

**IN THE MATTER OF  
AN ARBITRATION UNDER THE RULES OF THE  
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW  
UNCT/13/1**

**THE RENCO GROUP, INC.**

**CLAIMANT,**

**v.**

**THE REPUBLIC OF PERU**

**RESPONDENT.**

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**CLAIMANT'S REPLY ON SCOPE OF RESPONDENT'S  
ARTICLE 10.20(4) OBJECTIONS**

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Claimant makes this submission in response to Respondent's filing dated April 23, 2014 concerning the mandatory scope of Article 10.20(4) of the Peru/United States Trade Promotion Agreement (the "Treaty"), as requested by the Tribunal by letter of April 8, 2014.

In its effort to avoid the good faith and ordinary meaning of the relevant text of the Treaty, Peru seeks to create ambiguity and achieve an unfair opportunity for itself in this arbitration by: i) dismissing as irrelevant the critically important text of the Treaty that confirms Claimant's interpretation, ii) referring to Claimant's prior statements in various misleading ways, including by failing to include complete text where to do so would contradict Peru's assertion, iii) misstating the negotiating history of Article 10.20, and iv) continuing to misapprehend the procedural aspects and decisions of prior tribunals hearing disputes under the DR-CAFTA treaty.

**I. Peru Dismisses as Irrelevant Critical Text of the Treaty, Thereby Confusing the Mandatory Aspects of Article 10.20(4) With The Tribunal's Discretionary Authority To Decide Competence Objections as Preliminary Questions**

The fundamental flaw in Respondent's analysis, which permeates virtually its entire submission, is that the text of Article 10.20(4) treats objections to a Tribunal's competence to hear a dispute *differently* than objections as to the legal sufficiency of claims. The decision by the Republic of Peru and the United States to treat the two types of objections differently is not surprising, because they are indeed different, as Claimant detailed in its submission dated April 3, 2014, and as addressed further below in response to Peru's arguments. Respondent's decision to blur this fundamental distinction, or its failure to appreciate it, is fatal to its arguments.

Article 10.20(5) requires a tribunal to decide an objection to its competence on an expedited basis if the respondent so requests within 45 days after the tribunal is constituted. If a respondent does not challenge a tribunal's competence under Article 10.20(5) of the Treaty, a tribunal thereafter may, but is not required to decide competence objections as a preliminary question, but not as part of a 10.20(4) proceeding. A tribunal's discretionary authority to decide

competence objections either as a preliminary question, or later in the procedural schedule, derives, in cases brought under the UNCITRAL Rules, from Rule 23(3), which provides that “[t]he arbitral tribunal may rule on a plea referred to in paragraph 2 [objecting to tribunal’s jurisdiction] either as a preliminary question or in an award on the merits.”<sup>1</sup>

Peru does not distinguish between the Tribunal’s *authority* to decide competence as a preliminary question in its discretion (e.g., under UNCITRAL Rule 23(3)), and the limited scope of objections that the Tribunal is *compelled* by Article 10.20(4) of the Treaty to decide as a preliminary question. Each of Respondent’s arguments seems to rest -- and thus fall -- on this material error.

**A. The Text and Context of Article 10.20(4)**

For ease of reference (though the Tribunal likely has it memorized by now), Claimant quotes the introductory language of Article 10.20(4), with different type face for the two interrelated clauses that comprise the single introductory sentence:

**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 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).**

The ordinary meaning of the word “other” is something that is not included within, not the same as, and different than the primary object to which reference is made. The Merriam Webster online dictionary defines “other” as “being the one (as of two or more) remaining *or not*

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<sup>1</sup> In cases brought under the ICSID Convention, this authority derives from Article 41(2) of the Convention, which provides: “Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”

*included,*” “being the one or ones *distinct from* that or those first mentioned or implied,” and “*not the same: different.*”<sup>2</sup>

Thus, when the Treaty describes “an objection that a dispute is not within the tribunal’s competence” as an “other” objection, it clearly means that a competence objection is not included within, not the same as, and 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 under Article 10.26.” There is no other legitimate way to read the sentence. With this reality, it becomes clear that Article 10.20(4) is focused on the legal viability of a particular claim asserted to receive the type of final award that the Treaty authorizes under Article 10.26; and not on the tribunal’s competence to hear the dispute.

Respondent’s instant application must fail for the single and dispositive reason that Respondent turns a blind eye to the actual text of the Treaty, by pretending that the Treaty makes no distinction between an objection to a tribunal’s competence to hear a dispute and objections for failure to state a viable legal claim upon which an ultimate award may be rendered under Treaty Article 10.26. For example, Respondent states: “Renco attempts to reinforce its flawed reading of these Treaty provisions [Articles 10.20(4) and 10.20(5)] by arguing ‘[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’ . . . *In fact, the Treaty makes no such distinction,* or otherwise limits Article 10.20.4 objections to issues of viability.”<sup>3</sup> It is difficult to understand how Respondent can argue that the Treaty makes “*no distinction*” between the two very different types of objections, when the text of Article 10.20(4) expressly references *both* types of objections and

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<sup>2</sup> <http://www.merriam-webster.com/dictionary/other> (emphasis added).

<sup>3</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 23 (emphasis added)

distinguishes them with the word “*other*”; and the text of Article 10.20(5) also expressly references *both* types of objection and distinguishes between them with the word “*and*.” (Article 10.20(5) is addressed below).

Respondent argues that the “[w]ithout prejudice” language of Article 10.20(4) supports Respondent’s argument that a tribunal is compelled to hear and decide competence objections, together with claim viability objections, as part of an Article 10.20(4) application, when exactly the opposite is true. The “without prejudice” language makes it clear that the Treaty is not divesting a tribunal of its discretionary “authority” to address “other” objections (such as objections to a tribunal’s competence over a dispute) either as a preliminary question, or later in the process such as during the merits phase (*e.g.*, as UNCITRAL Rule 23(3) allows), but not under Article 10.20(4).

If the Tribunal were *required* under Article 10.20(4) to address and decide as a preliminary question objections that a dispute is not within the Tribunal’s competence, as Respondent incorrectly argues, the above-quoted text of Article 10.20(4) in boldface type would be completely contrary to the text that immediately follows it, and that simply cannot be the case. The two clauses of the same sentence must be read together, not in contradiction.

