain violation of Peru's Treaty rights and the orderly process already implemented to protect the rights of both Parties.

### **C. The Tribunal's Order Addresses Procedural Implications Related To Preliminary Objections**

33. Renco raises two purported procedural concerns with respect to Peru's right to raise Article 10.20.4 objections: (i) that there is "a very short period of time to deal with jurisdictional issues" for the Article 10.20.4 phase;<sup>51</sup> and (ii) that Peru allegedly may "receive two bites at the apple on the issue of the Tribunal's competence, with no risk of loss at the preliminary stage."<sup>52</sup> In fact, Renco has suggested that its concerns as to "an inefficient and unfair process" are "[e]ven more important[]" than its concerns as to the scope of Article 10.20.4.<sup>53</sup> Both of Renco's objections are unfounded, and indeed are addressed under the terms of the Treaty and the established Procedural Schedule.

34. First, given the discrete nature of the objections "as a matter of law" that Peru has raised, along with the assumed or otherwise undisputed facts, all of the preliminary objections can be addressed within the timeframe for the Article 10.20.4 phase as provided in Procedural Order No. 1. If Peru were later to raise additional competence objections as part of the joint jurisdiction/merits phase (if such a phase proves necessary), the proceedings again would advance exactly as set forth, and as the parties agreed, in Procedural Order No. 1. Moreover, as noted, Renco's purported concern as to the time periods for briefing has already been addressed in the Procedural Schedule, which includes a mechanism for scheduling adjustments, if any, after the Tribunal rules on the scope of objections. Renco's hyperbolic suggestion that the proceeding will "unnecessarily devolve into an unfair disarray"<sup>54</sup> is unfounded.

35. Second, Renco, not Peru, chose to bring this case under the Treaty.<sup>55</sup> The Treaty provides Peru the right to raise preliminary objections. The purpose of Article 10.20.4, the parties agree, is to protect a respondent from the time and cost of protracted proceedings when claims can be dismissed preliminarily as a matter of law, without factual development.<sup>56</sup> Renco further acknowledges that, under the Treaty, "a respondent has little, if anything, to lose by bringing an application under 10.20(4)" because, if the objections do not result in dismissal, "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 proceeding."<sup>57</sup> In

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<sup>51</sup> *Id.* at 147:1-4 (MR. KEHOE: "We are very concerned with both the timing of this, a very short period of time to deal with jurisdictional issues, and also two bites at the apple."); *see also* Letter from Renco to the Tribunal dated July 29, 2013, at 1 (arguing that Peru allegedly seeks to "shoehorn" objections "into the inadequately short time period set aside" for the Article 10.20.4 phase).

<sup>52</sup> Letter from Renco to the Tribunal dated April 3, 2014, at 2.

<sup>53</sup> Letter from Renco to the Tribunal dated July 29, 2013, at 1.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> Renco has already demonstrated fundamental failures in its pleading at the outset of the proceeding, filing a Notice of Arbitration dated April 4, 2011, and subsequently filing an Amended Notice of Arbitration dated August 9, 2011, that dropped parties and claims.

<sup>56</sup> *See, e.g.*, Letter from Renco to the Tribunal dated 29, 2013, at 3; Letter from Renco to the Tribunal dated April 3, 2014, at 7.

<sup>57</sup> *Id.* at 2.

other words, the so-called “two bites at the apple” is a mechanism expressly provided under the Treaty as part of the protections offered to respondent States. Likewise, the fact that a respondent can later account for Tribunal views, as reflected in a preliminary objection ruling, is a necessary consequence of the availability of preliminary objections. Renco chose to pursue its claims under the Treaty, and cannot unilaterally circumscribe the rights that the Treaty affords Peru – even if, from Renco’s perspective, they appear inefficient or inequitable.

36. In any event, Renco’s alleged concerns regarding a “piecemeal” competence objection strategy are meritless. As noted, Peru agreed to forgo seeking bifurcation of jurisdiction and merits phases in view of its ability to raise preliminary objections under Article 10.20.4 that assume the truth of Renco’s factual allegations or rely on undisputed facts.<sup>58</sup> If any claims remain after the preliminary objections phase, Peru may raise, together, any competence and merits defenses that turn on disputed factual issues. There would be no “two bites at the apple” for the competence issues decided under Article 10.20.4.

