

**The Renco Group, Inc.**

*Claimant*

v.

**The Republic of Peru**

*Respondent*

(UNCT/13/1)

**PERU'S COMMENTS ON THE  
NON-DISPUTING PARTY SUBMISSION**

3 October 2014



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

### **PERU'S COMMENTS ON THE NON-DISPUTING PARTY SUBMISSION**

1. Pursuant to Procedural Order No. 2, the Republic of Peru hereby provides its comments on the September 10, 2014, Submission of Non-Disputing Party the United States of America (“Non-Disputing Party Submission” or “Submission”) regarding the preliminary objections provision in Article 10.20.4 of the Peru-United States Trade Promotion Agreement (“Treaty”).<sup>1</sup>

#### **I. INTRODUCTION**

2. Peru appreciates the cooperative relationship that it shares with the United States in matters relating to trade, investment, development, and environmental protection, among others. These shared commitments of Peru and the United States are embodied in the Treaty, which reflects the States’ agreement on a broad range of issues negotiated over a period of years. Peru respects its international obligations under the Treaty and its rights thereunder, including those related to cooperation in environmental practices and dispute resolution where there is legitimate jurisdiction and transparency. As with all rights accorded each State under the Treaty, Peru also respects the right of the United States to make a non-disputing Party submission under Article 10.20.2.

3. On March 21, 2014, Peru exercised its right to raise objections pursuant to the Treaty, identifying three focused objections relating to waiver, temporality, and contract. As Professor Michael Reisman of Yale University has explained, the Treaty’s preliminary objections mechanism is “exceptionally concerned with protecting the respondent state from abusive uses of the extensive procedural powers afforded the putative investor.”<sup>2</sup> As Peru has explained, each objection can be decided as a matter of law based on the facts as alleged by Renco or on undisputed facts – and therefore meets the requirements of Article 10.20.4.<sup>3</sup> Each objection raises threshold issues that, when decided, could extinguish, narrow, or clarify the claims that may proceed to a fuller inquiry on the merits. Deferring resolution of such objections for a later phase not only contravenes the express terms of the Treaty, which provide that objections raised under Article 10.20.4 *shall* be decided as a preliminary question, but also would be highly inefficient and, thus, contrary to the purpose of Article 10.20.4, and the rights and protections it affords respondent States.

4. Renco seeks to cherry-pick the objection that it deems in its self-interest to hear at the outset of this already-protracted proceeding, and to deny Peru of its right to bring objections. It thus disputes that some of Peru’s three focused objections fall within the scope of Article 10.20.4.<sup>4</sup> Renco agrees with Peru that Article 10.20.4 permits preliminary objections to the legal sufficiency of claims, but

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

<sup>2</sup> Letter from Prof. M. Reisman to J. Hamilton dated April 22, 2014, at 1-2 (submitted as Annex A to Peru’s April 23, 2014 Submission on the Scope of Preliminary Objections) (“Reisman”).

<sup>3</sup> *See* Peru’s Submission on the Scope of Preliminary Objections dated April 23, 2014; Notification of Preliminary Objections from Peru to the Tribunal dated March 21, 2014; Letter from Peru to the Tribunal dated July 29, 2013.

<sup>4</sup> Claimant’s Reply on Scope of Respondent’s Article 10.20(4) Objections dated May 7, 2014; Letter from Claimant to the Tribunal dated April 3, 2014; Letter from Claimant to the Tribunal dated July 29, 2013.

argues that the mandatory provisions of Article 10.20.4 exclude objections which may be characterized as relating to competence. Renco thus seeks to manufacture a false divide between merits and competence defenses, so that the Tribunal might decide only those objections that Renco prefers to be addressed at this juncture – namely, those for which a decision might be useful for it in tort actions now proceeding against Renco in U.S. courts.

5. On July 31, 2014, the Tribunal invited the United States to submit its views on the scope of Article 10.20.4 objections.<sup>5</sup> The United States filed its Submission on September 10. In its Submission, the United States agrees with Peru that Article 10.20.4 is intended to promote the efficient resolution of claims at an early stage – and also that the Article does not limit, but rather supplements, the Tribunal’s authority.<sup>6</sup> Further, the Submission underscores that a tribunal has the authority to decide competence objections at a preliminary stage.<sup>7</sup> Nonetheless, the Submission appears to adopt the view that Article 10.20.4’s mandatory procedure for objections that a claim that cannot prevail as a matter of law excludes objections that may be characterized as competence objections.<sup>8</sup> As explained further herein, that interpretation would undermine the objective of the Article, as set forth in the Submission.