Specifically, if one accepts that Article 10.20(4) of the Treaty treats objections to competence and objections for failure to state a viable legal claim differently (which one must on a plain reading of the text, including its ordinary use of the word “other”), the Tribunal cannot have the discretionary “authority” to either address competence objections as a preliminary question, or defer the question until later (as UNCITRAL Rule 23(3) provides and the first clause of Article 10.20(4) recognizes), while simultaneously being required by the second part of Article 10.20(4) to address competence objections as a preliminary question. That makes no

sense, yet that is the illogical result of Respondent’s failure to acknowledge or recognize that an objection to a tribunal’s competence to decide a dispute is fundamentally different than an objection for failure to state a viable legal claim – and Article 10.20(4) *requires* only that a tribunal decide the latter type of objection as a preliminary question. And there certainly is no basis in the text of Article 10.20(4), or elsewhere in the Treaty (or any other treaty to Claimant’s knowledge) to distinguish between different types of objections to competence. To do so for purposes of shoehorning competence objections into Article 10.20(4) in this arbitration would be to literally, and impermissibly, re-write the Treaty.

Without notice or authorization from the Tribunal, Respondent submitted a written opinion of Professor Reisman that generally supports Respondent’s interpretation of the relevant treaty provisions. When weighing the probative value of Professor Reisman’s opinion, the Tribunal should treat the opinion as a submission by Respondent itself, and not as an independent “expert opinion.” Claimant recognizes that Professor Reisman is a distinguished international law scholar. However, his opinion does not contribute any specialized knowledge on the issues of treaty interpretation or international law that are before this international arbitration Tribunal convened under an international treaty and the UNCITRAL Rules.<sup>4</sup> In Claimant’s view, this Tribunal—comprised of equally distinguished international law scholars and practitioners—does not require expert testimony on how to interpret the ordinary meaning of the terms of the Treaty, or how to properly read DR-CAFTA arbitration awards. Claimant does not seek to strike Professor Reisman’s opinion as an improper expert submission, but Claimant

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<sup>4</sup> *See, e.g., The UNCITRAL Arbitration Rules: A Commentary* 637-38 (David D. Caron & Lee M. Caplan eds., Oxford Commentaries on International Law 2d ed. 2013) (“[W]here the [Tribunal’s] expertise is lacking to an extent capable of compromising the quality of a resulting award – the arbitral tribunal may consider enlisting the help of experts with specialized knowledge of the particular matters in question.”).

respectfully requests that it be given weight equal to that of the arguments advanced by Respondent itself.

Professor Reisman states that jurisdictional objections “must be within that scope” of Art. 10.20(4), because “dismissal of a claim on jurisdictional grounds is a dismissal as a matter of law”.<sup>5</sup> With due respect to Professor Reisman, this conclusion may seem reasonable on a superficial read, or in a vacuum, but only because it fails to account for both clauses of the single sentence in question; focusing instead only on the second clause, which obviously is an impermissible approach to treaty interpretation under the Vienna Convention.

As addressed above, the first clause of Article 10.20(4) confirms that “an objection that a dispute is not within a tribunal’s competence” is *different than, not included within, and not the same as* “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.” Accordingly, even if an objection to a tribunal’s jurisdiction provides a basis for “a dismissal as a matter of law,” it is of no moment, because the Treaty only requires a tribunal to address an objection as a preliminary question under Article 10.20(4) when the objection is directed at the legal sustainability of a particular claim, not the tribunal’s jurisdiction to hear the dispute.

Respondent’s argument that “[t]he subordinate clause does not commence with the words ‘[e]xcept for’ or their equivalent” is equally unpersuasive because it suffers from the same defect of failing to treat an objection to a tribunal’s competence to hear a dispute as distinct from objections that challenge the sustainability of a legal claim. Indeed, Professor Reisman seems to believe, incorrectly, that Claimant is interpreting the words “without prejudice” in a way that restricts the authority of the Tribunal to address “other” objections on a schedule that the

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<sup>5</sup> Prof. Reisman Opinion, Apr. 22, 2014 (“Prof. Reisman Op.”) at 4.

Tribunal deems appropriate. *See, e.g.*, Prof. Reisman Op. at 5 (“The express function of the ‘without prejudice’ clause is not to disempower the 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.”) (*emphasis in original*). Professor Reisman fails to appreciate the Peru, not Renco, is interpreting Article 10.20(4) in a manner that restricts the authority of the Tribunal with respect to “other” objections (including objections that a dispute is not within the Tribunal’s competence), because Peru (not Renco) is arguing that the Tribunal is *required* to address the “other” objections under Article 10.20(4), when in fact the Treaty places no such constraints on the Tribunal’s authority.

Article 10.20(4) only constrains the Tribunal’s authority in that it requires the Tribunal to address, 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*. And as addressed above, because objections to a tribunal’s competence are different than, and not included within objections for failure to state a viable legal claim, the constraint of Article 10.20(4) does not require the Tribunal to address and decide an objection to this Tribunal’s competence under Article 10.20(4). Peru may bring any competence objections in the merits phase of the case, as the parties agreed and as the current Procedural Schedule reflects.

Respondent is not the first to confuse and blur the important distinction between the two types of objections that are at issue here. Professor Paulsson notes in his paper on jurisdiction and admissibility:

[A] motion to dismiss for failure to state a cause of action, or, to use the expression current in England, a strike-out application . . . is a defense on the merits and not a matter of admissibility [or jurisdiction]. The USA was not arguing [in *Methanex v. USA*, an investment treaty case brought under NAFTA] that the case was *unhearable*, but that it was legally *hopeless*. That is precisely how

one should understand the difference between a challenge of inadmissibility and a strike-out application.

Even if facts are assumed true as pleaded (and there is therefore no resolution of factual controversies), a strike-out application involves a consideration of the merits of the case; the objective of the application is precisely to secure a determination that the *legal* basis of the claim is meritless. A ruling on such an application is therefore as unappealable as decisions on the merits generally. In this respect it is a harmless mistake to refer to such applications as dealing with admissibility. *Yet the confusion of terms comes at a cost when it blurs such fundamentally distinct concepts.*<sup>6</sup>

As the editors of the *Oxford Handbook of International Investment Law* explain,

A new generation of investment treaties involving the USA includes an express provision allowing a respondent State to make an application akin to a motion to dismiss.

[. . .]

A short explanation of CAFTA-DR produced by the Office of the United States Trade Representative states: “The CAFTA-DR includes safeguards to ensure that investors cannot abuse the arbitration process, including provisions (based on U.S. court rules) that allow tribunals to dismiss frivolous claims at an early stage of the proceedings or to award attorneys’ fees and costs as a deterrent to such claims.”

*Article 10.20 was inspired by the ‘motion to dismiss’ procedure, in which the defendant asserts that the plaintiff has failed to state a claim upon which relief can be granted (Rules of Federal Procedure, Rule 12(b)(6)).*

[. . .]