### III. PRECEDENTS CONFIRM PERU’S RIGHTS UNDER THE TREATY

37. Relevant investment arbitration jurisprudence provides still further support for the rights afforded a respondent State under the Treaty, including the proper scope of Article 10.20.4 and the interplay between Articles 10.20.4 and 10.20.5. This includes cases under the DR-CAFTA addressing a nearly identical preliminary objections provision, as well as cases addressing preliminary objections under the ICSID Arbitration Rules.

#### A. Preliminary Objections Under DR-CAFTA

38. *RDC v. Guatemala*. In *RDC v. Guatemala*, the respondent exercised its treaty right to make preliminary jurisdictional objections – first, under the expedited procedure of Article 10.20.5, and, later, under the non-expedited procedure of Article 10.20.4.<sup>59</sup> The tribunal adjudicated each set of jurisdictional objections pursuant to the respective Articles (and applicable procedures) under which they were brought – thus confirming that jurisdictional objections may be brought under either Article 10.20.4 or Article 10.20.5.

39. In the first instance, the respondent challenged the tribunal’s jurisdiction under Article 10.20.5 on the basis of the inefficacy of the claimant’s waiver.<sup>60</sup> The tribunal heard and decided the objection under the expedited procedures of that provision – without any suggestion that Article 10.20.5 somehow afforded the respondent the ability to raise broader objections than it could have raised under Article 10.20.4. Nor did the respondent take any such position; it simply availed itself of the expedited procedures that Article 10.20.5 provides. Moreover, the respondent expressly reserved the right to raise other jurisdictional objections later, and the tribunal acknowledged that, “[a]dmittedly, by

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<sup>58</sup> See, e.g., First Session Tr., 143:24-145:8, 151:6-152:19; Procedural Order No. 1, Annex A.

<sup>59</sup> See *Railroad Development Corp. v. Republic of Guatemala* (“*RDC v. Guatemala*”) (ICSID Case No. ARB/07/23), Decision on Objection to Jurisdiction CAFTA Article 10.20.5 of November 17, 2008; *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction of May 18, 2010 (RLA-20).

<sup>60</sup> *RDC v. Guatemala* (ICSID Case No. ARB/07/23), Decision on Objection to Jurisdiction CAFTA Article 10.20.5 of November 17, 2008, ¶ 18 (RLA-20).

filing an objection to jurisdiction under the expedited procedure, the Respondent is not foregoing its right under CAFTA to submit other objections in the future as permitted under Article 10.20.4.”<sup>61</sup>

40. The respondent followed through on its reservation. Following the tribunal’s first decision on the expedited jurisdictional objection, the respondent raised multiple other jurisdictional objections under Article 10.20.4, including as to jurisdiction *ratione temporis* (as Peru does here) and jurisdiction *ratione materiae*.<sup>62</sup> While noting that the respondent’s conduct “led in the present case to two jurisdictional hearings on different points, which is inconvenient, to say the least,” the tribunal nonetheless confirmed that Article 10.20.4 required it to determine two rounds of jurisdictional objections in a preliminary phase.<sup>63</sup>

41. The *RDC* tribunal’s adjudication of jurisdictional objections under DR-CAFTA Article 10.20.4 flies in the face of Renco’s misreading of nearly identical language in Article 10.20.4 of the Treaty. In an effort to minimize the import of *RDC*, Renco suggests that the “claimant apparently failed to point out that these objections fell outside the scope of Article 10.20(4).”<sup>64</sup> However, the claimant was represented by experienced international counsel, and, as Professor Reisman concludes, there is no basis whatsoever to presume that the non-controversial adjudication of jurisdictional objections under Article 10.20.4 was an oversight either of the claimant or the tribunal.<sup>65</sup> Renco also suggests that the tribunal improperly applied Article 10.20.4 because it “adjudicated disputed facts” as to the issue of jurisdiction *ratione temporis*.<sup>66</sup> To the contrary, the *RDC* tribunal recognized that disputed facts had been raised, but took care to reach its decisions without taking a position on the disputed facts. In particular, the tribunal determined that the claimant’s claims arose beginning with a so-called “*Lesivo* Resolution,” that “[i]t is undisputed that [the Resolution] occurred after the entry into force of the Treaty,” and thus that the *ratione temporis* objection was unfounded because “the dispute between the parties concerns a measure dated after the entry into force of the Treaty.”<sup>67</sup> Renco’s attempts to distinguish *RDC* fail.