6. In view of issues raised by the Submission, Peru elaborates on the following points herein:

- ***The Submission confirms the importance of preliminary objections to protect State rights.*** Prior investment arbitration experiences of the United States and Peru confirmed, for each State, the critical function of preliminary objection mechanisms that could be invoked at the State’s request to dismiss unmeritorious claims promptly and efficiently. Accordingly, the States made sure to build such protections into subsequent investment treaties, including the Peru-United States Treaty.
  - *The Treaty’s negotiating history clarifies the scope of Article 10.20.4.* Peru’s contemporaneous negotiating history documents confirm that the Parties agreed on a broad scope for preliminary objections under Article 10.20.4, including competence objections. No other evidence suggesting otherwise has been submitted. Further corroborating the negotiating history presented in the documents, Peru provides herewith a letter from Mr. Carlos Herrera Perret, the Executive Director (e) of PROINVERSIÓN, Peru’s Private Investment Promotion Agency, who served as the Team Leader of Negotiations for the investment chapter of the Treaty.<sup>9</sup> Mr. Herrera’s discussion on the negotiating history is addressed below.
  - *The Treaty text reflects the Parties’ agreement on Article 10.20.4.* The only textual restriction on the objections that may be raised under Article 10.20.4 is that the objection must be one that, “as a matter of law . . . an award in favor of the claimant may [not] be made;” there is no language in the text excluding jurisdictional

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<sup>5</sup> Procedural Order No. 2 of July 31, 2014; Joint Letter from the Parties to the U.S. Department of State dated August 5, 2014.

<sup>6</sup> Non-Disputing Party Submission, ¶¶ 3, 6, 8, 11.

<sup>7</sup> *Id.* ¶¶ 5-6.

<sup>8</sup> *Id.* ¶¶ 11-12.

<sup>9</sup> See Letter from Mr. C. Herrera Perret, Executive Director (e) of PROINVERSIÓN, to Mr. C. José Valderrama Bernal, President, Special Commission that Represents the State in International Investment Disputes, Ministry of Economy and Finance, dated Oct. 2, 2014 (“Herrera Letter”).

objections from that scope. Moreover, the Treaty text in Article 10.20.4(d) includes an express reference to “competence” objections in order to ensure that such objections are included in – and not excluded from – the scope of Article 10.20.4. The Submission does not address the strong textual analysis in Professor Reisman’s April 22, 2014 letter opinion (or any other conclusions from that opinion).

- *Investment treaty jurisprudence further clarifies the scope of Article 10.20.4.* The jurisprudence specific to preliminary objections under the DR-CAFTA and ICSID Arbitration Rules confirms that objections “as a matter of law” may include competence objections.
- ***The Submission expressly disclaims any view on the specific objections at issue.*** The particular objections that Peru has raised reinforce the agreed importance of efficient procedures to resolve claims that lack legal merit. As a further brief examination of Peru’s objections underscores, each presents threshold issues that may resolve certain claims outright, or clarify the scope of issues to be addressed at a later stage. Each calls for dismissal as a matter of law based on undisputed facts, including:
  - *Waiver violations:* The Treaty requires that Renco and its investment submit waivers of any right to initiate or continue other proceedings or dispute settlement procedures with respect to the same measures at issue in the arbitration.<sup>10</sup> Renco and its investment have failed to submit valid waivers, and have acted in violation of the waiver requirement.
  - *Temporal violations:* The Treaty limits arbitrable disputes to those that arise from facts that took place after the Treaty entered into force in 2009, and precludes submission of claims more than three years after a claimant knew or should have known of an alleged breach, and that it had suffered damages therefrom.<sup>11</sup> Renco’s claims violate both temporal limitations.
  - *Contract claim failures:* Renco raises Treaty claims based on alleged breaches of the Stock Transfer Agreement in connection with the tort suits proceeding against it in U.S. courts. Renco’s contract claims fail as a matter of law, *inter alia*, because the party to the contract is not a defendant in the U.S. lawsuits, and because expert procedure requirements under the contract were not followed.
- ***The Submission underscores that all of Peru’s objections can be decided now.*** Further to the principles of efficient and economic resolution of disputes, and the Tribunal’s authority as set forth in the Submission, the Tribunal can and should address all of Peru’s objections in the preliminary phase. The Tribunal alone has the authority to decide the issue, notwithstanding Renco’s efforts to limit Peru’s Treaty rights by imposing a U.S.-centric view, cherry-picking objections that Renco prefers to resolve sooner, and seeking to influence the outcome of the dispute through external pressures.