*[A] motion to dismiss is not a challenge to the court’s jurisdiction, but a challenge to the legal sustainability of the claim at a very early stage of the proceedings.*<sup>7</sup>

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<sup>6</sup> Jan Paulsson, *Jurisdiction and Admissibility*, in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* 607-08 (2005) (emphasis added).

<sup>7</sup> *Oxford Handbook of International Investment Law* 957-59 (Peter T. Muchlinski, Federico Ortino, and Christoph Schreuer eds., 2008) (emphasis added).

The Circuit Court of Appeals for the Fourth Circuit in the United States, deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, recently made an observation similar to that of Professor Paulsson concerning the confusion by many over the distinction between the two types of objections, stating:

The parties, and indeed the district court, have quite blurred the fundamental difference between a Rule 12(b)(1) motion for lack of subject matter jurisdiction and a Rule 12(b)(6) motion for failure to state a claim, failing to recognize the distinction between the Rules. A 12(b)(1) motion addresses whether [plaintiff] has a right to be in the district court at all and whether the court has the power to hear and dispose of his claim, and a 12(b)(6) motion addresses whether [plaintiff] has stated a cognizable claim, a challenge to the sufficiency of the complaint.<sup>8</sup>

Citing the Supreme Court of the United States, the Circuit Court went on to hold that “[J]urisdiction . . . is not defeated by the possibility that averments might fail to state a cause of action on which petitioners could actually recover.”<sup>9</sup>

Respondent complains of Claimant’s reliance on jurisprudence from the United States that undermines Respondent’s arguments.<sup>10</sup> These protestations are not well founded, however, considering that i) Article 10.20(4) was inspired by and based upon the “motion to dismiss” procedure of Rule 12(b)(6) of the Federal Rules of Civil Procedure, and ii) *it is common ground* between the parties that Article 10.20(4) “is similar to the motion to dismiss 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.”<sup>11</sup>

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<sup>8</sup> *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012).

<sup>9</sup> *Id.* at 699, quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S.Ct. 1003 (1998).

<sup>10</sup> See Respondent’s Submission, Apr. 23, 2014, at ¶ 19.

<sup>11</sup> See Respondent’s Submission, Mar. 21, 2014, at n. 20, quoting Claimant’s Letter dated July 29, 2013.

As others have done before it, Respondent has blurred the fundamentally distinct concepts of a tribunal's competence to decide a dispute, on the one hand, and whether a claim is one for which an award in favor of the claimant may be made, on the other, despite the clear language of the Treaty treating them differently. This has caused Respondent to argue incorrectly that its proposed competence objections are *included* within the mandatory scope of objections that the Tribunal is obligated to hear under Article 10.20(4), when in fact they are "*not included*" because they are "*other*" objections under the ordinary meaning of the text of the Treaty.

To be clear, after the time expired for Respondent to bring preliminary objections to the Tribunal's competence as a matter of right under the Treaty pursuant to Article 10.20(5), the Tribunal certainly had the *authority* (e.g., under UNCITRAL Rule 23(3)) to decide, as a preliminary question, whether this dispute is within the Tribunal's competence, and the Treaty does not affect that authority.<sup>12</sup> Nothing in the Treaty *prevented* the Tribunal from hearing and deciding all of Respondent's jurisdictional objections as a preliminary question, during the same general time period that the Tribunal would establish to hear Respondent's objections under Article 10.20(4). As Claimant stated repeatedly at the First Session in London on July 18, 2013, "[w]e agree that the Treaty would allow such a process of hearing jurisdiction and failure to state a claim at the same time."<sup>13</sup> Indeed, Claimant invited that very process at the First Session, by proposing that Respondent bring all of its competence objections as a preliminary question, to be addressed in a preliminary phase of the case, rather than in the piecemeal, improper and

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<sup>12</sup> See, e.g., First Session Tr. p. 176, lines 8-25; p. 177, lines 1-10.

<sup>13</sup> First Hearing Tr. p. 145, lines 17-19 and 146 lines 21-24.

impermissible fashion that Respondent proposed under Article 10.20(4). But Respondent rejected the invitation.<sup>14</sup>

If Peru had accepted Renco's offer to have all competence objections addressed as a preliminary question (as often happens in treaty disputes) during the same general timeframe and on the same schedule that the Tribunal also would be deciding any claim objections that Respondent might wish to bring under Article 10.20(4) (and the Tribunal had endorsed such a schedule in this hypothetical scenario), Respondent's two types of objections would have proceeded as preliminary questions under two entirely different bases. The competence objections would have proceed as a preliminary question under the Tribunal's discretionary authority (e.g. UNCITRAL Rule 23(3)), and the claim objections would have proceeded during the same general timeframe under the mandate of Article 10.20(4) which requires the Tribunal to decide claim objections as a preliminary question if Respondent so requests. The distinction obviously is quite a meaningful one, because Respondent's improper efforts to artificially shoehorn only some (not all) of its competence objections into an Article 10.20(4) application would ensure that Respondent cannot lose the application (because all facts are assumed to be true under 10.20(4)) and also would guarantee that Respondent would have two bites at the apple for the competence objections that it improperly brings under 10.20(4) and then brings again later with the merits. This is why Peru rejected Renco's proposal to have the Tribunal decide all competence objections as a preliminary question. Peru wants this Tribunal to give Peru an unfair advantage in these proceedings which text of Treaty does not afford to Peru.

After Respondent rejected Claimant's invitation to have the Tribunal hear and decide all competence objections as a preliminary question, the parties agreed instead during the First

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<sup>14</sup> See First Session Tr. p. 162, lines 19-25; pp. 163-65, lines 13-22.

Session that the Tribunal will address competence objections during the merits phase of the case (reflected in the Procedural Schedule), except, and only to the extent that the Treaty *requires* the Tribunal to decide its competence over the dispute as a preliminary question under Article 10.20(4). Because Article 10.20(4) does not require the Tribunal to decide competence as a preliminary question, all of Respondent's competence objections should be addressed in the merits phase.

Based on that agreement between the parties, and Procedural Order No. 1 which resulted from that agreement, Claimant filed its Memorial on the Merits on February 20, 2014, six months after the Tribunal signed Procedural Order No. 1. The question before the Tribunal now is whether Peru's competence objections come within the *mandatory* ambit of Article 10.20(4), and clearly they do not. They cannot, on any fair reading of Article 10.20(4) and Article 10.20(5), which distinguish between an objection to competence and claim objections.