42. ***Pac Rim v. El Salvador***. In *Pac Rim v. El Salvador*, the respondent filed a number of preliminary objections under both Articles 10.20.4 and 10.20.5. The respondent chose to designate objections regarding the legal adequacy of the claims under Article 10.20.4, and to designate an objection regarding competence (stemming from an invalid waiver) under Article 10.20.5.<sup>68</sup> Notwithstanding its choice of different designations, the respondent submitted, and the claimant did not dispute, that all of the

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<sup>61</sup> *Id.* ¶ 44 (RLA-20).

<sup>62</sup> *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction of May 18, 2010, §§ III(1) and III(2) (RLA-21).

<sup>63</sup> *See id.* n.2 (RLA-21).

<sup>64</sup> Letter from Renco to the Tribunal dated April 3, 2014, at10.

<sup>65</sup> Reisman at 9 (“The core of Renco’s gravamen seems largely that both claimant and tribunal in *RDC* actually read Article 10.20.4 correctly. . . . An objection under 10.20.4, specifically and separately from an objection under 10.20.5, was raised before it and the tribunal considered it. Moreover, the absence of any objection by the claimant for the tribunal to consider those jurisdictional objections under Article 10.20.4 is an indication that the claimant, too, saw no valid objection in view of the clear language of the Article 10.20.4.”).

<sup>66</sup> Letter from Renco to the Tribunal dated April 3, 2014, at10 (emphasis omitted).

<sup>67</sup> *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction of May 18, 2010, ¶¶ 120, 138 (RLA-21).

<sup>68</sup> *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 of August 2, 2010, ¶¶ 61-65 (RLA-9).

objections were to be governed together by the expedited procedure: “CAFTA Article 10.20.5, when used in conjunction with CAFTA Article 10.20.4, also allows a respondent to have a preliminary objection decided on an expedited basis.”<sup>69</sup> Absent opposition from the claimant, the tribunal accepted the application of “CAFTA Articles 10.20.4 and 10.20.5 [together] as an expedited procedure.”<sup>70</sup> Further, while proceeding along the expedited schedule under Article 10.20.5, the tribunal was adamant that, for purposes of the Article 10.20.4 objections, it was required to assume the truth of the allegations as pled by the claimant.<sup>71</sup>

43. The *Pac Rim* decision thus confirms that Article 10.20.4 objections can be adjudicated through the expedited procedures of Article 10.20.5, as the plain meaning of the Treaty text indicates. Contrary to Renco’s misreading of the Treaty, Articles 10.20.4 and 10.20.5 do not provide entirely distinct mechanisms and evidentiary standards, separate and apart from one another. While the *Pac Rim* tribunal stated in *dicta* that Article 10.20.5 has a “ground of objection as to competence,”<sup>72</sup> whether an Article 10.20.4 objection, based on undisputed facts, might also cover issues of competence was not an issue before the tribunal. Indeed, the parties did not focus on it in their briefs. Professor Reisman confirms that the *Pac Rim* tribunal’s *dicta* is “a misreading of the Treaty text” because “the scope of objections under Articles 10.20.4 and 10.20.5 is the same. In any event, the *Pac Rim* tribunal was not asked to address, and drew no conclusions on, whether competence objections might be raised under Article 10.20.4.”<sup>73</sup> The tribunal did, however, refute Renco’s argument that only objections that a claim is “legally hopeless”<sup>74</sup> can be heard under Article 10.20.4: “The Tribunal does not consider that the standard of review under Article 10.20.4 is limited to ‘frivolous’ claims or ‘legally impossible’ claims,” which, it determined, would “significantly restrict the arbitral remedy under Article 10.20.4.”<sup>75</sup> That is precisely the restriction that Renco seeks to impose here.

44. ***Commerce Group v. El Salvador.*** In *Commerce Group v. El Salvador*, the respondent chose to challenge the tribunal’s jurisdiction on the basis of the claimant’s invalid waiver – *i.e.*, one of the same preliminary objections that Peru has raised here – though under the expedited procedure of Article 10.20.5. There is no indication that the tribunal or either party viewed that provision as the sole mechanism for raising preliminary competence objections. Indeed, the tribunal identified both Articles 10.20.4 and 10.20.5 as “[t]he relevant provisions regarding the expedited procedures of CAFTA.”<sup>76</sup> Further, the tribunal treated the waiver objection as an Article 10.20.4 objection, subject to Article 10.20.5’s expedited procedures. Thus, the tribunal determined “[a]s an initial matter . . . that, in accordance with Article 10.20.4(c) of CAFTA,” the tribunal was required to assume the truth of the

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<sup>69</sup> *Id.* ¶ 82. The respondent also confirmed, pursuant to Article 10.20.4(d), that its objections were without prejudice to its right to raise other jurisdictional and competence objections at a later time. *Id.* ¶ 66 (RLA-9).