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<sup>10</sup> Peru-United States Trade Promotion Agreement, Art. 10.18.

<sup>11</sup> *Id.*, Arts. 10.1.3 & 10.18.1.

## II. THE SUBMISSION CONFIRMS THAT ARTICLE 10.20.4 PROVIDES A MECHANISM FOR THE EFFICIENT DISMISSAL OF CLAIMS

### A. The Submission Confirms The Critical Function Of Preliminary Objections

7. The Non-Disputing Party Submission traces the critical function of the preliminary objections provision in the Treaty (and other investment treaties to which the United States is a Party) back to the experience of the United States in the *Methanex Corp. v. United States* (“*Methanex*”) case. Peru similarly has addressed the impact of *Methanex* in its prior submissions.<sup>12</sup>

8. According to the Submission, the United States raised preliminary objections in *Methanex*, and “[t]he tribunal ultimately dismissed all of claimant’s claims for lack of jurisdiction, but only after three more years of pleading on jurisdiction and merits and millions of dollars of additional expense.”<sup>13</sup> As a result, “[i]n all of its subsequent investment agreements concluded to date, the United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary objections in an efficient manner.”<sup>14</sup> Although it is doubtful as to whether the availability of a procedure akin to that provided by Article 10.20.4 in the *Methanex* case would have resulted in the dismissal of that claim at an earlier stage,<sup>15</sup> it was that tribunal’s determination that it only could hear the United States’ jurisdictional objection, but lacked authority to decide the United States’ admissibility objections, in a preliminary phase,<sup>16</sup> that prompted the United States to adopt language in its future treaties granting express authority to tribunals to decide such objections preliminarily.<sup>17</sup> The Submission thus highlights the importance of Treaty mechanisms for the prompt and efficient resolution of claims in a preliminary phase.

9. The experience and perspectives of Peru are equally relevant to an understanding of the bilateral Treaty. Peru, too, participated in investment arbitration cases that shaped its views on the importance of preliminary objection procedures. In *Luchetti v. Peru*,<sup>18</sup> for example, Peru raised objections

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<sup>12</sup> Peru’s Submission on the Scope of Preliminary Objections of April 23, 2014 ¶ 9; Letter from Peru to the Tribunal dated July 29, 2013 (“This language was introduced by the United States in response to a decision by a tribunal deciding a claim under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules that it had authority to rule on issues of jurisdiction, but not admissibility, as a preliminary matter.”).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 3.

<sup>15</sup> The *Methanex* tribunal determined in the preliminary phase that it lacked jurisdiction over the claim, but permitted the claimant to amend its claim to add allegations which, if proven, would have provided the tribunal with jurisdiction. *Methanex Corp. v. United States of America* (UNCITRAL) Award of August 3, 2005. In the subsequent phase of the arbitration, the tribunal determined that it lacked jurisdiction over the claim and, even if it had jurisdiction, the claims would fail on the merits. *Id.* at Pt. 4, Ch. F, ¶¶ 5, 6. Because the *Methanex* tribunal did hear and decide the United States’s jurisdictional objection, on which it ultimately prevailed, in a preliminary phase, it is not evident that the claim would have been dismissed earlier with the availability of a preliminary objections mechanism like Article 10.20.4.

<sup>16</sup> *Methanex* Partial Award, ¶ 107.126.

<sup>17</sup> See Andrea J. Menaker, *Benefitting from Experience: Developments in the United States’ Most Recent Investment Agreements*, 12 U.C. Davis J.I.L.P. 121, 127 (2005) (noting that “[a]t least one tribunal applying the UNCITRAL Arbitration Rules in a NAFTA investor-State arbitration determined that it lacked authority to address admissibility objections, as opposed to jurisdictional objections, in a preliminary phase. The United States’ recent agreements ensure that such issues may be dispensed with at a preliminary phase, thus potentially avoiding the time and cost of a preliminary hearing.”).