In its April 23, 2014 submission, Respondent makes various references to statements by Claimant, incorrectly suggesting that Claimant previously agreed that jurisdictional objections come within Article 10.20(4). For example, Respondent quotes in its submission the following exchange from the First Session:

MR. LANDAU: Because Article 10.20 of the treaty is drafted in Mandatory terms. . . . It seems to me, it is without prejudice, under here 10.20.4, without prejudice to a tribunal's 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 as this kind of objection. . . . so what is the room for maneuvering actually?"

MR KEHOE: I agree with everything you said, with respect to a 10.20.4 application. There is no room for maneuvering.<sup>15</sup>

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<sup>15</sup> Respondent's Submission, Apr. 23, 2014, p. 7.

However, Respondent failed to quote text of the transcript that immediately followed (on the same transcript page) and completed this dialogue between Mr. Landau and Mr. Kehoe:

MR. LANDAU: Right.

MR. KEHOE: What I -- What I respectfully *disagree* with is that you have no room to maneuver with respect to jurisdictional objections, which are *different* than 10.20.4 objections. (emphasis added).<sup>16</sup>

When Claimant stated at the First Session and in correspondence that jurisdictional objections could be brought with a 10.20(4) application, Claimant obviously was referring to the timeframe and schedule that the parties and the Tribunal were discussing, not the substantive right of Peru to bring jurisdictional objections under Article 10.20(4), which Claimant has rejected from the outset. Claimant's position on this dispute has been consistent throughout, which is clear from the entire text and context of the transcript and correspondence from which Respondent selectively and improvidently quotes and misstates. The exchange quoted above is but one example.

#### **B. The Text and Context of Article 10.20(5)**

The first sentence of Article 10.20(5) further undermines Peru's contention that Article 10.20(4) requires the Tribunal to address objections to its competence over the dispute as a preliminary question. This sentence of Article 10.20(5) provides: "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.*"<sup>17</sup> As Renco explained in its letter of April 3, 2014, the words "an objection under paragraph 4 *and any objection that the dispute is not within the tribunal's*

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<sup>16</sup> First Session Tr. at 149.

<sup>17</sup> Treaty, Art. 10.20(5) (emphasis added).

competence” is additional confirmation that an objection under paragraph 4 of Article 10.20 regarding the substantive viability of a legal claim is *different than, and not included within*, an objection that the dispute is not within the tribunal’s competence. Any other reading impermissibly would cause the words of the Treaty to be in conflict.

In its submission of April 23, 2014, Peru asserts that “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.”<sup>18</sup> Similarly, Peru asserts that Article 10.20(5) “empowers a respondent to seek faster resolution of preliminary objections; it does not curtail the scope of available objections as provided under other provisions.”<sup>19</sup>

Again, Peru’s assertions miss the point. Renco does not argue that Article 10.20(5) “limits” Peru’s rights under Article 10.20(4) or that it “curtail[s]” the scope of the objections that a respondent may raise under other provisions of the Treaty whatsoever. Rather, Claimant notes that Article 10.20(5) provides additional confirmation that Respondent has no right under the Treaty to bring a competence objection under Article 10.20(4). When a right does not exist, the non-existent right cannot be limited or curtailed. Put simply, by arguing that Articles 10.20(4) and 10.20(5) “make no distinction” between a competence objection and claim objections, when both Articles clearly and obviously make such a distinction, Respondent violates Article 31(1) of the Vienna Convention on the Law of Treaties, which requires that “A treaty shall be interpreted in good faith and 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.” One area in which Claimant and

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<sup>18</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 3.

<sup>19</sup> *Id.* at ¶ 15.

Professor Reisman agree with respect to this dispute is that “[f]idelity to this cannon is one of the foundations of international law.”<sup>20</sup>

Professor Reisman seems to acknowledge that Claimant’s interpretation of the Treaty is consistent with the ordinary meaning of the Treaty provisions, and Peru’s is not, by his invocation of the extraordinary standard of “manifestly absurd or unreasonable.” Prof. Reisman states:

To try to interpret the “and” clause in Article 10.20.5 as adding something that would not *otherwise be in* Article 10.20.4 would be “manifestly absurd or unreasonable” in the language of the Vienna Convention on the Law of Treaties, for two reasons.<sup>21</sup>

Article 32(b) of the Vienna Convention allows recourse to “supplementary means of interpretation” to interpret a treaty beyond the ordinary meaning of its terms only in very limited circumstances, including “when the interpretation according to Article 31 . . . leads to a result which is *manifestly absurd or unreasonable*” (emphasis added). By invoking the “manifestly absurd or unreasonable” standard under Article 32(b), Professor Reisman thus appears to admit that Peru’s interpretation of the mandatory scope of Article 10.20(4) objections conflicts with the ordinary meaning of the Treaty’s provisions, when read as a whole in accordance with Article 31 of the Convention.

Professor Reisman offers two reasons why, in his view, the ordinary meaning of the Treaty’s provisions leads to “manifestly absurd or unreasonable” results. First, he claims that “if the objection to competence is not part of subparagraph 4 . . . the expedited procedure [under subparagraph 5] would perforce include objections to competence that also involve disputes

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<sup>20</sup> Prof. Reisman Op. p. 2.

<sup>21</sup> *Id.*, p. 6 (emphasis in original).

about facts,” which “would hardly lend themselves to an expedited procedure.”<sup>22</sup> However, a tribunal can resolve simple factual issues in an Article 10.20(5) proceeding while also deferring any complex factual disputes until a later phase of the arbitration. In fact, a tribunal could decide competence objections under Article 10.20(5) and still exercise its authority (under UNCITRAL Rule 23(3)) to determine competence as a preliminary question (which Claimant invited and Respondent rejected). This reality undermines Respondent’s argument entirely, which is an expected result when the wording of the Treaty is twisted beyond recognition.