<sup>70</sup> *Id.* ¶ 85 (RLA-9).

<sup>71</sup> *Id.* ¶ 79 (RLA-9).

<sup>72</sup> *Id.* ¶ 106 (RLA-9).

<sup>73</sup> Reisman at 8 n.12.

<sup>74</sup> Letter from Renco to the Tribunal dated April 3, 2014, at 6.

<sup>75</sup> *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 of August 2, 2010, ¶ 108 (RLA-9).

<sup>76</sup> *Commerce Group Corp. et al. v. El Salvador* (ICSID Case No. ARB/09/17) Award of March 14, 2011, ¶ 34 (RLA-22).

factual allegations when deciding the jurisdictional objection.<sup>77</sup> Finding that “[t]here is no dispute that,” as of the date of initiation of the arbitration, two claims filed by the claimants in local courts were still pending, and that the claims related to the same measures in the arbitration, the tribunal dismissed the case for lack of jurisdiction on the basis of the waiver objection.<sup>78</sup>

45. *Commerce Group* thus does not, as Renco claims, support its interpretation of the Treaty.<sup>79</sup> Just the opposite. At minimum, *Commerce Group* plainly contradicts Renco’s suggestion that a respondent’s decision to bring a preliminary objection under Article 10.20.5’s expedited procedures necessarily means that the objection is to be decided through the application of disputed facts.<sup>80</sup> In fact, *Commerce Group* confirms the plain meaning of the Treaty: namely, that a jurisdictional objection relating to the waiver requirement can be considered under the parameters of Article 10.20.4, the tribunal can decide such an objection on the basis of undisputed facts, and the respondent may choose to pursue such objections on an expedited basis under Article 10.20.5 (though this does not circumscribe the scope of available objections under Article 10.20.4).

## **B. Preliminary Objections Under The ICSID Arbitration Rules**

46. A similar debate to what Renco imposes on this proceeding was considered in the context of the 2006 modification to the ICSID Arbitration Rules which added a preliminary objections phase.<sup>81</sup> The position taken by Renco lost in that debate.

47. Rule 41(5) of the ICSID Arbitration Rules provides, in part, that “a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.”<sup>82</sup> This is roughly analogous to (albeit stricter than) the standard under Article 10.20.4 of the Treaty 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.” As with the US-Peru Treaty, ICSID Arbitration Rule 41(5) also provides that the preliminary objections are without prejudice to other jurisdictional objections or merits arguments that a party may raise later in the proceeding.<sup>83</sup> Notably, a number of tribunals have ruled that the “manifestly without legal merit” language of

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<sup>77</sup> *Id.* ¶ 55 (RLA-22); *see also id.* (“In light of this, the Tribunal does not purport to make any findings of fact in this Section, but rather sets out what it understand to be this matter’s factual background in light of the factual allegation in the Request, which the Tribunal assumes to be true in this phase of the proceedings.”).

<sup>78</sup> *Id.* ¶¶ 100-01, 114-15 (RLA-22).

<sup>79</sup> Letter from Renco to the Tribunal dated April 3, 2014, at 9.

<sup>80</sup> *See, e.g.*, Letter from Renco to the Tribunal dated April 3, 2014, at 2.

<sup>81</sup> *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3), Decision on the Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules of February 2, 2009, ¶ 44 (“According to the Claimant, objections pertaining to the jurisdiction or competence of the Arbitral Tribunal cannot constitute the subject matter of a preliminary objection within the sense of Rule 41(5) as the text only speaks of merit.”) (RLA-23).

<sup>82</sup> ICSID Arbitration Rule 41(5) (“(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.”).