<sup>18</sup> *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4), Award of February 7, 2005.

to the tribunal's jurisdiction at the outset, including with respect to jurisdiction *ratione temporis*, because the dispute arose before the relevant investment treaty entered into force. The case was dismissed on this ground.<sup>19</sup>

10. Mr. Carlos Herrera Perret is the Executive Director (e) of PROINVERSIÓN, Peru's Private Investment Promotion Agency. He also has served as a member of the Special Commission that Represents the State in International Investment Disputes, and as the Team Leader of Negotiations for the investment chapters of several free trade agreements concluded by Peru, including the Peru-United States Treaty. In his letter submitted herewith, Mr. Herrera explains, based on long experience in matters of foreign investment and trade, that he "observed the procedural and efficiency implications of opportunities used by Peru to raise objections on jurisdiction and merits in several cases," including *Luchetti* – and that Peru's approach to the negotiation of the Treaty took into account this experience in international cases.<sup>20</sup>

11. Accordingly, prior to negotiation of the Treaty, both the United States and Peru 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.

#### **B. The Treaty's Negotiating History Confirms That Peru's Objections Are Within The Scope Of Article 10.20.4**

12. The Non-Disputing Party Submission links the experience of the United States in the *Methanex* case to the negotiation of "all of its subsequent investment agreements concluded to date."<sup>21</sup> Nonetheless, the Submission does not address the negotiations that gave rise to the Treaty and, in particular, Article 10.20.4. Peru did offer details on the negotiating history of Article 10.20.4 in its April 23 submission, together with contemporaneous negotiating documents from Peru's Ministry of Foreign Trade and Tourism (MINCETUR).<sup>22</sup> As Peru explained, and further elaborates below, the negotiating history demonstrates that the Parties agreed that the Article 10.20.4 procedure would encompass objections both as to competence and the merits.<sup>23</sup>

13. The Treaty initially was negotiated as a multilateral free trade agreement between the United States and the Andean Countries of Peru, Colombia, Bolivia, and Ecuador. Mr. Herrera confirms that negotiation positions are reflected in the contemporaneous negotiating documents, and that "Peru's position took into account its experience in international cases including regarding the *importance of procedural efficiency and the right of States to make various preliminary objections regarding competence and the merits.*"<sup>24</sup> The negotiating documents evidence that the issue of preliminary objections was considered, and resolved, through multiple negotiation rounds:

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<sup>19</sup> *Id.*

<sup>20</sup> Herrera Letter.

<sup>21</sup> Non-Disputing Party Submission ¶ 3.

<sup>22</sup> Peru's Submission on the Scope of Preliminary Objections of April 23, 2014, ¶¶ 10-11.

<sup>23</sup> *Id.* ¶¶ 9-11.

<sup>24</sup> See Herrera Letter (emphasis added) & Attachment.

- Sixth round. Negotiations began at the end of November 2004. That same month, the United States completed its 2004 Model BIT, which included a preliminary objections provision substantially similar to Article 10.20.4 of the Treaty, but without any express reference to competence objections.<sup>25</sup> Peru’s documents reflect an intent to clarify in the negotiations that the preliminary objections provision in the Treaty *would* include competence objections. The MINCETUR negotiation summary states that one of the “Objectives to obtain” included: “Article 19.4 (Conduct of the Arbitration) To indicate the possibility of raising *preliminary objections regarding the lack of competence of the tribunal* to decide a claim.”<sup>26</sup> As the title reflects, Article 19.4 was the precursor to Article 10.20.4 in the final Treaty.
- Seventh round. Negotiations took place in February 2005. The contemporaneous MINCETUR document again states that “Objectives” included: “Article 19.4 Conduct of the Arbitration: *Point out specifically that one of the preliminary objections may be that the issue is not within the competence of the tribunal.*”<sup>27</sup>
- Eighth round. Negotiations took place in March 2005, and the negotiating States reached agreement on the preliminary objections provision. The negotiating history states that “[i]t has also been *expressly achieved* that it be recognized that arbitration proceedings that could occur (between investors and State) have *a stage of preliminary considerations, in which States can question the competence of arbitral tribunals* to hear and rule on the complaint that was raised.”<sup>28</sup> Eliminating any doubt that the referenced agreement concerned the preliminary objections provision at issue here, the document further states: “Article X.19.4 (Arbitration Procedure – Preliminary Objections): *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.”<sup>29</sup>