Second, Professor Reisman claims that Renco’s interpretation of Articles 10.20(4) and 10.20(5) “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,” adding that “instead of creating an efficient and economical procedure, this interpretation . . . would actually incentive trifurcation, which is hardly consistent with efficiency and economy.”<sup>23</sup> This argument suffers from the same malady as the first, and thus fails for the same reason. The expedited procedure under Article 10.20(5) is not the respondent’s “only opportunity” to raise competence objections as a preliminary question. A respondent could make an application to a tribunal to hear any and all competence objections as a preliminary question under UNCITRAL Rule 23(3), as many respondents do in treaty cases. Moreover, under Peru’s (and Professor Reisman’s) interpretation of the Treaty, which would require the a tribunal to hear competence objections as a preliminary question outside the mandatory scope of Article 10.20(5) or the permissive scope of UNCITRAL Rule 23(3), there would be even greater risk for “trifurcation” (or even “quadrifurcation”). Accordingly, contrary to Respondent’s arguments, the ordinary meaning of Articles 10.20(4) and 10.20(5) does not lead to “manifestly absurd or unreasonable” results. Quite the opposite.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

The final paragraph of Professor Reisman’s opinion evidences a similar lack of understanding on his part (and thus Respondent’s) of the interplay between Articles 10.20(4) and 10.20(5) of the Treaty. Professor Reisman states that he “can find no basis in the text to support” Claimant’s position that all facts are assumed to be true in a claim objection that a respondent brings under Article 10.20(4), and facts are not assumed to be true under a competence objection that a respondent brings under Article 10.20(5). The text supporting this position is Article 10.20(4)(c) of the Treaty, which provides that in deciding an objection under Article 10.20, paragraph 4, the tribunal shall assume to be true claimant’s factual allegations in support of any claim. No equivalent or similar text appears in Article 10.20, paragraph 5. Article 10.20(5) provides that a tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that a dispute is not within the tribunal’s competence in the event that the respondent so requests within 45 days after the tribunal is constituted. Thus, according to the ordinary meaning of the text, if a respondent seeks expedited resolution of a claim objection that arises substantively under Article 10.20(4), the respondent may bring the objection under Article 10.20(5) within 45 days after the tribunal is constituted, and the tribunal will hear it on an expedited basis. In such case, all facts will be assumed to be true per Article 10.20(4)(c). But if a respondent brings a competence objection under Article 10.20(5), the facts are not assumed to be true because Article 10.20(4) is not implicated in that scenario, and nothing in Article 10.20(5) says that the facts will be assumed true when a competence objection is brought under Article 10.20(5).

**C. The No Waiver Provision in Article 10.20(4)(d)**

Peru places heavy reliance for its position on Article 10.20(4)(d), which provides that “[t]he 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.” Peru contends that “[t]he necessary corollary of this provision is that a respondent may raise an objection as to competence under Article 10.20.4,” asserting that “[i]f 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>24</sup> No such “necessary corollary” flows from the express text of Article 10.24(4)(d) as Respondent argues, and if one were to accept Respondent’s indirect “necessary corollary” argument in interpreting Article 10.20(4)(d), it would impermissibly contradict the clear and express text of Article 10.20(4) and 10.20(5).

The reason for the “without prejudice” language is easily understood, when one recognizes (as Peru does) that Article 10.20(4) has its genesis in Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>25</sup> As Peru itself notes when citing and quoting Claimant’s letter to the Tribunal dated July 29, 2013, Article 10.20(4) “is similar to the motion to dismiss 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.”<sup>26</sup>

As Claimant explained in its April 3, 2014 submission, if a defendant in US litigation chooses to bring a Rule 12(b)(6) motion to dismiss a claim for its alleged legal insufficiency, the defendant also must simultaneously bring a motion objecting to the court’s jurisdiction, and

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<sup>24</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 13.

<sup>25</sup> United States-Peru Trade Promotion Agreement Implementation Act, pl. 22 (Dec. 14, 2007). *See also Oxford Handbook of International Investment Law* 957-59 (Peter T. Muchlinski, Federico Ortino, and Christoph Schreuer eds., 2008) (“Article 10.20 was inspired by the ‘motion to dismiss’ procedure, in which the defendant asserts that the plaintiff has failed to state a claim upon which relief can be granted (Rules of Federal Procedure, Rule 12(b)(6))”).

<sup>26</sup> *See* Respondent’s Submission, Mar. 21, 2014, at n. 20.

failure to do so will result in a waiver of such jurisdictional objections.<sup>27</sup> The “no waiver” language in Article 10.20(4)(d) of the Treaty appropriately confirms that there will be no similar waiver under the Treaty, notwithstanding its similarity to Rule 12(b)(6).

## **II. Excerpts of Summaries of Negotiation Sessions Held Four to Five Years Prior to Enactment Do Not Support Respondent’s Reading of Article 10.20(4)**

Peru’s citation to select and partial excerpts of summaries of negotiation sessions, apparently prepared by Peru’s Ministry of Foreign Trade and Commerce (although they also included other Andean countries, including Ecuador and Colombia), provides no support for Respondent’s argument that a tribunal is obligated to hear competence objections under the confines of Article 10.20(4).<sup>28</sup> First, the incomplete portions of the documents upon which Respondent relies concern early negotiations that occurred in 2004-2005 – almost five years prior to the enactment of the treaty, and could not alter the express and ordinary text of the final Treaty even if they were in conflict with the final Treaty.

Second, the comments are not in conflict with the final version of the Treaty because Peru’s argument seems to be based on what appears to be a faulty premise that the statements made during these early negotiations regarding preliminary objections relate only to Article 10.20(4) in the final version of the Treaty.<sup>29</sup> The early draft provisions to which Respondent refers appear to relate not only to the precursor to Article 10.20(4), but also to the precursors to Articles 10.20(5) and 10.20(6).<sup>30</sup> The final version of the treaty contains Article 10.20(5), which expressly allows preliminary objections to competence, while Article 10.20(4) makes clear that

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<sup>27</sup> See Claimant’s Submission, Apr. 3, 2014, p. 8, quoting *Federal Civil Rules Handbook*, Baicker-McKee, Janssen, Corr (2014).

<sup>28</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 10.

<sup>29</sup> *Id.* at ¶¶ 10-11.

<sup>30</sup> RLA-16, 29; RLA-17, 37.

other objections, such as competence, do not fall within its mandatory scope. Thus, there is nothing to be gleaned with respect to the current dispute from such statements as: “[the treaty should] specify the possibility of raising preliminary objections regarding the lack of competence of the tribunal to resolve a claim” and “[the treaty should] point out specifically that one of the preliminary objections may be that the issue is not within the competence of the tribunal.”<sup>31</sup>

The summaries of negotiations simply make clear that a respondent may bring a preliminary objection to the tribunal’s competence under the Treaty. But the question here is *not* whether the Treaty permits a respondent to raise a preliminary objection to the tribunal’s competence (it can under Art. 10.20(5)); the question is whether a tribunal is required to hear a preliminary objection of competence under the confines of Article 10.20(4). It is not.

