

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER CHAPTER 10 OF THE UNITED STATES –
PERU TRADE PROMOTION AGREEMENT AND
THE UNCITRAL ARBITRATION RULES (2010)**

In the arbitration proceeding between

THE RENCO GROUP, INC.
Claimant

and

REPUBLIC OF PERU
Respondent

UNCT/13/1

**DECISION AS TO THE SCOPE OF THE
RESPONDENT'S PRELIMINARY OBJECTIONS UNDER ARTICLE 10.20.4**

Members of the Tribunal

Dr. Michael J. Moser, Presiding Arbitrator
The Honorable L. Yves Fortier, CC, QC, Arbitrator
Mr. Toby T. Landau, QC, Arbitrator

Tribunal Secretary
Ms. Natalí Sequeira

Date

December 18, 2014

Representation of the Parties

Representing The Renco Group, Inc.:

Mr. Edward G. Kehoe
Mr. Guillermo Aguilar Alvarez
Mr. Henry G. Burnett
Ms. Caline Mouawad
King & Spalding LLP
1185 Avenue of the Americas
New York, New York 10036-4003

Representing the Republic of Peru:

Mr. Jonathan C. Hamilton
Ms. Andrea J. Menaker
White & Case LLP
701 Thirteenth Street N.W.
Washington, D.C. 20005

and

Mr. Eduardo Ferrero Costa
Ms. Maricarmen Tovar Gil
Estudio Ehecopar
De la Floresta 497, Piso 5
San Borja, Lima, Peru

TABLE OF CONTENTS

I.	INTRODUCTION AND PARTIES	1
II.	PROCEDURAL HISTORY.....	1
III.	SUMMARY OF THE PARTIES' POSITIONS.....	6
	A. Introduction	6
	B. Peru's Notification of Preliminary Objections under Article 10.20.4 of the Treaty.....	6
	(1) Violation of the Treaty's Waiver Provisions	7
	(2) Lack of Jurisdiction <i>Ratione Temporis</i>	8
	(3) Failure of Claims under the Plain Language of the Contract	8
	C. Peru's Position Regarding its Entitlement to Notify Preliminary Objections under Article 10.20.4 of the Treaty	9
	(1) The Treaty Provides a Procedure for Preliminary Objections	10
	(2) Investment Treaty Jurisprudence Confirms that Peru's Objections are within the Scope of Article 10.20.4.....	14
	(3) Peru's Exercise of Its Treaty Rights Cannot be Circumscribed.....	15
	(4) The Non-Disputing Party Submission of the USG Underscores that the Tribunal Can, and Should, Decide All Preliminary Objections at this Juncture	16
	(5) Request for Relief	17
	D. Renco's Submissions Challenging the Scope of Peru's Preliminary Objections	17
	(1) The Respondent's Interpretation of Article 10.20.4 Lacks Any Merit	19
	(a) 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	20
	(b) The Text and Context of Article 10.20.4.....	20
	(c) The Text and Context of Article 10.20.5.....	23
	(d) The No Waiver Provision in Article 10.20.4(d)	25
	(2) The Cases to Which the Respondents Cite Do Not Support the Respondent's Argument	25
	(3) Excerpts of Summaries of Negotiation Sessions Held Four to Five Years Prior to Enactment Do Not Support the Respondent's Reading of Article 10.20.4	27
	(4) Disputed Factual Issues Permeate the Respondent's Competence Objections	28
	(5) The Non-Disputing Party Submission of the USG Confirms that All Competence Objections Fall Outside the Scope of Article 10.20.4.....	29
	(6) Request for Relief	30
	E. Submission of the USG Pursuant to Article 10.20.2 Regarding the Interpretation of Article 10.20.4 of the Treaty	30
	(1) Expedited Review Mechanisms in U.S. International Investment Agreements ...	31

(2) Articles 10.20.4 and 10.20.5 of the Treaty.....	32
IV. THE TRIBUNAL'S ANALYSIS AND DECISIONS	33
A. The Relevant Issues	33
B. The Relevant Treaty Provisions	34
C. Interpretation of the Scope of Article 10.20.4.....	35
(1) The Question Presented and the Tribunal's Remit	35
(2) Principles of Treaty Interpretation	36
(3) Textual Analysis.....	37
(4) Object and Purpose	45
(5) Treaty Negotiations.....	46
(6) Investment Treaty Jurisprudence	48
(7) Other.....	49
(8) Conclusion.....	49
D. The Respondent's Preliminary Objections.....	50
E. Summary and Decisions	52
V. COSTS.....	53
VI. OTHER MATTERS.....	53

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Claimant	The Renco Group, Inc.
Claimant's Memorial	Claimant's Memorial on Liability submitted on February 20, 2014
Claimant's Submission, April 3, 2014	Claimant's submission challenging the scope of the Respondent's preliminary objections submitted on April 3, 2014
Claimant's Submission, May 7, 2014	Claimant's Reply on the Scope of Respondent's Article 10.20.4 Objections submitted on May 7, 2014
Claimant's Submission, October 3, 2014	Claimant's Comments on the Submission of the United States of America regarding the Interpretation of Article 10.20.4 submitted on October 3, 2014
<i>Commerce Group v. El Salvador or Commerce Group</i>	<i>Commerce Group Corp. et al. v. El Salvador</i> , ICSID Case No. ARB/09/17
<i>Commerce Group v. El Salvador Award</i>	<i>Commerce Group Corp. et al. v. El Salvador</i> , ICSID Case No. ARB/09/17, ICSID Case No. ARB/09/17, Award of March 14, 2011
Cremades Article	Bernardo M. Cremades, "The Use of Preliminary Objections in ICSID Annulment Proceedings", Kluwer Arbitration Blog dated September 4, 2013
Cremades Letter	Letter to the Tribunal from Mr. Bernardo M. Cremades dated September 16, 2014
DR-CAFTA	The Dominican Republic–Central America Free Trade Agreement signed on August 5, 2004
First Session	The first procedural session of the Tribunal and the Parties held at the International Dispute Resolution Centre (IDRC) in London on July 18, 2013
Herrera Letter	Letter from Mr. Carlos Herrera Perret, Executive Director of PROINVERSIÓN, Peru's Private Investment Promotion Agency

ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) as amended and in effect from April 10, 2006
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
<i>Methanex Corp. v. USA or Methanex</i>	<i>Methanex Corporation v. United States of America</i> , NAFTA/UNCITRAL
MINCETUR	Peru's Ministry of Foreign Trade and Tourism
<i>Pac Rim v. El Salvador or Pac Rim</i>	<i>Pac Rim Cayman LLC v. Republic of El Salvador</i> , ICSID Case No. ARB/09/12
<i>Pac Rim v. El Salvador</i> Decision on Respondent's Preliminary Objections	<i>Pac Rim Cayman LLC v. Republic of El Salvador</i> , 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
Parties	The Renco Group, Inc.(the Claimant) and the Republic of Peru (the Respondent)
Peru	The Republic of Peru
Professor Reisman's Letter	Letter from Professor W. Michael Reisman to Mr. Jonathan Hamilton dated April 22, 2014, Annex A to Respondent's Submission of April 23, 2014
<i>RDC v. Guatemala or RDC</i>	<i>Railroad Development Corp. v. Republic of Guatemala</i> , ICSID Case No. ARB/07/23
<i>RDC v. Guatemala</i> Decision on Objections to Jurisdiction	<i>Railroad Development Corp. v. Republic of Guatemala</i> , ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5 of November 17, 2008
<i>RDC v. Guatemala</i> Second Decision on Objections to Jurisdiction	<i>Railroad Development Corp. v. Republic of Guatemala</i> , ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction of May 18, 2010
Renco	The Renco Group, Inc.
Respondent	The Republic of Peru
Respondent's Submission, April 23, 2014	Respondent's submission on the scope of the preliminary objections submitted on April 23, 2014

Respondent's Submission, October 4, 2014 (as amended)"	Respondent's submission commenting on the Submission of the United States of America, submitted on October 4, 2014 (as amended)
Secretary-General	The Secretary-General for the time being of ICSID
Treaty	The United States - Peru Trade Promotion Agreement signed on April 12, 2006
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law Arbitration Rules (revised 2010)
Unofficial Translation of the MINCETUR 6th Round Negotiations	Peru's Ministry of Foreign Trade and Tourism ("MINCETUR"), 6th Round of Negotiations in Tucson, Arizona, United States, November 29-December 5, 2004 (unofficial translation)
Unofficial Translation of the MINCETUR 7th Round Negotiations	MINCETUR, 7th Round of Negotiations in Cartagena, Colombia, February 7-11, 2005 (unofficial translation)
Unofficial Translation of the MINCETUR 8th Round Negotiations	MINCETUR, 8th Round of Negotiations in Washington, United States, March 14-18, 2005 (unofficial translation)
USG	The Government of the United States of America
USG's Submission, September 10, 2014	A written submission filed by the Government of the United States of America as a non-disputing State Party pursuant to Article 10.20.2 of the United States - Peru Trade Promotion Agreement, submitted on September 10, 2014
Vienna Convention	The Vienna Convention on the Law of Treaties, May 23, 1969, Article 31(1), 1155 U.N.T.S. 331

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted on the basis of the United States - Peru Trade Promotion Agreement dated April 12, 2006 (the "Treaty") and the UNCITRAL Arbitration Rules (2010).
2. The Claimant is The Renco Group, Inc. and is hereinafter referred to as "Renco" or the "Claimant."
3. The Respondent is the Republic of Peru and is hereinafter referred to as "Peru" or the "Respondent."
4. The Claimant and the Respondent are hereinafter collectively referred to as the "Parties." The Parties' respective representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On December 29, 2010, the Claimant served its Notice of Intent to Commence Arbitration.
6. On April 4, 2011, the Claimant served its Notice of Arbitration and Statement of Claim, which it subsequently amended on August 9, 2011.
7. By a communication dated February 5, 2013, the Parties informed ICSID that the Claimant had appointed The Honorable L. Yves Fortier, CC, QC, a Canadian national, as its party-appointed arbitrator and that the Respondent had appointed Mr. Toby T. Landau, QC, a British national, as its party-appointed arbitrator in these proceedings. The Parties further requested the Secretary-General of ICSID to carry out the role of Appointing Authority for the appointment of the Presiding Arbitrator pursuant to Article 10.19.4 of the Treaty and the procedure jointly agreed by the Parties.
8. By letter dated February 6, 2013, the Secretary-General accepted the Parties' request and invited the Parties to provide "a copy of the Notice of Intent to commence arbitration or other such document." On the same date the Centre received a copy of the Claimant's Amended Notice of Arbitration and Statement of Claim dated August 9, 2011.

9. On April 3, 2013, the Secretary-General informed the Parties that according to the procedure jointly agreed by the Parties, the Parties concurred to the designation of Dr. Michael J. Moser, an Austrian national, as the Presiding Arbitrator.
10. On April 8, 2013, the Secretary-General informed the Parties that Dr. Michael J. Moser had accepted his appointment.
11. On April 23, 2013, ICSID received a request from the Parties to act as Administering Authority in this proceeding.
12. On May 8, 2013, the Centre informed the Parties that the reference number of the proceeding would be UNCT/13/1 and invited the Parties to submit copies of any communications that were exchanged between the Parties prior to the appointment of ICSID as the Administering Authority and that should be transmitted to the Tribunal as part of the case record.
13. On May 10, 2013, the Claimant informed the Centre that the Parties considered that it was not necessary to provide the Tribunal with any correspondence exchanged between counsel to date and that both Parties reserved their right to produce any such correspondence at a future date.
14. On the same date, the Respondent submitted its Response to the Claimant's Amended Notice of Arbitration and Statement of Claim dated August 9, 2011.
15. On May 13, 2013, the Centre circulated the statements of independence duly signed by the three members of the Tribunal pursuant to Article 11 of the UNCITRAL Arbitration Rules.
16. The first procedural session of the Tribunal and the Parties was held at the International Dispute Resolution Centre (IDRC) in London on July 18, 2013 (the "First Session"). Present at the First Session were:

Members of the Tribunal:

Dr. Michael J. Moser, Presiding Arbitrator

The Honorable Mr. L. Yves Fortier, CC, QC, Arbitrator

Mr. Toby T. Landau, QC, Arbitrator

ICSID Secretariat:

Ms. Natalí Sequeira, Tribunal Secretary

Assistant to The Honorable Mr. L. Yves Fortier CC, QC:

Ms. Annie Lespérance¹

Attending on behalf of the Claimant:

Mr. Dennis A. Sadlowski, The Renco Group, Inc.