14. As Mr. Herrera concludes regarding the foregoing evidence, “based 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 negotiations.*”<sup>30</sup>

15. The Non-Disputing Party Submission also does not address Renco’s ineffectual attempts to distract from the negotiating documents’ import. For the sake of clarity, Renco’s arguments are readily refuted:

- *Renco states: the documents “concern early negotiations that occurred in 2004-2005 . . . almost five years prior to the enactment of the treaty.”*<sup>31</sup> The Treaty was negotiated over the course of several rounds from 2004 to 2005. The Parties reached agreement on the

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<sup>25</sup> 2004 United States Model BIT, Art. 28.4 (“Without prejudice to a tribunal’s authority to address other objections as a preliminary question, 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 34.”).

<sup>26</sup> MINCETUR, 6th Round of Negotiations in Tucson, Arizona, United States, November 29 – December 5, 2004, at 29-30 (unofficial translation) (emphasis added).

<sup>27</sup> MINCETUR, 7th Round of Negotiations in Cartagena, Colombia, February 7-11, 2005, at 37 (unofficial translation) (emphasis added).

<sup>28</sup> MINCETUR, 8th Round of Negotiations in Washington, United States, March 14-18, 2005, at 14-15 (unofficial translation) (emphasis added).

<sup>29</sup> MINCETUR, 8th Round of Negotiations in Washington, United States, March 14-18, 2005, at 14-15 (unofficial translation) (emphasis added).

<sup>30</sup> Herrera Letter (emphasis added).

<sup>31</sup> Claimant’s Reply on Scope of Respondent’s Article 10.20(4) Objections dated May 7, 2014, at 19.



preliminary objections provision during this time. The Treaty was signed in April 2006. The passage of time until entry into force of the Treaty several years later is irrelevant. In fact, as Mr. Herrera states, the critical negotiating period arose at the same time that Peru won the *Luchetti* arbitration on a temporal issue, and Peru thus was alert to procedural and efficiency issues.

- *Renco states: the “early draft provisions to which Respondent refers appear to relate not only to the precursor to Article 10.20(4), but also to the precursors to Articles 10.20(5) and 10.20(6).”*<sup>32</sup> To the contrary, on their face, the documents relate expressly to the precursor to Article 10.20.4. Repeated reference is made solely to paragraph 4.
- *Renco states: the “summaries of negotiations simply make clear that a respondent may bring a preliminary objection to the tribunal’s competence under the Treaty.”*<sup>33</sup> To the contrary, the negotiations make clear that it was Peru’s intent to ensure that a respondent State could bring competence objections specifically under the procedures of Article 10.20.4, and that Peru and the United States reached agreement on this point.
- *Renco states: the “language Peru cites from the Eighth Round of negotiations is . . . neutral.”*<sup>34</sup> The two cited passages from the eighth round, when read together, confirm that the express reference to “competence” in Article 10.20.4 reflects that the negotiations “expressly achieved” Peru’s stated goal that preliminary objections could include competence objections. This is hardly “neutral.”

### **C. The Treaty Text Confirms That Peru’s Objections Are Within The Scope Of Article 10.20.4**

16. The negotiating history makes clear that the Treaty includes express reference to “competence” objections in Article 10.20.4 in order to ensure that such objections could be raised under the Article’s mandatory preliminary procedure. Notably, no evidence has been introduced, by Renco or otherwise, to counter the contemporaneous documents provided by Peru.

17. The negotiating history thus confirms what the Treaty text already establishes, as Peru and its international law expert, Professor Michael Reisman, detailed in prior submissions.<sup>35</sup> Without repeating them at length, the key conclusions to be drawn from the Treaty text are as follows:

- ***Any objection means any objection.***<sup>36</sup> Article 10.20.4 broadly allows “any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made.” Fundamentally, if a tribunal lacks jurisdiction over a claim or if a claim is inadmissible, then, as a matter of law, it is not a claim for which an award in favor of the claimant may be made.
- ***Undisputed facts apply.*** Article 10.20.4(c) requires that a preliminary objection must assume the facts as alleged by the claimant to be true, or otherwise rely upon facts that are not in

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

<sup>33</sup> *Id.* at 20.