The language Peru cites from the Eighth Round of negotiations is similarly neutral. 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”<sup>32</sup> is consistent with the “without prejudice” clause in Article 10.20(4)(d). As Claimant has made clear, nothing in Article 10.20(4) prevents a party from bringing a preliminary competence objection under Article 10.20(5), or prevents a tribunal from exercising its discretionary authority to decide a competence objection as a preliminary question—in fact, that is precisely what the Treaty provides. Article 10.20(5) also captures the State parties’ agreement that “the arbitration proceedings . . . have a stage of preliminary considerations, in which States can question the competence of arbitral tribunals.”<sup>33</sup>

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<sup>31</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 10.

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

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

### **III. The Relevant DR-CAFTA Cases Do Not Support Respondent’s Reading of Article 10.20(4); They Support Claimant’s Interpretation**

The *Pac Rim v. El Salvador, Commerce Group, and Railroad Development Corporation (RDC)* decisions do not support Respondent’s reading of Article 10.20(4).

*Pac Rim v. El Salvador*

Peru attempts to reconcile its position with the *Pac Rim v. El Salvador* decision by suggesting that the respondent in that case could have brought its competence objection under Article 10.20(4), but instead simply opted to bring it under Article 10.20(5).<sup>34</sup> The *Pac Rim* decision makes clear that this suggestion lacks any merit. First, the *Pac Rim* tribunal expressly recognized that a competence objection can only be brought under Article 10.20(5): “As regards the expedited procedure under Article 10.20.5, it is twinned with the procedure under Article 10.20.4 *with an additional ground of objection as to competence.*”<sup>35</sup> Second, in addition to bringing a competence objection under Article 10.20(5), the respondent also brought objections for failure to state a claim upon which relief could be granted under Article 10.20(4). The respondent’s decision to bring its preliminary objections under two different articles strongly suggests that (unlike Peru) it understood the limited scope of the objections that fall within Article 10.20(4).

Peru then suggests that the *Pac Rim* decision supports Peru’s position because it found that Article 10.20(5) permitted the tribunal to decide objections under 10.20(4) concurrently with objections to the tribunal’s competence.<sup>36</sup> This is a straw man. In fact, the *Pac Rim* finding on this point is consistent with both Respondent’s and Claimant’s reading of Article 10.20(5). As

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<sup>34</sup> *Id.* at ¶ 42.

<sup>35</sup> *Pac Rim Cayman LLC v. The Republic of El Salvador*, Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 (hereinafter, “*Pac Rim Cayman*”), ¶ 106 (emphasis added).

<sup>36</sup> Respondent’s Submission, Apr. 23, 2014, at ¶¶ 42-43.

Claimant has made clear, the issue here is whether the Treaty obligates the Tribunal to address competence objections as a preliminary objection under Article 10.20(4), not whether Article 10.20(4) claim objections can be adjudicated through the expedited procedures of Article 10.20(5). Thus, Respondent’s conclusion that “the scope of the objections under Articles 10.20.4 and 10.20.5 is the same” is simply wrong.<sup>37</sup>

*Commerce Group v. El Salvador*

Peru then argues that *Commerce Group v. El Salvador* supports its reading of Article 10.20(4), because, according to Peru, “there is no indication that the tribunal or either party viewed [Article 10.20(5)] as the sole mechanism for raising preliminary competence objections.”<sup>38</sup> However, it is clear that the respondent State in *Commerce Group* did consider Article 10.20(5) as the sole mechanism for raising preliminary competence objections, all of which it raised under that article.<sup>39</sup>

Peru is also incorrect in its argument that the *Commerce Group* tribunal “treated the [10.20.5] waiver objection as a 10.20.4 objection,” based on a single reference to the requirement in Article 10.20(4) that “the tribunal was required to assume the truth of the factual allegations.”<sup>40</sup> The tribunal’s decision to incorporate the 10.20(4)(c) limitation on factual considerations into its Article 10.20(5) analysis cannot be read to endorse Respondent’s theory about the scope of 10.20(4). Its decision certainly cannot support Peru’s conclusion that “*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

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<sup>37</sup> *Id.* at ¶ 43 (citing Prof. Reisman Op.).

<sup>38</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 44.

<sup>39</sup> *Commerce Group v. Republic of El Salvador*, The Republic of El Salvador’s Preliminary Objection Under Article 10.20.5 of the Dominican Republic-Central America Free Trade Agreement, August 16, 2010 (hereinafter, “*Commerce Group*”).

<sup>40</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 44.

10.20.4.”<sup>41</sup> To the contrary, consistent with Claimant’s and *Pac Rim*’s interpretation of Article 10.20(4), *Commerce Group* considered preliminary competence objections under Article 10.20(5), not 10.20(4).

*Railroad Development Corporation (RDC) v. Guatemala*

Peru argues that “the *RDC* tribunal’s adjudication of jurisdictional objections under DR-CAFTA Article 10.20.4 flies in the face of Renco’s reading of nearly identical language in Article 10.20.4 of the Treaty.”<sup>42</sup> More accurately stated, the *RDC* tribunal’s adjudication is inconsistent with DR-CAFTA Article 10.20(4) itself.

As Renco explained in its letter to the Tribunal of July 29, 2013, the *RDC* tribunal inappropriately considered competence objections under Article 10.20(4), and in doing so the tribunal reviewed and adjudicated disputed facts, even though competence objections do not come within Article 10.20(4) and facts are assumed to be true in Article 10.20(4) applications.<sup>43</sup> Guatemala first “objected to Claimant’s proposal [that the issue be limited to the facts presented by claimant], *inter alia*, because ‘its jurisdictional objections are inextricably intertwined with certain facts and thus the legal issues involved can only be evaluated with reference to those facts.’”<sup>44</sup> In response, “the Tribunal issued Procedural Order No. 5 deciding to hold a single three-day hearing on the objections to its jurisdiction.”<sup>45</sup> At the three-day hearing, the parties provided—and the tribunal considered—expert testimony and cross-examination on the issue of

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<sup>41</sup> *Id.* at ¶ 45.

<sup>42</sup> *Id.* at ¶ 41.

<sup>43</sup> Claimant’s Letter to the Tribunal, July 29, 2013, at 5.

<sup>44</sup> *Railroad Development Corporation (RDC) v. Guatemala*, ICSID CASE NO. ARB/07/23, Second Decision on Objections to Jurisdiction (hereinafter, “*RDC*”), ¶ 11 (“On November 24, 2009, Respondent objected to Claimant’s proposal, *inter alia*, because “its jurisdictional objections are inextricably intertwined with certain facts and thus the legal issues involved can only be evaluated with reference to those facts.”).