<sup>83</sup> *Id.*

Rule 41(5) encompasses objections as to both jurisdiction and merits. Thus, for example, in *Brandes Investment Partners v. Venezuela*, the tribunal ruled:

The Arbitral Tribunal therefore interprets Rule 41(5) in the sense that the term ‘legal merit’ covers **all objections** to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal. . . . [Manifestly] applies with respect to the merits of the claims but **also when the tribunal examines the question of jurisdiction**.<sup>84</sup>

48. Beyond the US-Peru Treaty text itself, and the DR-CAFTA cases discussed above, this ICSID line of cases construing the meaning of “manifestly without legal merit” further confirms that Renco’s efforts to circumscribe the scope of Article 10.20.4 are unfounded. Even under the separate ICSID regime, tribunals refuse to read a preliminary objections provision so narrowly as to limit it exclusively to “frivolous” claims or “failure to state a claim”-type objections.

### C. Implications

49. The Treaty grants Peru important rights to make preliminary objections under Article 10.20.4, which by design serve to protect the rights and interests of respondent States. Peru has chosen to exercise those rights. As Professor Reisman explains, “the procedure contemplated by Article 10.20.4 of the Treaty and its parallels in other investment treaties are an important safeguard against abuse of the international investment dispute resolution system and, as such, a considered reinforcement of international due process.”<sup>85</sup> Renco’s attempts to circumscribe Peru’s rights under the Treaty, and thus to deny Peru the due process to which it is entitled, must be rejected. Indeed, these considerations are all the more important, given that this is the first investment arbitration under the Treaty. As Professor Reisman concludes:

From the vantage point of a decision-maker, it would be troubling to curtail the Treaty rights of a respondent State by limiting the scope of that safeguard at the outset of a case of first impression. At the very least, the Tribunal should consider full submissions by the Parties on

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<sup>84</sup> *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3), Decision on the Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules of February 2, 2009, ¶¶ 55, 62 (emphases added) (RLA-23); see also, e.g., *Grynberg and RMS Production Corp. v. Grenada* (ICSID Case No. ARB/10/6), Award of December 10, 2010, ¶ 6.1 (“[T]he parties appear to find common ground as to the requirements of Article 41(5)’s ‘manifestly without legal merit’ standard. That is, that an objection under Article 41(5): (a) may go either to jurisdiction or the merits . . .”) (RLA-24); *Global Trading Resources Corp. & Globex Int’l, Inc. v. Ukraine* (ICSID Case No. ARB/09/11), Award of December 1, 2010, ¶ 57 (dismissing the claim for lack of jurisdiction pursuant to an Article 41(5) objection because “the sale and purchase contracts entered into by the Claimants are pure commercial transactions that cannot on any interpretation be considered to constitute ‘investments’ within the meaning of Article 25 of the ICSID Convention”) (RLA-25); *Cementownia “Nowa Huta” S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2), Award of September 17, 2009, ¶ 172 (declining jurisdiction pursuant to a Rule 41(5) objection because “the Claimant has filed a fraudulent claim against the Republic of Turkey”) (RLA-26); *Accession Mezzanine Capital L.P. & Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary* (ICSID Case No. ARB/12/3), Decision on Respondent’s Objection under Arbitration Rule 41(5) of January 16, 2013, ¶¶ 49-52 (addressing respondent’s jurisdictional objections that it had not consented to arbitrate the claims in question) (RLA-27); *Emmis Int’l Holding, B.V. v. Hungary* (ICSID Case No. ARB/12/2), Decision of Respondent’s Objection Under ICSID Arbitration Rule 41(5) of March 11, 2013, ¶ 15 (addressing respondent’s jurisdictional objection that it had not consented to arbitrate claims in question) (RLA-28).

<sup>85</sup> Reisman at 2.

Peru's preliminary objections, and render a decision only after the issues have been fully argued.<sup>86</sup>

50. Peru's objections arise under Article 10.20.4 and fit within its broad scope. Further, the procedural and due process provisions already built into the Procedural Schedule anticipated, and now repudiate, Renco's baseless objections and concerns. Peru's preliminary objections may serve to resolve certain claims outright – or, in the alternative, to clarify the scope of issues to be decided at a later stage. These critical preliminary objections should be briefed and considered in full during the preliminary objections phase, as the Treaty provides.

#### **IV. REQUEST FOR RELIEF**

51. Pursuant to Procedural Order No. 1 and as the Treaty mandates, the preliminary objections that Peru has notified are within the scope of Article 10.20.4 of the Treaty. Renco must not be permitted to limit Peru's objections and Treaty rights related thereto. Peru thus respectfully requests that the Tribunal rule that the case should proceed to a full briefing of the preliminary objections, as the Treaty mandates.

Respectfully submitted,

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<sup>86</sup> *Id.*