Mr. Edward G. Kehoe, King & Spalding LLP

Mr. Henry G. Burnett, King & Spalding LLP

Attending on behalf of the Respondent:

Mr. Carlos José Valderrama, Ministry of Economy and Finance of the Republic of Peru

Mr. Jonathan C. Hamilton, White & Case LLP

Ms. Andrea J. Menaker, White & Case LLP

Mr. Maricarmen Tovar Gil, Estudio Echecopar

Mr. Jacob S. Stoehr, White & Case LLP

Mr. Alejandro Manrique, Embassy of Peru in the United Kingdom

17. During the First Session the Parties confirmed that the Tribunal was properly constituted and that the Parties had no objections to the appointment of any member of the Tribunal. It was agreed, inter alia, that the proceedings are to be conducted in accordance with the UNCITRAL Arbitration Rules, as revised in 2010, except as modified by Chapter Ten of the Treaty and the provisions of Procedural Order No.1. The Parties further agreed that the procedural languages of the arbitration shall be English and Spanish; that the place of the arbitration shall be Paris, France; and that the location of hearings shall be Washington, D.C., but that the Tribunal may designate alternate locations for hearings (in the Americas, Paris or otherwise) upon further consultation with the Parties. During the First Session, the Parties further agreed on a procedural schedule ("Procedural Schedule").
18. The agreements of the Parties reached during the First Session were embodied in Procedural Order No. 1, signed by the three Members of the Tribunal and circulated to the Parties on August 22, 2013.

¹ Attending as an observer.

19. On February 20, 2014, the Claimant submitted its Memorial on Liability, including Witness Statements and Expert Reports.
20. On March 21, 2014, the Respondent submitted a Notice of its intention to make a submission on preliminary objections pursuant to Article 10.20.4 of the Treaty.
21. On April 3, 2014, the Claimant filed a submission challenging the scope of the Respondent's preliminary objections.
22. On April 8, 2014, the Tribunal invited the Respondent to provide further submissions regarding the scope of Article 10.20.4 by April 23, 2014 and invited the Claimant to reply by May 7, 2014.
23. On April 23, 2014, Peru filed a submission on the scope of the preliminary objections.
24. On May 7, 2014, the Claimant filed a reply on the scope of the Respondent's Article 10.20.4 Preliminary Objections.
25. By letter dated May 27, 2014, the Tribunal informed the Parties that it had benefited from the extensive written submissions and appended materials provided by the Parties on the meaning and ambit of Article 10.20.4 and that the Tribunal was comfortable to proceed to deliberations and render a preliminary decision as to the scope of the Respondent's preliminary objections on the basis of the materials as they stood. The Tribunal requested the Parties to confirm whether oral submissions were necessary.
26. On the same date the Claimant advised the Tribunal that it did not request any further argument.
27. On May 30, 2014, the Respondent indicated that "[w]hile not calling for a hearing, Peru remains available to address at a hearing or otherwise any issues of particular concern should they be identified by the Tribunal, if of assistance."
28. On June 6, 2014, the Tribunal noted that as neither Party had requested a hearing to make oral submissions, the Tribunal would "proceed to deliberations based on the materials in hand."
29. By letter dated July 8, 2014, the Tribunal informed the Parties that, in accordance with Article 10.20.2, it proposed to invite the Government of the United States of America (the "USG"), as a non-disputing Party, to comment on the issues of interpretation in

dispute between the Parties in relation to the Article 10.20.4 proceedings, and thereafter to request the Parties to comment on the submissions of the USG. The Tribunal also attached to its letter an article by Bernardo M. Cremades, entitled "*The Use of Preliminary Objections in ICSID Annulment Proceedings*,"² and invited the Parties' comments thereon.

30. On July 31, 2014, the Tribunal issued Procedural Order No. 2 providing that "[i]n accordance with Article 10.20.2 of the Peru-United States Trade Promotion Agreement (the 'Treaty') [it considered it] appropriate to invite the Government of the United States of America (the 'USG'), as the 'non-disputing Party,' to comment on issues of Treaty interpretation in dispute between the Parties in relation to Article 10.20.4 of the Treaty."
31. Procedural Order No. 2 also indicated (i) that the USG shall be invited to indicate, together with its written submission, whether it wished to make oral submissions to the Tribunal; and (ii) that the Parties shall be invited to provide comments on the non-disputing Party submission filed by the USG within three weeks from the date of receipt of said submission.
32. In accordance with Procedural Order No. 2, on August 5, 2014, the Parties sent a joint letter to the USG inviting it to comment on the interpretation of Article 10.20.4 of the Treaty within twenty-one (21) calendar days, and requesting the USG to confirm whether it wished to make oral submissions.
33. On August 21, 2014, the USG requested an extension to file its comments.
34. On August 26, 2014, the Tribunal informed the USG and the Parties that it granted the extension requested by the USG for filing its non-disputing Party submission.
35. On September 10, 2014, the USG filed a written submission as a non-disputing Party regarding the interpretation of Article 10.20.4 of the Treaty and informing that it did not wish "to exercise its right to make an oral submission at this time."
36. On September 30, 2014, the Parties requested the Tribunal to grant an extension for the submission of their comments on the USG's non-disputing Party submission. On October 1, 2014, the Tribunal informed the Parties that it granted the extension.

² Bernardo M. Cremades, "The Use of Preliminary Objections in ICSID Annulment Proceedings", Kluwer Arbitration Blog, www.kluwerarbitrationblog.com, September 4, 2013 ("Cremades Article").

37. On October 3, 2014, the Claimant filed comments on the USG's non-disputing Party submission. The Respondent filed its comments on October 4, 2014. Both submissions were simultaneously circulated by the Centre to the Members of the Tribunal on October 4, 2014. The Respondent filed a revised version of its submission on October 6, 2014.

III. SUMMARY OF THE PARTIES' POSITIONS

A. Introduction

38. The Tribunal has had the benefit of extensive written submissions by both Parties in this case, as well as on behalf of the USG, a summary of which is set out by the Tribunal in this section. The Parties have however raised a number of ancillary issues and arguments in their written submissions. For the avoidance of doubt, even if not specifically noted in the summary below, all of these issues and arguments have been carefully considered by the Tribunal in reaching its decisions.
39. The Tribunal's own analysis of the issues is reserved to Section IV below.

B. Peru's Notification of Preliminary Objections under Article 10.20.4 of the Treaty

40. Article 10.20.4 of the "Treaty" provides, inter alia, that:

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 10.26.1.

41. By letter dated March 21, 2014, Peru notified its intention to make three preliminary objections under Article 10.20.4 of the Treaty relating to (1) Renco's violation of the Treaty's waiver provisions; (2) the lack of jurisdiction *ratione temporis*; and (3) the failure of claims under the plain language of the contract. Peru contends that, in each instance, Renco's claims fail as a matter of law.

42. For the purposes of making its Article 10.20.4 preliminary objections, Peru states that it assumes Renco's factual allegations to be true, despite considering them inaccurate and incomplete. Peru does however specifically indicate that it does not otherwise accept the truth of any of Renco's allegations and expressly reserves all of its rights.
43. According to the Respondent, even a cursory examination of its three preliminary objections "confirms that no further factual development or adjudication is needed to decide them as a matter of law" and that "they concern threshold issues that may extinguish, or alternatively, narrow or clarify the scope of the claims once decided."³
44. The bases of each of Peru's preliminary objections under Article 10.20.4 of the Treaty are set out below.

(1) Violation of the Treaty's Waiver Provisions

45. It is Peru's position that, according to the Treaty, its consent to arbitrate, and therefore the Tribunal's jurisdiction, is subject to the submission of valid waivers, as set forth in Article 10.18 of the Treaty.⁴
46. The Respondent argues that the submission of such valid waivers has not taken place as (i) Renco presented an invalid waiver which does not conform with the language required by the Treaty, and (ii) Doe Run Peru S.R. Ltda. ("Doe Run Peru"), which was also required to submit a waiver, improperly purported to withdraw the waiver submitted with the Claimants' Notice of Arbitration and Statement of Claim of April 4, 2011.
47. In addition, the Respondent contends that both Renco and Doe Run Peru have violated the waiver requirement through their initiation and continuation of certain proceedings with respect to measures alleged to constitute a breach by Renco.

³ Respondent's Submission commenting on the Submission of the United States of America, submitted on October 4, 2014 (as amended) (the "Respondent's Submission, October 4, 2014 (as amended)"), at ¶ 28.

⁴ "No claim may be submitted to arbitration under this Section unless [...] the notice of arbitration is accompanied for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16." Article 10.18 of the Treaty.

(2) Lack of Jurisdiction *Ratione Temporis*

48. According to the Respondent, the Tribunal lacks jurisdiction *ratione temporis* over certain claims made in this arbitration for three reasons.
49. First, Renco has submitted claims that arose before the entry into force of the Treaty in 2009.
50. Second, Renco has submitted claims based on facts that pre-date the entry into force of the Treaty.
51. Third, Renco has submitted claims relating to alleged breaches that occurred more than three years after Renco first acquired knowledge, or should have first acquired knowledge, of the alleged breach.

(3) Failure of Claims under the Plain Language of the Contract

52. It is Peru's position that, even assuming that the facts alleged by Renco are true, as a matter of law, Peru could not have breached the Stock Transfer Agreement (the "Contract").
53. According to Peru, it is Renco's case that "Peru's refusal to assume liability for the claims in the St. Louis Lawsuits violates the Treaty because it breaches the Guarantee Agreement and the Contract, which together constitute an Investment Agreement."⁵ Further, Renco argues, the Guarantee Agreement makes Peru liable for the contractual obligations undertaken by Centromin in the Contract.
54. It is Peru's case that the plain language of Clauses 6.5 and 8.14 of the Contract concern third-party claims relating to Doe Run Peru, the entity referred to in those clauses. However, because Doe Run Peru is not a party to the St. Louis Lawsuits, even assuming that the facts alleged by Renco are true, Peru, as a matter of law, could not have breached the Contract.

⁵ Claimant's Memorial § IV(A)-(B). 1. Renco describes the St. Louis Lawsuits as follows: "Plaintiffs seek damages for alleged personal injuries and punitive damages, and name as defendants Renco and Doe Run Resources, as well as their affiliated companies DR Acquisition Corp. and Renco Holdings, Inc., and directors and officers Marvin K. Kaiser, Albert Bruce Neil, Jeffery L. Zelms, Theodore P. Fox III, Daniel L. Vornberg, and Ira L. Rennert (collectively, the 'Renco Defendants'). The plaintiffs did not bring claims against Centromin's successor, Activos Mineros, nor against the Republic of Peru, or Doe Run Peru, and instead chose to sue Doe Run Peru's U.S.-based affiliates in the courts of the United States." Claimant's Memorial at ¶ 78.

55. Peru further contends that given that neither Renco nor Doe Run Peru has followed the procedure mandated by the Contract for the referral of matters to decision by a technical expert, as a matter of law, Peru cannot be deemed to have breached any contractual obligation with respect to the St. Louis Lawsuits.
56. In this respect Peru relies on Clauses 5.3 and 5.4 of the Contract which provide that “any controversy on the determination of whether ... the standards or practices used by the Company were or were not less protective of the environment or of the public health than those that were applied by Centromin”, or “in those cases in which no consensus was reached between Centromin and the Company with regard to the causes of the presumed damage that is the subject of the claim or with regard to the manner in which liability will be shared amongst them ...”, the matter is to be submitted to the decision of a technical expert.

C. Peru’s Position Regarding its Entitlement to Notify Preliminary Objections under Article 10.20.4 of the Treaty

57. In its letter dated March 21, 2014, notifying three preliminary objections under Article 10.20.4 of the Treaty, and in its further observations on the scope of those preliminary objections (including a letter from Professor W. Michael Reisman to Mr. Jonathan Hamilton)⁶ Peru outlined its position regarding its entitlement to notify and the permissible scope of preliminary objections under Article 10.20.4 of the Treaty.
58. Peru further supplemented this position when it filed its comments on the Submission of the USG regarding the interpretation of Article 10.20.4 on October 4, 2014 and in the subsequently filed revised version on October 6, 2014. The Respondent’s comments on the submission of the USG were accompanied by a letter from Mr. Carlos Herrera Perret, Executive Director of PROINVERSIÓN, Peru’s Private Investment Promotion Agency.⁷

⁶ Letter from Professor W. Michael Reisman to Mr. Jonathan Hamilton dated April 22, 2014, Annex A to Respondent’s Submission of April 23, 2014 (“Professor Reisman’s Letter”).

⁷ Letter from Mr. Carlos Herrera Perret, Executive Director of PROINVERSIÓN, Peru’s Private Investment Promotion Agency (“Herrera Letter”).

(1) The Treaty Provides a Procedure for Preliminary Objections

59. It is the Respondent's case that Article 10.20.4 of the Treaty was designed to provide respondent States with a mechanism to avoid the time and expense of an evidentiary phase if the claims presented would fail as a matter of law.
60. According to the Respondent, pursuant to the Vienna Convention, Article 10.20.4 of the Treaty must 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."⁸
61. On its case, which in its view is supported by the Submission of the USG as a non-disputing Party, the object and purpose of Article 10.20.4 is to provide a respondent State the means to efficiently and quickly dispose of, or curtail, at an early stage in the proceedings claims that cannot prevail as a matter of law – and thus avoid unnecessary burden in terms of time and cost.⁹
62. The Respondent also relies on the Submission of the USG and the letter of Mr. Carlos Herrera submitted therewith as confirmation of the critical function of preliminary objections in the provision of such mechanism for the efficient disposal of claims. It states that, by tracing back the preliminary objections provision in the Treaty (and in other investment treaties to which the USG is a party), the USG's submission highlights the importance of preliminary treaty mechanisms for the prompt and efficient resolution of claims and demonstrates that both the United States and Peru had had experiences that motivated them to provide procedures in their treaties to ensure that preliminary objections would be heard at an early phase of the proceedings.
63. The Respondent rejects the argument that Article 10.20.4 should be considered to be an equivalent of a preliminary motion under U.S. Federal Rules of Civil Procedure Rule 12(b)(6) for failure to state a claim on the basis that the text and negotiating history of the Treaty demonstrate that Article 10.20.4 is not limited to "frivolous" claims, and

⁸ Article 31(1) of the Vienna Convention.