<sup>45</sup> *Id.* at ¶ 12 (“On December 1, 2009, the Tribunal issued Procedural Order No. 5 deciding to hold a single three-day hearing on the objections to its jurisdiction.”)

the timing and nature of the critical “breaching” resolution, among other factual issues.<sup>46</sup> This approach was directly contrary to subparagraph (c) of Article 10.20(4), which (as discussed above) requires the tribunal to assume as true all of the claimant’s factual allegations when deciding an objection under Article 10.20(4). Thus, it is not even clear that the *RDC* tribunal was relying on its authority under Article 10.20(4) when deciding the respondent’s competence objections as it resembled more a full-blown jurisdictional hearing, with disputed facts, which is not permitted under 10.20(4) and which the parties in the instant case have agreed to defer until the merits phase.

There is no indication—as Respondent now suggests—that the *RDC* tribunal’s decision to adjudicate the facts of the jurisdictional objections was “non-controversial” or an “oversight” by claimant.<sup>47</sup> To the contrary, claimant made clear that it did not consider that the tribunal should adjudicate the facts as part of an Article 10.20(4) proceeding, proposing a “bifurcated hearing whereby the Tribunal would hear first oral argument on whether any of Respondent’s jurisdictional objections are maintainable or proper as a matter of law without any need to resolve any disputed questions of fact.”<sup>48</sup> The tribunal did not accept this position.<sup>49</sup> It is also untrue that the tribunal only considered “undisputed facts;”<sup>50</sup> in fact, the tribunal made factual determinations based on expert testimony.<sup>51</sup>

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<sup>46</sup> *Id.* at ¶¶ 120-124; *see also id.* at ¶ 8 (“September 24, 2009, Guatemala filed its Memorial on Objections to Jurisdiction (‘Respondent’s Memorial’); Claimant filed its Counter-Memorial on Jurisdiction (‘Claimant’s Counter-Memorial’) on October 26, 2009”).

<sup>47</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 41 (citing Prof. Reisman’s unfounded proposition).

<sup>48</sup> *Id.* at ¶ 10.

<sup>49</sup> *Id.* at ¶¶ 10-12 (“Respondent objected to Claimant’s proposal, inter alia, because “its jurisdictional objections are inextricably intertwined with certain facts and thus the legal issues involved can only be evaluated with reference to those facts. On December 1, 2009, the Tribunal issued Procedural Order No. 5 deciding to hold a single three-day hearing on the objections to its jurisdiction.”).

<sup>50</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 41.

<sup>51</sup> *RDC*, Second Decision on Objections to Jurisdiction, at ¶¶ 120-124 (making factual determinations).

Peru also tries to downplay the fact that the respondent State was able to bring a jurisdictional objection under Article 10.20(5) and then another one under Article 10.20(4), leading the *RDC* tribunal to express concern that “[t]his led in the present case to two jurisdictional hearings on different points, which is inconvenient, to say the least.”<sup>52</sup> This makes sense: Respondent is asking this Tribunal to endorse a reading that would permit this type of inefficiency and duplication. And it is precisely this type of situation that Claimant’s reading of the Treaty would avoid.

For the foregoing reasons, to the extent that the *RDC* tribunal determined objections to its competence under Article 10.20(4) (which is not clear), its decision should not be given any weight in these proceedings.<sup>53</sup> Indeed, the tendency of some parties, courts and tribunals to blur the fundamental difference between lack of competence and failure to state a cognizable legal claim, as Peru does here, may at least partly explain why the *RDC* tribunal struggled with this issue.

#### **IV. Disputed Factual Issues Permeate Respondent’s Competence Objections**

In its April 23, 2014 submission, Peru asserts that it is raising only three preliminary objections under Article 10.20(4), not six as claimed by Renco.<sup>54</sup> However, Peru does not attempt to explain how the six distinct objections that it raised in its March 21, 2014 submission

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<sup>52</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 40.

<sup>53</sup> Professor Reisman submitted an opinion interpreting the DR-CAFTA treaty in the *Pac Rim Cayman LLC v. El Salvador* case, which the tribunal rejected. Professor Reisman opined that the investor violated the waiver requirement under DR-CAFTA Article 10.18.2(b) by asserting, within the context of the ICSID proceeding itself, a claim against El Salvador for violations of the Investment Law of El Salvador.<sup>53</sup> In disagreeing with Professor Reisman’s opinion, the Tribunal concluded: “[T]o decide otherwise would require an interpretation of CAFTA Article 10.18(2) wholly at odds with its object and purpose and potentially resulting in gross unfairness to claimant. *Pac Rim Cayman*, ¶ 253.

<sup>54</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 24.

(and that Renco listed in the second paragraph of its April 3, 2014 letter) can be counted as three. Merely grouping the six objections under three headings, as Peru does at paragraphs 25 to 27 of its submission, does not suffice to alter their number.

As Renco explained in its April 3, 2014 letter, and in reply above, five of Peru's six objections fall outside the scope of Article 10.20(4) because they have nothing whatsoever to do with whether Renco has stated a cognizable "claim," as required by Article 10.20(4); instead, they relate only to the Tribunal's competence to hear this dispute.<sup>55</sup> The five objections in question are: (i) presentation of an invalid waiver, (ii) violation of the waiver, (iii) lack of jurisdiction *ratione temporis*, (iv) violation of the Treaty's three-year limitations period, and (v) failure to submit two factual issues for determination by a technical expert prior to commencement of the arbitration, all of which Peru itself has characterized as jurisdictional. Only Peru's objection for failure to state a claim for breach of the investment agreement arguably falls within Article 10.20(4).

Each of Respondent's five competence objections involves such an abundance of disputed facts that it would be virtually impossible for the Tribunal to determine Respondent's competence objections without a factual inquiry. This reality exposes Respondent's true motive here. Respondent wishes to inappropriately flesh out Claimant (and possibly the Tribunal) on jurisdictional issues, and secure two opportunities to bring exactly the same competence objections in two different phases of the case. This is a bogus legal strategy designed to gain an advantage for Peru in these proceedings.

Article 10.20(4)(c) provides that "[i]n deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the

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<sup>55</sup> See Claimant's Submission, Apr. 3, 2014, at 1-2.