<sup>34</sup> *Id.*

<sup>35</sup> Peru’s Submission on the Scope of Preliminary Objections ¶¶ 6-23; Letter from Peru to the Tribunal dated July 29, 2013, at 2-4; Reisman, at 4-5.

<sup>36</sup> See Reisman at 4 (“The ordinary meaning of the words ‘any objection’ is any objection.”).

dispute. This ensures that preliminary objections can be decided without fact development or other more extended procedures that would defeat the purpose of disposing of certain preliminary objections promptly and efficiently through the Article 10.20.4 mechanism.

- **Competence objections are not waived.** 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.
- **Expedited procedures are available, at the State’s option.** Article 10.20.5 provides expedited procedures that Peru chose not to use, and in no way limits the scope of Peru’s rights under Article 10.20.4. “It would be illogical to contend . . . that the scope of objections for Article 10.20.5’s expedited procedure is somehow broader than that of Article 10.20.4.”<sup>37</sup>

18. Despite this clarity, the Non-Disputing Party Submission suggests that Article 10.20.4 provides “a further ground for dismissal,” separate and apart from objections to a tribunal’s competence.<sup>38</sup> This is not supported by the text of the Treaty or the negotiating history. Moreover, if competence objections were excluded from the scope of Article 10.20.4, the Treaty would not offer a solution to the issue that surfaced in *Methanex* – which, the Submission indicates and Peru agrees, the preliminary objections mechanism in Article 10.20.4 was intended to do.

19. As noted, in *Methanex*, the United States presented a number of preliminary objections as to jurisdiction and admissibility; each of its admissibility objections assumed the truth of the facts alleged.<sup>39</sup> The tribunal ruled that all but one of the objections concerned admissibility, and that it lacked the authority under the UNCITRAL Arbitration Rules to decide admissibility objections as a preliminary matter.<sup>40</sup> The United States and Peru agree that it was this ruling that prompted the United States to include the preliminary objections procedure in Article 10.20.4 in its subsequent treaties.<sup>41</sup>

20. If “competence” objections are excluded from the scope of Article 10.20.4, this objective – on which the State Parties agree – would not be met. This is because competence is regularly 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.”<sup>42</sup>

[T]he conceptual triad of jurisdiction, admissibility and competence may be understood to consist of only two concepts – jurisdiction and competence/admissibility – or indeed of only one: jurisdiction in the broad sense (also comprehending competence/admissibility) or competence in the broad sense (also covering jurisdiction and admissibility). In any event, *there is no*

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<sup>37</sup> *Id.* at 10.

<sup>38</sup> Non-Disputing Party Submission ¶ 6.

<sup>39</sup> See *Methanex* Partial Award, ¶ 45 (“[T]hese materials can be only assumed facts for the purpose only of the Tribunal’s decision in this Award on the USA’s challenges on jurisdiction and admissibility.”)

<sup>40</sup> *Id.* ¶¶ 95, 107, 126.

<sup>41</sup> Non-Disputing Party Submission ¶¶ 1-2; Peru’s Submission on the Scope of Preliminary Objections ¶ 9.

<sup>42</sup> Veijo Heiskanen, *Ménage A Trois? Jurisdiction, Admissibility And Competence In Investment Treaty Arbitration*, ICSID Review (2013), at 13.

*substantive basis to draw a strict conceptual distinction between competence and admissibility – they are two sides of one and the same conceptual coin,* viewed from two different perspectives, one internal to the tribunal (competence) and the other external (admissibility). Decisions on the admissibility of the claim are decisions on the tribunal’s competence – and vice versa.<sup>43</sup>

21. Renco itself has treated competence and admissibility as interrelated concepts.<sup>44</sup> Accordingly, establishing a mandatory procedure for preliminary objections that excluded competence objections would also exclude admissibility objections, and would leave unresolved the problem that the *Methanex* decision raised, and which all parties agree was intended to be resolved by Article 10.20.4. That could not have been the intent of the United States or Peru when crafting Article 10.20.4. Indeed, the text and negotiating history demonstrate that it was not.