⁹ The Respondent states that the origins of the provision may be traced back to the NAFTA case *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, ("*Methanex Corp. v USA*" or "*Methanex*"), where the United States argued at an early stage that the claims were inadmissible because the claims were without legal merit. The tribunal ruled that it could not address this issue in a preliminary phase and eventually, after years of costly proceedings, the tribunal determined that it did not have jurisdiction and the claims had no legal merit. The United States began incorporating language similar to Article 10.20.4 in free trade agreements in 2002-2003, and in its Model Bilateral Investment Treaty in 2004. See, e.g., US-Singapore FTA, June 26, 2002, Article 15.19.4; US-Chile FTA, June 6, 2003, Article 10.19.4; U.S. 2004 Model BIT, Article 28.4.

instead does contemplate competence objections. In support of this argument, the Respondent cites the *Pac Rim v. El Salvador* case.¹⁰

64. Thus, according to the Respondent, consistent with the principles of treaty interpretation, Article 10.20.4 broadly establishes Peru's right to make "**any** objection" as a preliminary matter, provided it meets two basic conditions:

(1) 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

(2) 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).

65. According to the Respondent, its conclusion that a respondent may raise competence objections under Article 10.20.4 and that such objections can be decided as a preliminary question, is supported by (1) the use of the word "competence" in Article 10.20.4; (2) certain documents from Peruvian negotiators of the Treaty which demonstrate that both the United States of America and Peru intended that the Article 10.20.4 procedure must include competence objections,¹¹ and (3) the opinion of Professor Reisman.¹² In relation to its second point, Peru argues that no evidence has been introduced by Renco or otherwise, to counter the contemporaneous documents provided by Peru.

¹⁰ 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." *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12 ("*Pac Rim v. El Salvador*" or "*Pac Rim*"), Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 of August 2, 2010 ("*Pac Rim v. El Salvador* Decision on Respondent's Preliminary Objections") at ¶ 117.

¹¹ Peru's Ministry of Foreign Trade and Tourism ("MINCETUR"), 6th Round of Negotiations in Tucson, Arizona, United States, November 29 – December 5, 2004 (unofficial translation)("Unofficial Translation of the MINCETUR 6th Round Negotiations"); MINCETUR, 7th Round of Negotiations in Cartagena, Colombia, February 7-11, 2005 (unofficial translation) ("Unofficial Translation of the MINCETUR 7th Round Negotiations") and MINCETUR, 8th Round of Negotiations in Washington, United States, March 14-18, 2005 (unofficial translation) ("Unofficial Translation of the MINCETUR 8th Round Negotiations"). For Peru's argument that the negotiating history makes clear that the Treaty includes express reference to "competence" objections in Article 10.20.4 see Respondent's Submission, April 23, 2014, at ¶¶ 6-23; Letter from Peru to the Tribunal, July 29, 2013, at 2-4; Professor Reisman's Letter, Note 6 at 4-5. In this respect, in the Respondent's Submission, October 4, 2014 (as amended) at 5-6, Peru takes issue with the USG's non-disputing Party submission on the basis that, while it links the experience of the United States in the *Methanex* case to the negotiation of subsequent investment agreements, the USG failed to address the negotiations that gave rise to the Treaty relevant in this case and, in particular, Article 10.20.4 thereof. See *Methanex Corp. v. USA*, Note 9.

¹² Professor Reisman's Letter, Note 6.

66. The Respondent disagrees with the Claimant's reliance on the first phrase of Article 10.20.4¹³ to exclude competence objections from its scope. For the Respondent, 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. Thus, Article 10.20.4 objections are "without prejudice" to such "authority." Peru states that it relied on this right in choosing to forego the possibility of bifurcation with respect to issues of competence later in the proceeding.
67. Although the USG also suggests that Article 10.20.4 provides "a further ground for dismissal", separate and apart from objections to a tribunal's competence,¹⁴ according to the Respondent, (1) this is not supported by the text of the Treaty or the negotiating history and (2) the decision on the scope of preliminary objections rests solely with the Tribunal.
68. In relation to the first point the Respondent argues that if competence objections were excluded from Article 10.20.4, the Treaty would not offer a solution to the issue that arose in *Methanex*¹⁵ – which all parties agree, the preliminary objections mechanism in Article 10.20.4 was intended to do.¹⁶
69. In relation to the second point the Respondent highlights Article 10.20.2 of the Treaty which provides that a non-disputing Party submission may address matters of Treaty interpretation, but is not intended to "go beyond interpretation and become a fact specific exercise." Thus, numerous tribunals have considered submissions by non-disputing Parties, and reached different conclusions with respect to matters of Treaty interpretation.¹⁷ It is the Respondent's position that the Tribunal should do the same here.

¹³ This first sentence 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," Article 10.20.4 of the Treaty. [emphasis added].

¹⁴ USG's Submission, September 10, 2014, at ¶ 6.

¹⁵ See *Methanex Corp. v. USA*, Note 9.

¹⁶ It is the USG's position – and the Respondent agrees – that it was this ruling that prompted the United States to include the preliminary objections mechanism in Article 10.20.4 in subsequent treaties. According to the Respondent, if "competence" objections were excluded from Article 10.20.4, this objective – on which both State Parties to the Treaty agree – would not be met. The Respondent argues that this is because competence is generally understood to include concepts including both jurisdiction and admissibility. Indeed, competence and admissibility have been described as "two sides of one and the same conceptual coin." See Respondent's Submission, October 4, 2014 (as amended), at ¶ 20 n. 42, citing Veijo Heiskanen, *Ménage A Trois? Jurisdiction, Admissibility and Competence In Investment Treaty Arbitration*, ICSID Review (2013), at 13.

¹⁷ Respondent's Submission, October 4, 2014 (as amended), at ¶ 35, citing *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award of November 15, 2004, at ¶¶ 29-30; *The Loewen Group*,

70. Further, the Respondent argues that if all competence objections were excluded from the scope of Article 10.20.4, as Renco contends, it would be superfluous for the Treaty to provide, as it does in sub-paragraph (d) of Article 10.20.4, that a “respondent does not waive any objection as to competence ... merely because the respondent did or did not raise an objection under this paragraph ...” The Respondent relies on Professor Reisman’s Letter to support its position in this respect.¹⁸ According to the Respondent the purpose of this language is to ensure that, whether or not a respondent raises competence objections pursuant to 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).
71. The Respondent argues that 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 as provided for in Article 10.20.4.
72. Finally, according to the Respondent, when looked at in the context of other Treaty provisions, the broad scope of permissible objections under Article 10.20.4 is confirmed. In the Respondent’s view, Article 10.20.5 offers a respondent the choice to pursue an expedited procedure for Article 10.20.4 objections so as to seek faster resolution of preliminary objections, but it does not curtail the scope of available objections as provided under other provisions. Not only would this view be contrary to the object and purpose of the right to make preliminary objections if the scope of objections for Article 10.20.5’s expedited procedure is broader than that of Article 10.20.4, which does not contain a fast-track procedure, it would also raise serious issues of interpretation and practical problems. In particular, the Respondent asserts that if the Article 10.20.5 procedure is not limited to accepting the facts as stated in the Notice of Arbitration, the expedited procedure would include objections to competence that also involved disputes about facts which would hardly be consistent with an expedited procedure. Additionally, this interpretation would compel a respondent to always rely on the expedited procedure for objections as to competence, as this would be its only opportunity to do so.

Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction of January 5, 2001, at ¶ 52; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues of December 6, 2000, at ¶ 44.

¹⁸ Professor Reisman’s Letter, Note 6.

73. Thus, it is the Respondent's case that, by its own terms, the scope of the Treaty is clear:

- It grants Peru the right to make any objection under Article 10.20.4, including jurisdictional and other objections;
- Article 10.20.4 is drafted in mandatory terms and these objections *shall* be decided as a preliminary matter; and
- In determining Peru's objections, facts alleged by Renco in support of claims in its notice of arbitration, as amended, and statement of claim are presumed to be true.

74. The Respondent claims that, as long as an objection, including any jurisdictional objection, assumes the facts as pleaded by a claimant (without the need to consider or weigh disputed evidence) thus providing a basis for outright dismissal as a matter of law, the objection should be considered as properly within the scope of Article 10.20.4.

(2) Investment Treaty Jurisprudence Confirms that Peru's Objections are within the Scope of Article 10.20.4

75. The Respondent notes that while this is the first investment arbitration brought under the Treaty, Article 10.20.4 is analogous to the preliminary objection provision contained in the Dominican Republic–Central America Free Trade Agreement ("DR-CAFTA") which has been considered by at least three arbitral tribunals, each of which has confirmed that the proper scope of Article 10.20.4 does encompass competence objections – including, the type of objections that Peru has raised in this case.¹⁹

76. The Respondent also refers to the 2006 modification to the ICSID Arbitration Rules which added a preliminary objections phase under Rule 41(5), providing that "a party may, no later than 30 days after the constitution of the Tribunal, and in any event before

¹⁹ See *Pac Rim v. El Salvador* Decision on Respondent's Preliminary Objections, Note 10; *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23 ("*RDC v. Guatemala*" or "*RDC*"), Decision on Objection to Jurisdiction CAFTA Article 10.20.5 of November 17, 2008 ("*RDC v. Guatemala* Decision on Objections to Jurisdiction"); *RDC v. Guatemala* Second Decision on Objections to Jurisdiction of May 18, 2010 ("*RDC v. Guatemala* Second Decision on Objections to Jurisdiction"); *Commerce Group Corp. et al. v. El Salvador*, ICSID Case No. ARB/09/17 ("*Commerce Group v. El Salvador*" or "*Commerce Group*") Award of March 14, 2011 ("*Commerce Group v. El Salvador* Award"). All available at icsid.worldbank.org. The Respondent also relies on the review of ICSID annulment decisions in the Cremades Article, to support its interpretation of the scope of preliminary objections available under Article 10.20.4 of the Treaty, as, according to the Respondent, in that article Mr. Cremades concludes that patently unmeritorious claims warranting early dismissal include claims where the tribunal lacks competence. See the Cremades Article, Note 2.

the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.” The Respondent notes that 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.

77. The Respondent asserts that this provision is roughly analogous to the standard applicable under Article 10.20.4 of the Treaty and notes that a number of ICSID tribunals have ruled that the language of Rule 41(5) encompasses objections as to both jurisdiction and merits.²⁰
78. Finally the Respondent argues that, beyond the text of the Treaty itself, the DR-CAFTA and ICSID precedents construing the meaning of “manifestly without legal merit” further confirm that the Claimant’s interpretation of Article 10.20.4 is unfounded as tribunals have refused to limit preliminary objections to “frivolous” claims or “failure to state a claim” type objections.

(3) Peru’s Exercise of Its Treaty Rights Cannot be Circumscribed

79. It is also the Respondent’s case that the Procedural Schedule adopted by the Tribunal in Procedural Order No. 1 established an organized procedure for Peru’s Article 10.20.4 objections, duly reflecting the procedural concerns and due process rights of both Parties. The Respondent considers that to modify such structure would curtail Peru’s Treaty rights in plain violation of those rights and the process already implemented to protect both Parties’ rights.
80. The Respondent notes that the Claimant has raised several procedural concerns with respect to the Respondent’s right to submit Article 10.20.4 objections. In particular, the Claimant has stated that (1) there is “a very short period of time to deal with jurisdictional issues” in this Phase; and (2) Peru may “receive two bites at the apple on the issue of the Tribunal’s competence, with no risk of loss at the preliminary stage.” In reply, the Respondent states as follows.
81. First, the Respondent states that, given the discrete nature of the objections that it has raised, all of its preliminary objections can be addressed within the timeframe fixed for the Article 10.20.4 Phase as provided in Procedural Order No. 1. The Respondent

²⁰ See, e.g., *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3.

further notes that the Claimant's concern as to the time periods has already been addressed in the Procedural Schedule, which includes a mechanism for scheduling adjustments, should they be required.

82. Second, the Respondent points out that the Claimant chose to pursue its claims under the Treaty, and it cannot now unilaterally circumscribe the rights that the Treaty affords the Respondent. 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. If any claims remain after the preliminary objections phase, Peru may raise, together, any competence and merits defenses that turn on disputed factual issues. Thus, the Respondent contends that there would be no "two bites at the apple" for the competence issues decided under Article 10.20.4.