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.*” This proceeding is governed by the UNCITRAL Arbitration Rules, as revised in 2010.<sup>56</sup> Accordingly, Article 10.20(4)(c) requires the Tribunal to assume as true all of the factual allegations contained in Renco’s 192-page Memorial on Liability, including the 190 factual exhibits, four fact witness statements and three expert reports that Renco submitted in support of its Memorial.<sup>57</sup>

The following is a brief overview of some factual issues arising from Peru’s five competence objections, which provides some insight into why i) an objection as to competence appropriately is not included within objections for failure to state a claim upon which relief can be granted, and ii) Peru is being disingenuous when it contends that it is assuming all of Renco’s facts to be true for purposes of (improperly) proposing to bring an objection to competence under Article 10.20(4). For example,

- Peru has notified its intent to object under Article 10.20(4) for lack of jurisdiction *ratione temporis* on the ground that Renco’s claims “turn on alleged facts that predate the entry into force of the Treaty [on February 1, 2009].”<sup>58</sup> Peru does not specify which of Renco’s claims allegedly turn on facts that predate the Treaty’s entry into force for the simple reason that even a cursory review of Renco’s Memorial on Liability demonstrates the falsity of Peru’s assertion. For example, Renco’s claim that Peru breached the investment agreement consisting of the Guaranty Agreement and the Stock Transfer Agreement includes Peru’s *continuing* failure to assume liability for the claims asserted in the St. Louis Lawsuits (the vast majority of which were not even filed until 2012, more than

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<sup>56</sup> See Procedural Order No. 1, ¶ 1.1.

<sup>57</sup> In its March 21, 2014 submission, Peru conceded that under Article 10.20(4)(c), the Tribunal would be required to accept as true all of the factual allegations contained in Renco’s Memorial on Liability, to which Peru cited at least five times. See Respondent’s Submission, Mar. 21, 2014, at nn. 8, 15, 16, 17, 19. However, contrary to Peru’s own position, Professor Reisman asserts in his April 22, 2014 opinion that “[t]he factual matrix for [the Article 10.20(4)] procedure is the claimant’s narrative *in the notice of arbitration.*” Prof. Reisman Op. at 4 (emphasis added), which is incorrect.

<sup>58</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 26.

three years after the Treaty entered into force).<sup>59</sup> Likewise, Renco's claim that Peru breached the fair and equitable treatment standard through, among other things, its pattern of mistreatment of Doe Run Peru's *force majeure* extension requests and proposed restructuring plans includes conduct that occurred during the period from 2010 to 2012, well after the Treaty entered into force.<sup>60</sup>

- Similarly, Peru's objection that Renco's claims violate the three-year statute of limitations under Article 10.18(1) of the Treaty fails on its face. Again, Peru does not specify which of Renco's claims allegedly violates this limitations period for the simple reason that none of them even arguably does. As already noted, Renco's claims all arose after the Treaty entered into force on February 1, 2009, and Renco filed its initial notice of arbitration on April 4, 2011, well within the three-year period under Article 10.18(1).
- Peru also obfuscates its two separate waiver objections in order to conceal their patent lack of merit, in the hope that the Tribunal will allow the objections to go forward to an extensive briefing stage. Peru objects that: (1) Renco presented an invalid waiver; and (2) Renco violated the waiver that it presented.<sup>61</sup> In its April 23, 2014 submission, Peru contends that these two objections "tur[n] 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."<sup>62</sup> Apart from this deliberately vague statement, Peru fails to provide any clue as to the basis for either of its two waiver objections, nor does it indicate what "limited undisputed facts" it intends to rely upon. The reasons for Peru's obfuscation are clear: its objections are completely devoid of any merit because Renco has presented a waiver that conforms *verbatim* to the waiver required under Article 10.18(2) of the Treaty, and it has never done anything that even arguably violates this waiver.
- Finally, Peru contends that Renco's claim is inadmissible before this Tribunal because it failed to submit two factual issues for determination by a technical expert prior to bringing the claim.<sup>63</sup> In its April 23, 2014 submission, Peru contends that "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."<sup>64</sup> However, as already set forth in Renco's Memorial on Liability, neither Peru nor Activos Mineros ever submitted these factual issues for determination by a technical expert, nor did they ever

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<sup>59</sup> See Renco's Memorial on Liability, Part IV.A. It is well-settled under international law that a State's "failure to pay sums due under a contract is an example of a continuing breach." *SGS v. Philippines*, ¶ 167.

<sup>60</sup> See Renco's Memorial on Liability, Part IV.C.

<sup>61</sup> Respondent's Submission, Mar. 21, 2014, at 4.

<sup>62</sup> Respondent's Submission, Apr. 23, 2014, at ¶ 25 (emphasis added).

<sup>63</sup> Respondent's Submission, Mar. 21, 2014, at 6-7.

<sup>64</sup> Respondent's Submission, Apr. 23, 2014, at ¶ 27.

request that Renco do so, despite numerous opportunities to do so.<sup>65</sup> Under these circumstances (among others), Peru's objection could not possibly succeed "as a matter of law," even if competence objections were included under Article 10.20(4), which they are not.

## V. Other Tribunals' Understanding of ICSID Article 41(5) is Irrelevant

Contrary to Respondent's assertions, prior tribunals' interpretations of Article 41(5) of the ICSID Convention are irrelevant to how this Tribunal should read Article 10.20(4) of the Treaty. The *Pac Rim* tribunal clearly articulated this point: "[t]he Tribunal was also not materially assisted by comparisons with NAFTA or the new ICSID Arbitration Rule 41.5, which have different wording and do not share exactly the same object and purpose."<sup>66</sup>

Moreover, as shown above, Article 10.20(4) distinguishes between preliminary objections to competence and a preliminary objection for failure to state a claim upon which relief may be granted. In contrast, Article 41.5 provides simply that "a party may . . . file an objection that a claim is manifestly without legal merit," without any reference to competence or jurisdiction. This unqualified language underpinned the *Brandes* tribunal's determination that Article 41.5 could include preliminary jurisdictional objections.

## VI. Conclusion

The scope of the objections that a respondent may bring under Article 10.20(4) of the Treaty between Peru and the United States is a question of first impression. This Tribunal not only has the obligation to resolve this important issue for the parties to this dispute in accordance with the Treaty, the UNCITRAL Rules and the interpretive mandate of the Vienna Convention, but the Tribunal also has the opportunity to render a reasoned award that may provide thoughtful

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<sup>65</sup> See Renco's Memorial on Liability, ¶¶ 79-90.

<sup>66</sup> *Pac Rim Cayman* at ¶ 118.

clarity, from the outset, to others who confront this rather serious issue under this Treaty. For the reasons explained above, Claimant respectfully requests that the Tribunal issue an award declaring that Respondent's five objections to the Tribunal's competence fall outside Article 10.20(4) of the Treaty, and that pursuant to the agreement between the parties as reflected in Procedural Order No. 1, Respondent will bring its objections to the Tribunal's competence (if any) during the merits phase of the case.

Dated: New York, New York  
May 7, 2014

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