(4) The Non-Disputing Party Submission of the USG Underscores that the Tribunal Can, and Should, Decide All Preliminary Objections at this Juncture

83. The Respondent submits that even if its preliminary objections do not fall within the mandatory scope of Article 10.20.4, the objections still can and should be decided at this point of the proceedings to safeguard due process and to ensure efficiency.
84. Respondent points to the non-disputing Party Submission of the USG and, in particular, the statement made therein that "reasons of economy and efficiency will often weigh in favor of competence objections being decided preliminarily and at the same time as objections made under paragraph 4",²¹ to suggest that Article 10.20.4 supplements, rather than displaces or limits, the Tribunal's authority to decide preliminary objections. Thus, according to the Respondent and, on its submission, as supported by the USG, the Tribunal retains the authority to decide competence objections as a preliminary matter, whether or not they fall within the scope of mandatory objections under Article 10.20.4.
85. In light of this, the Respondent requests that the Tribunal determine all of its preliminary objections under the authority granted to it by Article 10.20.4 of the Treaty or, alternatively, pursuant to Article 23(3) of the UNCITRAL Arbitration Rules. It is Peru's case that reasons of economy and efficiency favor hearing all of its objections during

²¹ USG's Submission, September 10, 2014, at ¶ 11.

the preliminary phase, as determining these objections now may serve to resolve certain claims outright or to clarify the scope of issues to be decided at a later stage.

(5) Request for Relief

86. Peru requests that the Tribunal rule that the case should proceed to a full briefing of each of its preliminary objections pursuant to the Treaty.

D. Renco's Submissions Challenging the Scope of Peru's Preliminary Objections

87. On April 3, 2014, the Claimant submitted a letter challenging the scope of the Respondent's preliminary objections raised in Peru's letter dated March 21, 2014. On May 7, 2014, the Claimant submitted its Reply on the Scope of the Respondent's Preliminary Objections.
88. The Claimant further supplemented its position when it filed its comments on the Submission of the USG regarding the interpretation of Article 10.20.4 on October 3, 2014 and the accompanying letter to the Tribunal from Mr. Bernardo Cremades, submitted by the Claimant in response to the Tribunal's invitation of July 8, 2014.²²
89. According to the Claimant, the Respondent's submissions comprise the following six preliminary objections (1) presentation of an invalid waiver; (2) violation of the waiver; (3) lack of jurisdiction *ratione temporis*; (4) violation of the Treaty's three-year limitation period; (5) failure to state a claim for breach of the investment agreement; and (6) failure to submit two factual issues for determination by a technical expert prior to commencement of the arbitration.
90. The Claimant characterizes objections (1) through (4) as relating to the Tribunal's competence, or jurisdiction over the dispute, while it characterizes objections (5) and (6) as objections for "failure of claims under the plain language of the Contract." However, it is the Claimant's position that Article 10.20.4 of the Treaty does not give the Respondent the right to bring objections (1) through (4) and (6) as preliminary objections.

²² Letter to the Tribunal from Mr. Bernardo M. Cremades dated September 16, 2014 ("Cremades Letter").

91. The Claimant argues that by reading Articles 10.20.4 and 10.20.5 together, rather than in isolation, as the Respondent chooses to, it is clear that the preliminary objections that a respondent may bring for failure to state a viable legal claim are different from preliminary objections that a respondent may raise as to the competence of the tribunal, and that these types of preliminary questions are to be treated differently.
92. According to the Claimant, there is a significant difference between objecting to the viability of a claim as a matter of law (assuming all facts asserted by a claimant to be true), and objecting to a tribunal's competence to hear and decide a claim. The question under Article 10.20.4 is whether the facts as alleged by the Claimant are capable of constituting a breach of a legal right protected by the Treaty, whereas an objection to the Tribunal's competence is concerned with the question whether the Tribunal is competent to hear the claim, irrespective of the claim's legal merit. It is the Claimant's position that preliminary objections as to the Tribunal's competence must therefore be brought under Article 10.20.5, not Article 10.20.4.
93. According to the Claimant, to allow the Respondent to bring preliminary objections as to the Tribunal's alleged lack of competence under Article 10.20.4 would be inconsistent with the terms of the Treaty, would prejudice the Claimant unfairly, and the Respondent's attempt to improperly "shoehorn" what the Respondent itself describes as jurisdictional objections into an Article 10.20.4 application, would effectively allow it to receive "two bites at the apple on the issue of the Tribunal's competence, with no risk of loss at the preliminary stage."
94. Further, the Claimant argues that, if the Respondent truly wished to receive a preliminary decision on issues of the Tribunal's competence, the Respondent should have brought a timely application under Article 10.20.5, and the Tribunal could then have decided the disputed legal and factual issues. However, the Claimant notes the Respondent chose not to pursue that course.
95. According to the Claimant, the question now before the Tribunal is whether Article 10.20.4 of the Treaty requires the Tribunal to entertain, at this preliminary stage, the five competence objections that the Respondent has raised as preliminary objections. This is clear from the Procedural Order No. 1 and it is common ground between the Parties. The question is not whether the Tribunal has the discretion to hear competence objections as a preliminary matter outside the mandatory scope of Article 10.20.4.

96. The Claimant asserts that the Parties have agreed, and the Tribunal has endorsed through Procedural Order No. 1 that, to the extent one or more of the Respondent's proposed Article 10.20.4 objections fall outside the mandatory scope of Article 10.20.4, the Tribunal will not hear such objection(s) in this preliminary phase. Instead, the Respondent, should it wish to bring objections outside the scope of Article 10.20.4, would have to pursue them later in these proceedings pursuant to the schedule established by Annex A of Procedural Order No. 1. The Claimant states that it would not have agreed to the Procedural Schedule adopted in Procedural Order No. 1 if the Respondent were to be permitted to bring preliminary objections outside the mandatory scope of Article 10.20.4, during the 10.20.4 Phase of the proceedings.
97. Therefore, for the reasons set out below, in Claimant's view, objections (1) through (4) and (6) fall outside the scope of the Article 10.20.4 Phase established in Procedural Order No. 1 and objection (5) is the only "proper objection" under Article 10.20.4.
98. The Claimant supports its view with the following arguments.

(1) The Respondent's Interpretation of Article 10.20.4 Lacks Any Merit

99. The Claimant states that Article 10.20.4 does not authorize the Respondent to raise "any" objection as a preliminary question. Rather, it only allows the Respondent to raise as a preliminary question "any objection . . . that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26." [Emphasis added] The Claimant points out that, according to the Respondent's interpretation, the underlined language would be superfluous. It is the Claimant's case that the Respondent's reading of Article 10.20.4 thus violates the *effet utile* principle and must be rejected by the Tribunal.
100. The Claimant further argues that the Respondent would not waive its jurisdictional objections under the Treaty by bringing an Article 10.20.4 objection. According to the Claimant, the clarifying language in paragraph (d)²³ avoids that potential confusion, and it in no way converts a preliminary objection for failure to state a claim into a preliminary objection to competence, as it is alleged by the Respondent.

²³ Article 10.20.4(d) of the Treaty states that: "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."

(a) 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

101. The Claimant claims that the fundamental flaw in the Respondent's analysis is to allege 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.
102. According to the Claimant's reading, 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 tribunal's competence is not challenged under Article 10.20.5 in this way, 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.
103. The Claimant further states that a tribunal's discretionary authority to decide competence objections, either as a preliminary question, or later in the Procedural Schedule, derives in this case from Article 23(3) of the UNCITRAL Rules. This Article provides that "[t]he arbitral tribunal may rule on a plea referred to in paragraph 2 [objecting to the tribunal's jurisdiction] either as a preliminary question or in an award on the merits."
104. The Claimant argues that the Respondent errs by not distinguishing between the Tribunal's authority to decide competence as a preliminary question in its discretion under, for example, Article 23(3) of the UNCITRAL Rules, 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.

(b) The Text and Context of Article 10.20.4

105. For the Claimant it is clear that when Article 10.20.4 refers to "an objection that a dispute is not within the tribunal's competence" as an "other" objection, it means that a competence objection is not included within, and is 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."
106. According to the Claimant, the Respondent pretends 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.

107. The Claimant suggests that the USG, in its non-disputing Party Submission, followed the same approach as the Claimant with respect to the interpretation of Article 10.20.4. In particular, the Claimant points to the USG's approval of the proposition that the second clause of Article 10.20.4 should be read together, both with Article 10.20.5 and with the "without prejudice" clause of Article 10.20.4, which refers to an "objection that a dispute is not within the tribunal's competence," as an "other" objection.²⁴ According to the Claimant, the USG's position is in agreement with the Claimant's to the effect that an objection to the tribunal's competence "fall[s] outside [the] scope"²⁵ of Article 10.20.4.
108. The Claimant further states that the language of Article 10.20.4 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, as Article 23 of the UNCITRAL Rules allows, but that they should not be addressed under Article 10.20.4.
109. The Claimant further argues that if one accepts that Article 10.20.4 of the Treaty does treat objections to competence and objections for failure to state a viable legal claim differently, the Tribunal cannot have the "discretionary authority" to either address competence objections as a preliminary question, or defer the question until later (as Article 23(3) of the UNCITRAL Rules provides and the first clause of Article 10.20.4 recognizes), while concurrently being "required" by the second clause Article 10.20.4 to address competence objections as a preliminary question.
110. The Claimant notes 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.
111. According to the Claimant, 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

²⁴ USG's Submission, September 10, 2014, at ¶ 6 n.4.

²⁵ *Ibid.*

claimant may be made under Article 10.26. Because objections to a tribunal's competence are different, Article 10.20.4 does not require the Tribunal to address and decide an objection to the Tribunal's competence under Article 10.20.4.²⁶ Thus, according to the Claimant, the Respondent may bring any competence objections in the merits phase of the case, as reflected in the Procedural Schedule.

112. The Claimant also considers that the Respondent's criticism with respect to the Claimant's reliance on jurisprudence from the United States is not well founded. In this respect the Claimant asserts that 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 that 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."
113. The Claimant recalls that during the First Session in London, it expressed its consent to a schedule by which the Tribunal could decide on "jurisdiction and failure to state a claim" at the same time on the same schedule that the Tribunal also would be deciding any claim objections under Article 10.20.4. However, according to the Claimant, in this scenario the Respondent's two types of objections would have proceeded under two entirely different legal bases. The competence objections would have proceeded as a preliminary question under the Tribunal's discretionary authority (*e.g.*, Article 23(3) of the UNCITRAL Rules), and the claim objections would have proceeded (during the same timeframe) pursuant to Article 10.20.4, which "requires" the Tribunal to decide claim objections as a preliminary question.
114. The Claimant argues that the distinction is quite meaningful, because the Respondent's efforts to "shoehorn" only some of its competence objections into an Article 10.20.4 application would ensure that the Respondent cannot lose the application (because all facts are assumed to be true under 10.20.4). It would also guarantee that the Respondent would have two opportunities to bring its competence objections, first it could bring the claims improperly under 10.20.4 and then again later with the merits.

²⁶ The Claimant also relies on the USG's statement at ¶ 9 of its non-disputing Party submission where the US states that the "evidentiary standard" set forth in Article 10.20.4(c) "facilitates an efficient and expeditious process for eliminating claims that lack legal merit", and that the sub-paragraph "does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider" in support of its argument.

115. According to the Claimant, during the First Session the Respondent rejected its invitation to have the Tribunal decide all competence objections as a preliminary question. Instead, the Parties agreed (as reflected in the Procedural Schedule attached to Procedural Order No. 1), that the Tribunal would address competence objections during the merits phase, except, and only to the extent that, the Treaty requires the Tribunal to decide on its competence as a preliminary question under Article 10.20.4. The Claimant contends that because Article 10.20.4 does not require the Tribunal to decide competence as a preliminary question, all of the Respondent's competence objections should be addressed in the merits phase.
116. The Claimant further states that when, at the First Session and in correspondence, it acknowledged that jurisdictional objections could be brought with a 10.20.4 application, it was referring to the schedule that the Parties and the Tribunal were discussing and not to the substantive right of Peru to bring these objections under Article 10.20.4, which the Claimant has rejected from the outset.

(c) The Text and Context of Article 10.20.5

117. The Claimant also relies on the first sentence of Article 10.20.5 which provides that “an objection under paragraph 4 *and* any objection that the dispute is not within the tribunal's competence” [emphasis added]. This is an additional confirmation that an objection under Article 10.20.4 regarding the substantive viability of a legal claim is different than an objection that the dispute is not within the tribunal's competence.
118. The Claimant explains that its argument is not that Article 10.20.5 somehow “limits” the Respondent's rights under Article 10.20.4 or that it “curtails” the scope of the objections that a respondent may raise under the Treaty. Rather, the Claimant contends that the language of Article 10.20.5 provides additional evidence that the Respondent simply does not have the right to bring a competence objection under Article 10.20.4.
119. 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 Claimant's interpretation, 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 the expedited procedure

provided for in Article 10.20.5. In such case, all facts will be assumed to be true pursuant to Article 10.20.4(c). However, 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 applicable in that scenario and Article 10.20.5 does not provide so.

120. In addressing the arguments raised by Professor Reisman that, if objections to competence are not included in paragraph 4 of Article 10.20, the expedited procedure (pursuant to paragraph 5) would perforce include objections involving disputed facts “which would hardly lend themselves to an expedited procedure”,²⁷ the Claimant points to the possibility that a tribunal may resolve simple factual issues in an Article 10.20.5 proceeding, while deferring complex factual disputes until a later phase of the proceeding. Moreover, according to the Claimant, a tribunal could decide competence objections under Article 10.20.5 and still exercise its authority pursuant to Article 23(3) of the UNCITRAL Rules to determine competence as a preliminary question.
121. The Claimant also takes issue with Professor Reisman’s opinion that 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.”²⁸ The Claimant argues that this view is incorrect, and that the expedited procedure under Article 10.20.5 is not in fact the Respondent’s “only opportunity” to raise competence objections as a preliminary question, as a respondent could make an application to a tribunal to hear any and all competence objections as a preliminary question under Article 23(3) of the UNCITRAL Rules.²⁹
122. The Claimant further argues that while in a claim objection brought by a respondent under Article 10.20.4, all facts are assumed to be true, the same does not apply to competence objections that a respondent brings under Article 10.20.5. The text supporting this position is Article 10.20.4(c) which provides that in deciding an objection under Article 10.20.4, the tribunal shall assume to be true the claimant’s factual allegations. No equivalent text appears with respect to Article 10.20.5.

²⁷ Professor Reisman’s Letter, Note 6, at 6.

²⁸ *Ibid.*

²⁹ The Claimant requests the Tribunal, when weighing the probative value of Professor Reisman’s Letter, to treat the opinion as a submission by the Respondent itself, and not as an independent “expert opinion.” The Claimant does not seek to strike Professor Reisman’s opinion, but it requests that it be given weight equal to that of the arguments advanced by the Respondent itself. See the Claimant’s Submission, May 7, 2014, at 5.

(d) The No Waiver Provision in Article 10.20.4(d)

123. Article 10.20.4(d) of the Treaty 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.”
124. For the Claimant, the reason for this “without prejudice” language, heavily relied on by the Respondent, is easily understood when one recognizes the similarities between Article 10.20.4 and Rule 12(b)(6) of the Federal Rules of Civil Procedure.
125. The Claimant explains that if a defendant in a United States federal court 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 failure to do so will result in a waiver of such jurisdictional objections. Thus, the Claimant contends that the language in Article 10.20.4(d) was included to confirm that there will be no similar waiver under the Treaty, notwithstanding its similarity to Rule 12(b)(6).

(2) The Cases the Respondent Cites Do Not Support the Respondent’s Argument

126. While the Claimant agrees with the Respondent that the language in Article 10.20.4 of the Treaty is nearly identical to Article 10.20.4 of the DR-CAFTA, the Claimant does not agree that the three tribunals that have dealt with this provision (*Pac Rim v. El Salvador*,³⁰ *Commerce Group v. El Salvador*³¹ and *RDC v. Guatemala*³²), support the Respondent’s position. Nor, on the Claimant’s case, do prior tribunals’ interpretations of ICSID Arbitration Rule 41(5) have any relevance for the purpose of interpreting Article 10.20.4 of the Treaty.
127. The Claimant asserts that the *Pac Rim v. El Salvador* and *Commerce Group v. El Salvador* cases support the Claimant’s interpretation of the Treaty, and not the Respondent’s, while the tribunal in *RDC v. Guatemala* “clearly misapplied” Article 10.20.4 of the DR-CAFTA treaty by considering competence objections under Article

³⁰ See *Pac Rim v. El Salvador* Decision on Respondent’s Preliminary Objections, Note 10.

³¹ See *Commerce Group v. El Salvador* Award, Note 19.

³² See *RDC v. Guatemala*, Note 19.

10.20.4 and reviewing and adjudicating disputed facts, meaning the decision in that case should not be given any weight in these proceedings.

128. For the Claimant, the central distinction between the *Pac Rim v. El Salvador* and *Commerce Group v. El Salvador* cases and these proceedings is that the respondents in those cases brought preliminary objections to the tribunal's competence under Article 10.20.5. The Respondent has not done that here and the Claimant considers it "unlikely" that the Respondent's decision to proceed only under Article 10.20.4, foregoing Article 10.20.5 altogether, was an oversight.
129. First, counsel for the Claimant repeatedly objected to the Respondent's proposal to reach an "agreement" that it would bring jurisdictional objections under Article 10.20.4, noting that the Treaty did not allow it.
130. Second, counsel for the Respondent referred to the DR-CAFTA cases prior to the First Session in London, and in its subsequent letter dated March 21, 2014, and, as mentioned above, all of these cases involved Article 10.20.5.
131. The Claimant argues that the *Pac Rim v. El Salvador* tribunal's analysis of Articles 10.20.4 and 10.20.5 supports Renco's interpretation of the scope of these provisions. In particular, the *Pac Rim* tribunal noted that "[a]s regards the expedited procedure under Article 10.20.5, it is twinned with the procedure under Article 10.20.4 with an additional ground of objection as to competence."³³ [Emphasis added] The *Pac Rim* tribunal thus recognized that competence is an additional ground for preliminary objections afforded by Article 10.20.5, not found in Article 10.20.4.
132. In *Commerce Group v. El Salvador*, the respondent only raised objections related to the waiver under Article 10.20.5 of the DR-CAFTA. Thus, the tribunal in *Commerce Group* did not address the scope of these provisions because it dismissed the entire dispute for lack of jurisdiction in the Article 10.20.5 phase.³⁴
133. In *RDC v. Guatemala*, the respondent first raised a competence objection predicated on waiver under Article 10.20.5 of the DR-CAFTA. After the tribunal rejected this objection, the respondent raised two further preliminary competence objections (*ratione temporis* and *ratione materiae*) under Article 10.20.4. The claimant apparently failed to point out

³³ *Pac Rim v. El Salvador* Decision on Respondent's Preliminary Objections, at ¶ 106, Note 10.

³⁴ See *Commerce Group v. El Salvador* Award, Note 19.

that these objections fell outside the scope of Article 10.20.4. In any event, the *RDC* tribunal did not address the scope of Article 10.20.4 objections in its decision.³⁵

134. Further, it is the Claimant's case that, contrary to the Respondent's assertions, prior tribunals' interpretations of ICSID Arbitration Rule 41(5) are irrelevant for purposes of Article 10.20.4 of the Treaty.
135. For the Claimant, while Article 10.20.4 distinguishes between preliminary objections to competence and preliminary objections for failure to state a claim upon which relief may be granted, ICSID Rule 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.
136. To support its position the Claimant, in response to the Tribunal's letter of July 8, 2014, invited Mr. Bernardo Cremades to comment on his article regarding the application of Rule 41(5) of the ICSID Rules. Mr. Cremades states in his letter to the Tribunal of September 16, 2014 that ICSID Rule 41(5) is irrelevant for the purposes of this dispute and indicates that he agrees with the Claimant's interpretation of Treaty Article 10.20.4.³⁶
137. According to the Claimant, if the Tribunal entertains under Article 10.20.4 the Respondent's preliminary objections as to competence, this will only add an inefficient and iniquitous process into these proceedings that would allow the Respondent to advance competence objections with no risk of an adverse ruling (because all of the Claimant's facts are assumed to be true). The Respondent's strategy is inconsistent with the Treaty language and with the schedule to which the Parties agreed and the Tribunal ordered in Procedural Order No. 1.

**(3) Excerpts of Summaries of Negotiation Sessions Held Four to Five Years
Prior to Enactment Do Not Support the Respondent's Reading of Article
10.20.4**

138. In response to Respondent's argument that certain documents from Peruvian negotiators of the Treaty demonstrate that both the United States of America and Peru

³⁵ See *RDC v. Guatemala*, Note 19.

³⁶ See the Cremades Letter, Note 22.

intended that the Article 10.20.4 procedure must include competence objections, the Claimant asserts that the Respondent is relying on incomplete portions of the documents, concerning early negotiations that occurred between 2004 and 2005, *i.e.*, almost five years prior to the enactment of the Treaty.

139. Further, according to the Claimant, the comments are not in conflict with the final version of the Treaty because the Respondents' 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. According to the Claimant, the summaries of negotiations provided by the Respondent simply make clear that a respondent may bring a preliminary objection to the tribunal's competence under the Treaty. However, the Claimant contends that the question before the Tribunal is not whether the Treaty permits a respondent to raise a preliminary objection to the tribunal's competence, but instead whether a tribunal is *required* to hear a preliminary objection of competence pursuant to Article 10.20.4.

(4) Disputed Factual Issues Permeate the Respondent's Competence Objections

140. The Claimant considers that merely grouping six objections under three headings, as indicated by the Respondent in paragraphs 25 to 27 of its submission of April 23, 2014, does not suffice to alter the real number of objections submitted by the Respondent.
141. The Claimant reiterates that five of these six objections fall outside the scope of Article 10.20.4 because they relate only to the Tribunal's competence and have nothing to do with a cognizable "claim" as required by Article 10.20.4.
142. Moreover, each of these five competence objections involves an abundance of disputed facts. Thus it would be virtually impossible for the Tribunal to determine the Respondent's competence objections without a factual inquiry. In the Claimant's opinion this shows that the Respondent simply wishes to secure two opportunities to bring exactly the same competence objections in two different phases of the case.

**(5) The Non-Disputing Party Submission of the USG Confirms that All
Competence Objections Fall Outside the Scope of Article 10.20.4**

143. For the Claimant, the USG's Submission confirms its interpretation of Article 20.10.4 by agreeing that an objection to the tribunal's competence "fall[s] outside [the] scope" of Article 10.20.4 and that "objections asserted under [Article 10.20.4] are distinct from objections to the tribunal's competence",³⁷ thereby rejecting the Respondent's argument that a preliminary objection to the tribunal's competence as a matter of law falls within the scope of Article 10.20.4.
144. The Claimant finds support for its position in the USG's Submission, including, inter alia, that:
- Article 10.20.4(c) only encompasses objections to the legal sufficiency of a claim and therefore if an objection to the tribunal's competence falls within the scope of Article 10.20.4, then Article 10.20.4(c) would require the tribunal to assume to be true all of the claimant's factual allegations in the notice of arbitration and the statement of claim, and not just those "in support of any claim." Thus, the USG supports the Claimant's position that the inclusion of the phrase "in support of any claim" in Article 10.20.4(c) confirms that objections to the tribunal's competence fall outside the scope of Article 10.20.4.
 - "Subparagraph (d) confirms that a respondent is not required to request a preliminary decision on an objection to competence when invoking the procedures under paragraph 4 (or paragraph 5). That is, the applicable arbitration rules permit, but do not require, a respondent to seek a preliminary decision on any objections to competence, and paragraph 4 does not alter those rules."³⁸ According to the Claimant, this evidences USG's rejection of the Respondent's "necessary corollary" argument³⁹ and adopts the Claimant's reading of Article 10.20.4(d).

³⁷ USG's Submission, September 10, 2014, at ¶ 6 n.4.

³⁸ *Id.*, at ¶ 10.

³⁹ According to the Respondent, "[t]he necessary corollary of this provision is that a respondent may raise an objection as to competence under Article 10.20.4", because "[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." See Respondent's Submission, April 23, 2014, at ¶ 13.

- “[A]n objection under paragraph 4 *and any objection that the dispute is not within the tribunal’s competence*” emphasizes that objections asserted under paragraph 4 are distinct from objections to the tribunal’s competence.”⁴⁰ For the Claimant this statement by the USG is consistent with its position that “the words ‘an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence’ is additional confirmation that an objection under paragraph 4 of Article 10.20 regarding the substantive viability of a 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.”⁴¹

(6) Request for Relief

145. Based on the above arguments and “as unequivocally confirmed by the USG’s Submission,”⁴² the Claimant contends that the Respondent’s five competence objections fall outside the scope of Article 10.20.4 of the Treaty and that the Tribunal is not required or compelled to hear them in the Article 10.20.4 Phase of this arbitration, as argued by the Respondent.
146. The Claimant requests that the Tribunal issue an award declaring that the Respondent’s competence objections 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, the Respondent will bring its objections to the Tribunal’s competence during the merits phase of the case.

E. Submission of the USG Pursuant to Article 10.20.2 Regarding the Interpretation of Article 10.20.4 of the Treaty

147. On September 10, 2014, the USG filed a written submission as a non-disputing Party pursuant to Article 10.20.2 of the Treaty, regarding the interpretation of Article 10.20.4 and informed the Tribunal that it did not wish “to exercise its right to make an oral submission at this time.”

⁴⁰ USG’s Submission, September 10, 2014, at ¶ 6 n. 4 (emphasis in the original).

⁴¹ Claimant’s Submission, April 3, 2014, at 6; Claimant’s Submission, May 7, 2014, at 13-14.

⁴² Claimant’s Submission, October 3, 2014, at 14.

148. The USG observed that it was not taking a position on how its interpretation applies to the facts of this case and noted that no inference should be drawn from the absence of comment on any issue not addressed in its Submission.
149. The Parties' respective positions on the USG's Submission are summarized in parts C(4) and D(5) of Section III of this Decision above.

(1) Expedited Review Mechanisms in U.S. International Investment Agreements

150. The USG's non-disputing Party Submission traces the origins of the expedited review mechanisms, introduced by the USG in recent investment agreements, to the USG's experience in the *Methanex Corp. v. USA* case.⁴³
151. In the *Methanex* case, the arbitral tribunal constituted under NAFTA Chapter Eleven, concluded that it lacked authority to rule on the USG's preliminary objection that, even accepting all of the claimant's allegations of fact, the claims should be dismissed for "lack of legal merit."⁴⁴
152. The *Methanex* tribunal ultimately dismissed all claims for lack of jurisdiction but, according to the USG, this was possible only after spending a significant amount of time and resources pleading on jurisdiction and merits.
153. Accordingly, in all subsequent investment agreements concluded to date by the USG, it has negotiated expedited review mechanisms that allow a respondent State to assert preliminary objections in an efficient manner.⁴⁵

⁴³ See *Methanex Corp. v. USA*, Note 9.

⁴⁴ *Methanex Corp. v. USA*, Partial Award, August 7, 2002, at ¶¶ 109, 126.

⁴⁵ The Claimant submits that the USG's explanation of the origin of the expedited review mechanisms pursuant to Article 10.20.4 and Article 10.20.5, is fully consistent with its position that objections to the tribunal's competence "fall outside [the] scope" of Article 10.20.4. The Claimant explains that in its Partial Award (during the jurisdictional phase of the proceeding), the *Methanex* tribunal considered the USG's challenge to jurisdiction (postponing decision pending its receipt of further pleadings and evidential materials from the parties), while concluding that it "lacked authority" to rule on the USG's objection to the legal sufficiency of Methanex's claims. In the Claimant's view, the introduction of the Article 10.20.4 procedure in further treaties was therefore clearly intended to provide tribunals with the authority that the *Methanex* tribunal lacked, while the introduction of the Article 10.20.5 procedure was intended to provide an expedited review mechanism both for Article 10.20.4 objections and for objections to the tribunal's competence under the applicable arbitration rules. See *Methanex Corp. v USA*, Note 9.

(2) Articles 10.20.4 and 10.20.5 of the Treaty

154. The USG states that paragraphs 4 and 5 of Article 10.20 establish efficient and cost-effective mechanisms for a respondent State to dispose of claims that cannot prevail as a matter of law, potentially together with any preliminary objections to the tribunal's competence.
155. The USG observes that paragraph 4 allows a respondent to submit "any objection" that, "as a matter of law", a claim is not one for which the tribunal may issue an award in favor of the claimant. The USG also notes that paragraph 4 further clarifies that it operates "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question."
156. Thus, according to the USG, paragraph 4 of Article 10.20 provides a further ground for dismissal, in addition to "other objections", such as preliminary objections to the tribunal's competence. The USG considers that in view of the "without prejudice" clause, a tribunal may also hear preliminary objections to competence asserted under the applicable arbitration rules.
157. The USG further indicates that paragraph 5 of Article 10.20 establishes that a 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*", [emphasis added] thus emphasizing that objections asserted under paragraph 4 are distinct from objections to the tribunal's competence. Likewise, the chapeau of paragraph 4 gives as an example of the "other objections" that fall outside its scope, "an objection that a dispute is not within the tribunal's competence."⁴⁶
158. Regarding paragraph 4, the USG also notes that sub-paragraph (a) requires any such objections to be submitted "as soon as possible after the tribunal is constituted", and generally no later than the date for the submission of the counter-memorial, contrasting with the expedited procedures contained in paragraph 5.
159. As to sub-paragraph (b), the USG observes that it provides a mandatory requirement ("a tribunal "shall" hear and decide as a preliminary question any objection made under paragraph 4"). Thus, this requirement complements the tribunal's discretion, under the

⁴⁶ USG's Submission, September 10, 2014, at ¶ 6 n.4.

applicable arbitration rules, to decide an objection to competence as a preliminary matter.

160. The USG states that the evidentiary standard in sub-paragraph (c) facilitates an efficient and expeditious process for eliminating claims that lack legal merit. The USG notes that sub-paragraph (c) does not address, and does not govern, other objections, such as an objection to competence.
161. The USG further indicates that sub-paragraph (d) confirms that a respondent is not required to request a preliminary decision on an objection to competence when invoking the procedures under paragraph 4 (or paragraph 5). Thus, the applicable arbitration rules may allow, but do not require, a respondent to seek a preliminary decision on any objections to competence, and paragraph 4 does not modify those rules.
162. For the USG, Article 10.20.4 supplements the tribunal's authority under the available arbitration rules to decide preliminary objections, such as competence objections, separately from the merits.
163. Thus, according to the USG's submission, if a respondent makes a preliminary objection under Article 20.10.4, the tribunal retains its authority under the applicable arbitration rules to hear any preliminary objections to competence. However, reasons of procedural economy "will often weigh in favor of deciding competence objections as a preliminary matter and at the same time as objections made under paragraph 4."⁴⁷
164. Finally, the USG states that the expedited procedure provided for in Article 10.20.5 refers to all preliminary objections, whether permitted by paragraph 4 or the applicable arbitral rules. Thus, the USG submits that Article 10.20.5 modifies the applicable arbitration rules, requiring a tribunal to decide on an expedited basis any Article 10.20.4 objection as well as any objection to competence, provided that such request is made within 45 days of the date of the tribunal's constitution.

IV. THE TRIBUNAL'S ANALYSIS AND DECISIONS

A. The Relevant Issues

165. The key questions for determination by the Tribunal are two:

⁴⁷ *Id.*, at ¶ 11.

- (1) Does Article 10.20.4 of the Treaty encompass within its scope preliminary objections which may be characterized as relating to competence?
- (2) Which, if any, of the preliminary objections raised by the Respondent should be permitted to proceed to scheduling and full briefing for final decision in the Article 10.20.4 Phase of these proceedings?

166. In this decision, the Tribunal addresses only the limited procedural issues raised by the Respondent's preliminary objections under Article 10.20.4 of the Treaty. For the avoidance of doubt, the Tribunal does not otherwise address or decide any other procedural issues or any of the merits of the claims advanced or denied by the Parties.

B. The Relevant Treaty Provisions

167. The relevant Treaty provisions at issue are found in Article 10.20.4. Although not engaged on the facts here, Article 10.20.5 is also of relevance to the extent that it assists in the proper interpretation of Article 10.20.4. For convenience, these two provisions are set out in full as follows:

Article 10.20.4:

- "4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the 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.*
- (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment);*
 - (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established*

for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

- (c) *In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.*
- (d) *The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5."*

Article 10.20.5:

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

C. Interpretation of the Scope of Article 10.20.4

(1) The Question Presented and the Tribunal's Remit

168. The question presented for decision by the Tribunal relates to the proper scope of Article 10.20.4. The issue is one of considerable importance, not least because it is a matter of first impression under the Treaty.

169. At the outset, the Tribunal notes that the two State Contracting Parties to the Treaty, the Republic of Peru and the United States of America, have adopted different views as to the ambit of Article 10.20.4.
170. Peru has set out its view in its extensive written submissions in these proceedings. In short, Peru argues that Article 10.20.4 requires this Tribunal to address and decide “any objection” that a claim submitted is not a claim for which an award in favor of the Claimant may be made under Treaty Article 10.26. Peru contends that “any objection” includes both objections as to the merits and to competence.
171. The USG has provided its interpretation of the scope and effect of Article 10.20.4 in its non-disputing Party submission. The position of the USG is that “objections asserted under paragraph 4 [of Article 10.20] are distinct from objections to the tribunal’s competence” and that “an objection that a dispute is not within the tribunal’s competence” falls “outside the scope” of Article 10.20.4.
172. The Tribunal credits the views of both State Contracting Parties with the highest respect. However, the Tribunal is not bound by the views of either party.⁴⁸
173. Further, the Tribunal has taken note that the Free Trade Commission, established pursuant to the Treaty and authorized to issue binding interpretations as to the Treaty’s provisions, has issued no interpretation of Article 10.20.4 to date.
174. Under the circumstances, the proper interpretation of Article 10.20.4 and how it should be applied to the facts of this case are tasks which reside exclusively with this Tribunal.

(2) Principles of Treaty Interpretation

175. As emphasized by all Parties in this case, the starting point for the Tribunal’s analysis of Article 10.20.4 of the Treaty must be Article 31(1) of the Vienna Convention on the Law of Treaties, by which a 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.”

⁴⁸ See Meg N. Kinnear, Andrea K. Bjorklund, *et al.*, Article 1128-Participation by a Party in Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1, March 2008 (Kluwer Law International 2006) at 1128-1-1128-5, 1128-4; see also Respondent’s Submission October 4, 2014, at ¶ 35 and the materials cited at Note 73.

176. It is generally accepted that Article 31(1) of the Vienna Convention requires that a treaty should be interpreted first on the basis of its “plain language.”⁴⁹
177. The Tribunal also notes that the principle of effectiveness (*effet utile*) is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that “every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or *inutile*) .”⁵⁰
178. In addition, Article 32 of the Vienna Convention provides that in the interpretation of a treaty recourse may be had to “the preparatory work of the treaty and the circumstances of its conclusion”, either to “confirm the meaning” of the treaty provisions interpreted in accordance with Article 31 or “to determine the meaning” when the interpretation of treaty provisions leaves the meaning “ambiguous or obscure” or leads to a result which is “manifestly absurd or unreasonable.”
179. In interpreting the Treaty provisions in issue here, the Tribunal will be guided by the fundamental principles set out above.

(3) Textual Analysis

180. The Tribunal now turns to the interpretation of the text of the relevant Treaty provisions.
181. For the reasons set out below, the Tribunal has concluded that the plain language of Article 10.20.4, interpreted in accordance with the ordinary meaning of the terms in their context, clearly shows that objections as to competence are not included within the scope of Article 10.20.4 objections.
182. The Tribunal begins with an overview of the structure and scheme of Article 10.20.4 and its companion Article 10.20.5.

⁴⁹ See, e.g., *Yukos Universal Ltd. v. the Russian Federation*, PCA Case AA 227IIC 416 (2009), Interim Award on Jurisdiction and Admissibility of November 30, 2009, at ¶ 411 (“According to Article 31 of the [Vienna Convention], a treaty must be interpreted first on the basis of its plain language.”).

⁵⁰ See Oppenheim’s International Law 1280-81 (R. Jennings & A. Watts eds., 9th ed. 1996) (“The parties are assumed to intend provisions of a treaty to have a certain effect, and not to be meaningless: the maxim is *ut res magis valeat quam pereat*. Therefore, an interpretation is not admissible which would make a provision meaningless, or ineffective.”) See also *Eureko B.V. v. Republic of Poland*, *ad hoc*, Partial Award of August 19, 2005, at ¶ 248 (“It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. [T]reaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.” For further cases and materials on point, see Cremades Letter, Note 22 at 6-8.

183. Article 10.20.4 consists of a chapeau containing two clauses: (1) a principal clause and (2) a preceding subordinate clause. The chapeau is followed by four separate sub-paragraphs (a)-(d).

184. The principal clause states:

“[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.”

185. The effect of the principal clause is to establish a special regime that requires a tribunal to deal with a certain category of objections—namely, objections by a respondent to the legal sufficiency of claims brought by the claimant—as preliminary questions. These objections are hereafter referred to as “Article 10.20.4 objections.”

186. The preceding subordinate clause in the chapeau to Article 10.20.4 states that the principal clause is:

“[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.”

187. The subordinate clause thus provides clarification that the mandatory procedure for addressing Article 10.20.4 objections established by the primary clause is to operate without detriment to or effect on a tribunal's power to deal with “other objections” (including competence objections) as preliminary questions.

188. It is common ground between the Parties that a “tribunal's authority” to deal with “other objections” is derived from the applicable arbitration rules.⁵¹ Where the 2010 UNCITRAL Rules apply (as is the case here), Article 23(3) of the Rules grants the tribunal the authority, exercisable at its discretion, to deal with an objection to jurisdiction as a preliminary question.

189. Sub-paragraphs (a)-(d) of Article 10.20.4 follow the principal clause of the chapeau and provide certain procedural rules when dealing with Article 10.20.4 objections. Thus:

(a) “*Such* objection” must be submitted to the tribunal within the time limit specified.

⁵¹ Claimant's Submission, May 7, 2014, at 1-2; Respondent's Submission, October 4, 2014, at 23.

- (b) Upon receiving “an objection under this paragraph”, the tribunal shall suspend the proceedings on the merits and establish a timetable for dealing with the objection. Such timetable shall be “consistent with any schedule [the tribunal] has established for considering any other preliminary question.” This is a clear reference to preliminary questions dealt with under the applicable arbitration rules and accords with the general purpose of the article to ensure an efficient and cost-effective procedure for disposing of preliminary objections.
- (c) When deciding “an objection under this paragraph,” the tribunal is required to adopt an evidentiary standard which assumes that all of claimant's factual allegations in support of its claim as set out in the pleadings are true.
- (d) The respondent is not deemed to have waived “any objection as to competence or any argument on the merits” merely because it did or did not raise “*an objection under this paragraph*” or under Article 10.20.5.

190. Article 10.20.5 is a companion provision to Article 10.20.4 which provides for an expedited procedure for dealing with preliminary objections. Article 10.20.5 provides:

“...Upon the request of the respondent 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...”

191. As the above exposition of Articles 10.20.4 and 10.20.5 demonstrates, the Treaty draws a clear distinction between three different categories of procedures for dealing with preliminary objections. Thus:

- (1) The principal (“shall address and decide”) clause in Article 10.20.4 refers to objections alleging the insufficiency of a claim as a matter of law which a tribunal is mandated to decide as a preliminary issue based on assumed facts.
- (2) The subordinate (“without prejudice”) clause in Article 10.20.4 preserves a tribunal's right to decide “other objections” (including competence objections) as preliminary questions pursuant to the applicable arbitration rules.

(3) Article 10.20.5 provides for a special expedited procedure, at a respondent's option, for dealing with preliminary objections under both (1) and (2).

192. In the Tribunal's view, the underlying scheme established by the provisions and the plain language found in the text make it clear that competence objections were not intended to come within the scope of the Article 10.20.4 objections referred to in category (1) above.
193. First, it is noteworthy that the principal clause in Article 10.20.4 (preliminary objections category 1) makes no explicit reference to competence objections. This is to be contrasted with the express references to "objections to the tribunal's competence" contained in both the subordinate clause of Article 10.20.4 (category 2) and in Article 10.20.5 (category 3).
194. If the State Contracting Parties to the Treaty had intended competence objections to fall within the scope of Article 10.20.4 objections, they could have easily drafted language for inclusion in the principal clause of Article 10.20.4 to achieve this.⁵² However, both the language and the logic of the provisions suggest that this was not done because the drafters intended to draw a distinction between Article 10.20.4 objections on the one hand and "other objections", such as competence objections, on the other.
195. In the Tribunal's view, the use of the words "other objections" in the subordinate clause of Article 10.20.4 must be seen to be a reference to objections that are *other than*, meaning *different from*, the objections referred to in the article's primary clause. If Article 10.20.4 objections included objections to competence, there would plainly be no need to describe competence objections as "*other objections*." Therefore, in order to invest logic and meaning in the provision as a whole, the Tribunal considers that competence objections must be understood to fall outside the scope of the Article 10.20.4 objections.
196. Further support for this reading of the Treaty's language is to be found in Article 10.20.5. As stated above, Article 10.20.5 was intended to provide an expedited pathway for the disposal of preliminary objections. By its terms, Article 10.20.5 is not limited to Article 10.20.4 objections.

⁵² See Cremades Letter, Note 22 at 5-6.

197. The first sentence of Article 10.20.5 makes plain that the expedited procedure applies to both “...an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence.” [Emphasis added]
198. In the Tribunal's view, this sentence provides additional and cogent confirmation that the Treaty drafters intended to draw a clear demarcation between Article 10.20.4 objections and objections as to competence, and that the latter do not fall within the scope of the Article 10.20.4 objections.
199. As noted by Mr. Bernardo M. Cremades, if competence objections were already included within the scope of Article 10.20.4 then the words “and any objection that the dispute is not within the tribunal's competence” at the end of the first sentence of Article 10.20.5 would be superfluous.⁵³ The principle of *effet utile* requires that a treaty be interpreted so that every operative clause is “meaningful rather than meaningless.” In the Tribunal's judgment, to ascribe to the provision the meaning contended for by the Respondent would offend against this important principle.
200. Further support for the distinction drawn in the Treaty provisions between Article 10.20.4 objections and competence objections can be seen in the way in which the timetabling of preliminary issues is addressed.⁵⁴ Sub-paragraph (b) of Article 10.20.4 provides that upon the receipt of a preliminary objection under that Article, the tribunal shall establish a schedule for considering the objection which is “consistent with any schedule it has established for considering any other preliminary question...” As discussed above, the purpose of this phrase is to require, on grounds of efficiency, that Article 10.20.4 objections and competence objections brought under the applicable arbitration rules are dealt with on parallel briefing schedules. By contrast, Article 10.20.5 contains no such provision. This is obviously because Article 10.20.5 (unlike Article 10.20.4) already includes objections to competence within its scope.
201. The Respondent argues that the phrase “any objection” in the principal clause of Article 10.20.4 clearly establishes Peru's right to bring objections to competence in the Article 10.20.4 Phase. The Respondent is supported by Professor Michael Reisman who asserts: “[T]he ordinary meaning of the words 'any objection' is any objection.”⁵⁵

⁵³ Cremades Letter, Note 22 at 7- 8.

⁵⁴ *Id.* at 8.

⁵⁵ Professor Reisman's Letter, Note 6 at 4.

202. The Tribunal considers it would be wrong to read the words “any objection” in isolation. The Vienna Convention on the interpretation of treaties requires that the words must be construed in their proper context. When viewed in the context of the provision as a whole it is clear that the words “any objection” are not open ended. Rather, they are qualified - and circumscribed - by the preceding subordinate clause. Read together, it is clear that in this context, contrary to the Respondent’s case, “any” does not mean “any” without qualification, but rather “any” within a limited universe that excludes those types of objections which are identified in the subordinate clause, and which are the subject of separate provisions elsewhere.
203. Further, “any” refers to a specific category of objections, namely “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.” [Emphasis added]
204. The Claimant’s submission is that there is a 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.”⁵⁶ [Emphasis in original] The Respondent disagrees and argues that the word “claim” is broad enough to include jurisdictional or competence objections. In this regard, the Respondent relies on the opinion of Professor Reisman that “dismissal of a claim on jurisdictional grounds is a dismissal as a matter of law.”⁵⁷
205. Having carefully considered the views of both Parties, the Tribunal is persuaded that the better view is that there is a meaningful distinction between an objection that mounts a challenge to the sustainability of a legal claim, and an objection to a tribunal’s competence to hear a dispute. As Professor Jan Paulsson has noted:

“[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] that the case was unhearable, but that it was legally hopeless.

⁵⁶ Claimant’s Submission, April 3, 2014 at 6.

⁵⁷ Professor Reisman’s Letter, Note 6 at 4.

That is precisely how one should understand the difference between a challenge of inadmissibility and a strike-out application.”⁵⁸

206. In the case at hand, the distinction drawn by Professor Paulsson is apparent from the fact that when addressing an Article 10.20.4 objection for legal insufficiency of a claim, a tribunal will be called to decide whether the claim is “legally hopeless.” Consideration of an objection to competence, however, requires a tribunal to ask a different kind of question: whether the objection is “hearable” at all, irrespective of a party’s substantive Treaty rights or the legal merit of the claim.
207. Moreover, even if an objection to a tribunal’s competence provides a basis for “dismissal as a matter of law”, Article 10.20.4 only requires a tribunal to decide as a preliminary question an objection which is directed at the legal sustainability of a claim, not the tribunal’s jurisdiction.⁵⁹ This follows from the distinction created by the structure of Article 10.20.4 which, as discussed above,⁶⁰ confirms that objections as to competence are “other objections”, which are different from objections 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...”
208. Further, the Tribunal is persuaded by the Claimant’s submission that the text of sub-paragraph (c) of Article 10.20.4 provides a further indication that the scope of Article 10.20.4 objections is limited to objections to the legal sufficiency of a claim.⁶¹ Under sub-paragraph (c), when deciding an Article 10.20.4 objection “the tribunal shall assume to be true claimant’s factual allegations in support of any claim...” [Emphasis added] If the word “claim” were intended to include objections to competence, then sub-paragraph (c) would require a tribunal to assume the entirety of the claimant’s factual allegations in the pleadings to be true, not only those factual allegations “in support of any claim.” In the Tribunal’s view, the inclusion of the words “in support of any claim” is consistent with the view that competence objections fall outside the scope of Article 10.20.4 objections. To interpret the language in sub-paragraph (c) otherwise would be impermissible under the principle of *effet utile*, as it would to render the phrase “in support of any claim” meaningless.

⁵⁸ 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).

⁵⁹ Claimant’s Submission, May 7, 2014 at 6.

⁶⁰ See *supra* at ¶¶ 182-191.

⁶¹ Claimant’s Submission, October 1, 2014 at 8-9.

209. Accordingly, based on the foregoing, the Tribunal has concluded that the Respondent's contention that the word "claim" in the primary clause of Article 10.20.4 should be interpreted broadly to include competence objections is without merit.

210. The Respondent also contends that sub-paragraph (d) of Article 10.20.4 provides support for its argument that competence objections should be included within the ambit of Article 10.20.4 objections. The Respondent has stated:

*"Article 10.20.4(d) confirms Peru's right to raise competence objections under Article 10.20.4, by providing that a respondent State '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'. The necessary corollary to this provision is that a State may raise an objection as to competence under Article 10.20.4."*⁶² [Emphasis in original]

211. In the Tribunal's view, this is incorrect. Sub-paragraph (d) reads in full as follows:

"[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." [Emphasis added]

212. When read in its entirety, it is plain that the cross-reference to Article 10.20.5 (which includes objections as to competence) explains the earlier reference in sub-paragraph (d) to the non-waiver of competence objections. Therefore, in the Tribunal's judgment, the better view of sub-paragraph (d) is that the provision draws the same distinction between Article 10.20.4 objections and objections to competence as is found in the principal and subordinate clauses of Article 10.20.4 and in Article 10.20.5. As such, the Tribunal concludes that the provision does not support the Respondent's argument but confirms that competence objections are excluded from the scope of Article 10.20.4 objections.⁶³

213. In conclusion, having carefully considered all of the submissions of both Parties and the relevant Treaty texts, the Tribunal has determined that on a proper interpretation of the

⁶² Respondent's Submission, October 4, 2014 at 8.

⁶³ In reaching this conclusion, the Tribunal has found it unnecessary to address the Claimant's arguments based on the U.S. Federal Rules of Civil Procedure, on which it expresses no opinion.

text of the Treaty provisions, objections as to a tribunal's competence are outside the scope of Article 10.20.4.

(4) Object and Purpose

214. It is common ground between the Parties that the object and purpose of Article 10.20.4 and its companion Article 20.10.5 is to provide an efficient and cost-effective mechanism for respondent States to assert preliminary objections to dispose of claims at an early stage in the arbitration proceedings.
215. Further, both State Contracting Parties to the Treaty have traced the origins of the provisions contained in Articles 10.20.4 and 10.20.5 to the NAFTA case of *Methanex v. United States*.⁶⁴
216. In *Methanex*, the United States was confronted with claims that it contended were without legal merit, even assuming the truth of the claimant's allegations. However, the tribunal ruled that it could not address such objections in a preliminary phase. Only after protracted and costly proceedings did the tribunal ultimately decide that it did not have jurisdiction and that the claims should be dismissed
217. In the light of *Methanex*, the United States and Peru agreed to include in the Treaty provisions which would allow a respondent State to assert preliminary objections in an efficient manner and thus avoid the unnecessary time and expense of adjudicating a legally meritless claim.
218. The Respondent contends that in order for Article 10.20.4 to fulfil its intended object and purpose, the provision must be interpreted to include competence objections within its scope. If this is not done, the Respondent argues, the preliminary objections mechanism provided for in the Treaty would be incapable of solving the issues which surfaced in *Methanex* and which they were originally intended to address.
219. In the Tribunal's view, the Respondent's argument is unavailing. As discussed above, the scheme put into place by Articles 10.20.4 and 10.20.5 of the Treaty provides for three different procedural options for dealing with preliminary objections. These include (1) the special procedure for dealing with Article 10.20.4 objections; (2) the provisions

⁶⁴ See the Respondent's Submission, April 23, 2014, at 4; the USG's Submission, September 10 2014, at ¶¶ 2-3.

contained (in this case) in Article 23(3) of the UNCITRAL Rules for dealing with jurisdictional objections as preliminary questions; and, importantly, (3) the expedited procedure provided for under Article 10.20.5 which materially enhances the efficient handling of preliminary objections brought under both (1) and (2). Taken together, these provisions address the issues confronted by the respondent in *Methanex*.

220. The Tribunal is unpersuaded by Professor Reisman's suggestion that preliminary objections in which there may be disputed issues of fact (as per Article 23(3) of the UNCITRAL Rules, and Article 10.20.5 of the Treaty, and unlike Article 10.20.4 of the Treaty) are somehow incapable of being determined with expedition.⁶⁵
221. Further, the Tribunal doubts that the accepted object and purpose of the Treaty would be achieved if objections as to the Tribunal's competence could be brought more than once (i.e. under Article 10.20.4, on the basis of assumed facts, and thereafter as a preliminary objection under – in this case – Article 23(3) of the UNCITRAL Rules).
222. In summary, the Tribunal concludes that the provisions contained in Articles 10.20.4 and 10.20.5 provide for an efficient mechanism for disposing of claims at an early stage in the arbitral proceedings which is fully consonant with the object and purpose intended by the Parties.

(5) Treaty Negotiations

223. Peru contends that the negotiating history of the Treaty demonstrates that the Parties agreed that the scope of Article 10.20.4 would encompass both competence objections and objections as to the merits.
224. In support, Peru has submitted excerpts from the negotiation summaries prepared by Peru's Ministry of Foreign Trade and Tourism. Peru contends that the negotiation summaries demonstrate that the possibility of raising preliminary objections to the competence of the tribunal was one of the "objectives" of Peru in the negotiations with the United States during the Six (2004) and Seventh (2005) Rounds of negotiations.⁶⁶ Further, Peru contends that the negotiation summary for the Eight Round (2005) of

⁶⁵ Professor Reisman's Letter, Note 6 at 6: "... objections that included disputes about facts, with all that entails procedurally, would hardly lend themselves to an expedited procedure."

⁶⁶ Unofficial Translation of the MINCETUR 6th Round Negotiations, Note 11 at 29-30 and Unofficial Translation of the MINCETUR 7th Round Negotiations, Note 11 at 37.

negotiations shows that Peru and 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.”⁶⁷

225. In addition, Peru has submitted a letter from Mr. Carlos Herrera Perret who formerly served as “team leader” of negotiations for the investment chapters of the Treaty. Mr. Herrera states: “[B]ased on my role in the negotiations, the issue of the interpretation of Article 10.20.4 of Chapter 10 of the Treaty is unequivocal: the scope of the provision is very broad and reflects the position that Peru sought in the negotiations.”⁶⁸

226. The negotiation summaries and the Herrera Letter have presumably been put forward by Peru as evidence of “preparatory work” within the meaning of Article 32 of the Vienna Convention. However, these materials appear to reflect only Peru's own position, objectives, and understanding in the course of the negotiations.

227. The utility of unilateral evidence emanating from one of the negotiating sides of a treaty in investor-state disputes has been the subject of analysis by numerous commentators and tribunals. For example, Dr Thomas Wälde has noted:

*“One has to be careful with the views, in particular ex post, of participants in the negotiations. Like witnesses in court, they will interpret what has happened through the lens of their own—as a rule limited and one-sided—perspective, views on desirability, and interests of their principals. They will tend to suppress ‘cognitive dissonance’ and rather confirm what has happened is what they think should have happened.”*⁶⁹

228. Similarly, Anthony Aust has stated:

“The summary record of a conference prepared by an independent and experience secretariat will carry more weight than an unagreed record produced by [a] participating state. However, even the records of a conference served by a skilled secretariat will generally not tell the whole story. The most important parts of negotiating and drafting often take place informally, with no agreed record

⁶⁷ Unofficial Translation of the MINCETUR 8th Round Negotiations, Note 11 at 15.

⁶⁸ Herrera Letter, Note 7.

⁶⁹ Thomas W. Wälde, “*Interpreting Investment Treaties: Experiences and Examples*”, in Christina Binder et al., eds., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), at 778.

being kept. The reasons why a particular compromise formula was adopted, and what it was intended to mean, may be difficult to establish.”⁷⁰

229. Hence tribunals in investor-state arbitrations have tended to approach the testimony of state officials and negotiators with caution.⁷¹
230. In any event, under Article 32 of the Vienna Convention a tribunal may have recourse to “supplementary means of interpretation”, such as reference to a treaty’s “preparatory work”, in only limited circumstances. These are (i) to “confirm the meaning” of treaty provisions interpreted in accordance with Article 31, or (ii) to “determine the meaning” of treaty provisions when interpretation leaves the meaning of treaty provisions “ambiguous or obscure” or to a result which is “manifestly absurd or unreasonable.”
231. In this case, this Tribunal has already determined that Article 10.20.4 of the Treaty, when interpreted in accordance with Article 31 of the Vienna Convention, clearly and unambiguously excludes competence objections from its scope. Therefore, the Tribunal sees no need to refer to supplementary interpretation to either confirm or determine the meaning of the Treaty provisions.

(6) Investment Treaty Jurisprudence

232. The Respondent has also argued that investment treaty jurisprudence supports its position that Article 10.20.4 should be interpreted to include competence objections within the scope of the provision.
233. In particular, the Respondent has referred to the *RDC v. Guatemala* Decision on Objections to Jurisdiction; the *RDC v. Guatemala* Second Decision on Objections to Jurisdiction; the *Pac Rim v. El Salvador* Decision on Respondent’s Preliminary Objections; and the *Commerce Group v. El Salvador* Award.⁷²
234. In addition, the Respondent has relied on comparisons between ICSID Arbitration Rule 41.5 and the provisions contained in Article 10.20.4 of the Treaty.

⁷⁰ Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2005) at 5.

⁷¹ See e.g., *Eureko B.V. (The Netherlands) v. Republic of Poland*, ad hoc Arbitration, Partial Award of August 19, 2005, at ¶ 185; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award of July 7, 2011, at ¶¶ 166-171, 212.

⁷² See *Pac Rim v. El Salvador* Decision on Respondent’s Preliminary Objections, Note 10 and *Commerce Group v. El Salvador* Award, Note 19.

235. The Tribunal has carefully considered the legal materials submitted by the Respondent referred to above and to the submissions of both Parties with respect thereto.
236. The Tribunal has not been materially assisted by the decisions of other arbitral tribunals construing provisions found in DR-CAFTA which are analogous (if not identical) to Articles 10.20.4 and 10.20.5 of the Treaty. As not all the same points on construction were apparently argued in these cases as have been argued here, and, in so far as they differ from the points set out above, ultimately the Tribunal is unpersuaded by the analysis and conclusions of these other tribunals. In this Tribunal's view, none of these decisions is precisely on point with the issues presented in this case and as such can provide only limited guidance here.
237. Similarly, the Tribunal has not been materially assisted by comparisons between the provisions contained in ICSID Arbitration Rule 41.5 and the Treaty provisions of concern in this case. In the Tribunal's judgment, ICSID Rule 41.5 contains language that is very different from that found in Articles 10.20.4 and 10.20.5 of the Treaty. Nor does ICSID Rule 41.5 share precisely the same object and purpose as Articles 10.20.4 and 10.20.5 of the Treaty.
238. For the above reasons, the Tribunal has placed no reliance on the above materials in reaching its decision here.

(7) Other

239. The Parties have raised a number of ancillary issues and arguments in their written submissions. For the avoidance of doubt, all of these issues and arguments have been carefully considered by the Tribunal in reaching its decisions even if each and every one has not been specifically referred to herein.

(8) Conclusion

240. For the reasons stated above, the Tribunal has concluded that objections to a tribunal's competence fall outside the scope of Article 10.20.4. Therefore, the Treaty does not mandate or require this Tribunal to address and decide objections as to competence in the Article 10.20.4 Phase of the arbitration proceedings.

241. The Tribunal's decision follows from its interpretation of Treaty Articles 10.20.4 and 10.20.5. This interpretation has been based upon the principles of treaty interpretation declared in Article 31 of the Vienna Convention, including the ordinary meaning of the terms contained in the Treaty, viewed in their context and in light of the Treaty's object and purpose.

D. The Respondent's Preliminary Objections

242. The Tribunal now turns to the question of which of the Respondent's preliminary objections should proceed to scheduling and briefing in the Article 10.20.4 Phase of these proceedings.

243. In its submission dated March 21, 2014 the Respondent noticed three preliminary objections pursuant to Article 10.20.4:

- (1) *Violation of the Treaty's Waiver Provisions.* Peru contends that Renco has presented an invalid waiver in this arbitration, in violation of Article 10.16.1(b) of the Treaty. In addition, Peru contends that, through the initiation and continuation of certain proceedings, Renco has acted in violation of the Treaty's waiver requirement.
- (2) *Lack of Jurisdiction Ratione Temporis.* Peru asserts that the Treaty limits arbitrable claims to those that arise from facts that took place after the Treaty came into force in 2009. Further, Peru argues that the Treaty precludes the submission of claims more than three years after a claimant knew or should have known of an alleged breach. Peru contends that the claims advanced by Renco in these proceedings violate both temporal limitations.
- (3) *Failure of Claims Under the Plain Language of the Contract.* Peru contends that Renco's Treaty claims are based on alleged breaches of the Stock Transfer Agreement in connection with the tort suits proceeding against Renco in the United States. Peru argues that these contract claims must fail as a matter of law because the party to the Stock Transfer Agreement is not a defendant in the U.S lawsuits. Further, Peru argues that Renco failed to submit a claim for determination by a technical expert as required by the Stock Transfer Agreement. Therefore, Peru

contends that it cannot be deemed to have breached a contractual obligation with respect to the U.S. lawsuits as asserted by Renco.

244. Peru contends that each of the above preliminary objections falls within the scope of Article 10.2.4 and should be considered and decided by the Tribunal in the Article 10.20.4 Phase of these proceedings.
245. The Claimant considers that the three preliminary objections noticed by Peru in its letter dated March 21, 2014 include six different preliminary objections. These are: (1) presentation of an invalid waiver; (2) violation of the waiver; (3) lack of jurisdiction *ratione temporis*; (4) violation of the Treaty's three-year limitations period; (5) failure to state a claim for breach of the investment agreement; and (6) failure to submit two factual issues for determination by a technical expert prior to commencement of the arbitration.
246. The Claimant contends that Peru's objections (1)-(4) and (6) above all relate to the Tribunal's competence or jurisdiction over this dispute. As such, the Claimant argues that they fall outside the scope of the Article 10.20.4 Phase established by Procedural Order No. 1. As to Peru's preliminary objection (5), the Claimant accepts that the Treaty allows Peru to bring this objection as a preliminary question under Article 10.20.4.
247. Peru has asserted that the preliminary objections it has raised under the heading "Violation of the Treaty's Waiver Provisions" (characterized by the Claimant as objections (1) and (2)) implicate "the Tribunal's jurisdiction."
248. As to the objections raised under the heading "Lack of Jurisdiction *Ratione Temporis*" (characterized by the Claimant as objections (3) and (4)) Peru has asserted: "The Tribunal lacks jurisdiction over these claims."
249. As regards Peru's preliminary objection based on the failure to submit two factual issues for determination by a technical expert prior to the commencement of the arbitration (characterized by the Claimant as objection (6)), this objection is one of admissibility. As such, Peru's objection here clearly goes to the competency of the Tribunal. In its own

submissions, Peru has accepted that competence and admissibility are “two sides of one and the same conceptual coin.”⁷³

250. In view of the foregoing, and in light of the Tribunal's finding above that on a proper interpretation of Treaty Article 10.20.4 objections relating to the Tribunal's competence fall outside the mandatory scope of Article 10.20.4, the Tribunal declines to hear Peru's competence objections in the Article 10.20.4 Phase of these proceedings. Peru may bring its competency objections later in these proceedings in accordance with the timetable agreed in Annex A of Procedural Order No. 1.
251. There remains the question of Peru's preliminary objection based on the Claimant's alleged failure to state a claim for breach of the investment agreement (what the Claimant has characterized as preliminary objection (5)).
252. Both Parties agree that this objection properly falls within the scope of Article 10.20.4. Accordingly, the Tribunal decides that this objection shall be briefed and heard as a preliminary objection in the Article 10.20.4 Phase of these proceedings in accordance with a timetable to be set by the Tribunal following further submissions from the Parties.

E. Summary and Decisions

253. The Procedural Schedule annexed to Procedural Order No. 1 requires the Tribunal to make a preliminary decision (or full or partial deferral of decision) on the Respondent's preliminary objections after hearing from the Parties.
254. Having carefully considered all of the submissions of both Parties, the Tribunal decides that on a proper interpretation of the Treaty provisions the Respondent's objections as to the Tribunal's competence fall outside the scope of Article 10.20.4.
255. In view of the above, only one of the various preliminary objections noticed by the Respondent, namely, the Claimant's alleged failure to state a claim for breach of the investment agreement, will be considered and decided in the Article 10.20.4 Phase of these proceedings.

⁷³ Respondent's Submission, October 4, 2014, at 8, citing with approval Veijo Heiskanen, *Menage A Trois? Jurisdiction, Admissibility and Competence In Investment Treaty Arbitration*, ICSID Review (2013), at 13.

256. The Respondent's other preliminary objections, which relate to competence, may be brought by the Respondent together with its Counter-Memorial on Liability in accordance with the timetable set out in Annex A to Procedural Order No. 1.

257. In order to fix the timetable for the Article 10.20.4 Phase, the Parties are directed to file their submissions on the scheduling implications of this Decision within fourteen (14) days from the date hereof.

V. COSTS

258. The Tribunal decides to make no order as to costs at this stage under Article 10.20.6 of the Treaty but to reserve its decision to the final stage of these arbitration proceedings.

VI. OTHER MATTERS

259. As to all other matters, the Tribunal retains its full power to decide any further matters in these arbitration proceedings, whether by order, decision or award.

Made in Paris, France

Date: December 18, 2014

[Signed]

The Honorable L. Yves Fortier, CC, QC
Arbitrator

[Signed]

Mr. Toby T. Landau, QC
Arbitrator

[Signed]

Dr. Michael J. Moser
Presiding Arbitrator