#### **D. Investment Treaty Jurisprudence Further Confirms That Peru’s Objections Are Within The Scope Of Article 10.20.4**

22. The Submission focuses on a textual interpretation of the Treaty, and also acknowledges the availability of making competence objections at a preliminary stage in accordance with different arbitration rules.<sup>45</sup> It does not, however, comment on the decisions of arbitral tribunals that have considered preliminary objections under rules identical or similar to Article 10.20.4. As Peru has established, decisions interpreting analogous provisions under both the DR-CAFTA and the ICSID Arbitration Rules, confirm that the proper scope of Article 10.20.4 does encompass competence objections – including, in fact, the very objections that Peru has raised in this case.<sup>46</sup>

##### **1. Preliminary Objections Under The DR-CAFTA**

23. As previously noted, Articles 10.20.4 and 10.20.5 of the DR-CAFTA are nearly identical to the corresponding provisions of the Treaty.<sup>47</sup> CAFTA decisions on preliminary objections confirm that Peru’s objections are properly considered under Article 10.20.4.

- ***RDC v. Guatemala***<sup>48</sup>

- *Objections*: Invalid waiver (first round of objections); jurisdiction *ratione temporis*, jurisdiction *ratione materiae*, and invalid waiver (second round of objections).

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<sup>43</sup> *Id.* at 15 (emphasis added); *see also id.* at 13 (“If a claim is not admissible before an international court or tribunal, whether in terms of time (*ratione temporis*), person (*ratione personae*) or subject matter (*ratione materiae*), this means that the court or tribunal is not competent to deal with the claim. Or more precisely, when taking a decision whether or not a purportedly international claim is admissible, whether *ratione temporis*, *ratione personae* or *ratione materiae*, an international court or tribunal is effectively taking a decision on its competence – and vice versa, when taking a decision on its competence, an international court or tribunal effectively determines whether the claim brought before it is admissible in terms of time, person or subject matter.”).

<sup>44</sup> *See, e.g.*, Letter from Renco to the Tribunal dated April 3, 2014, at 2 n.1 (“In the context of objection number (6), the competence question is one of admissibility.”).

<sup>45</sup> *See* Non-Disputing Party Submission ¶¶ 5-12 & n.5.

<sup>46</sup> Peru’s Submission on the Scope of Preliminary Objections ¶¶ 37-50.

<sup>47</sup> *Id.* ¶ 37.

<sup>48</sup> *See Railroad Development Corp. v. Republic of Guatemala* (“*RDC v. Guatemala*”) (ICSID Case No. ARB/07/23), Decision on Objection to Jurisdiction CAFTA Article 10.20.5 of November 17, 2008; *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction of May 18, 2010.

- *Provisions invoked*: Article 10.20.5 (expedited first round); Article 10.20.4 (second round).
  - *Factual basis*: Undisputed facts.
  - *Tribunal Analysis*: The respondent raised two sets of jurisdictional objections in succession. The tribunal adjudicated each set pursuant to the respective Articles (and applicable procedures) under which they were brought. Noting that the respondent’s conduct “led in the present case to two jurisdictional hearings on different points, which is inconvenient, to say the least,” the tribunal nonetheless confirmed that Article 10.20.4 required it to decide respondent’s jurisdictional objections raised under the Article, after it already had conducted a hearing considering its objections raised under Article 10.20.5’s expedited procedure, as a preliminary matter.<sup>49</sup>
  - *Takeaway*: The tribunal decided objections as to jurisdiction *ratione temporis* and invalid waiver, each raised by Peru in this case, under Article 10.20.4. The RDC tribunal also recognized that consideration of all preliminary objections raised by the respondent under Article 10.20.4 was mandatory, notwithstanding the inefficiencies raised by the respondent’s approach in that case (which is not present here, because Peru has not made objections under Article 10.20.5 and it is too late for it to do so).
- ***Pac Rim v. El Salvador***<sup>50</sup>
    - *Objections*: Failure to allege actions that caused legal harm; invalid waiver.
    - *Provisions invoked*: Articles 10.20.4 (failure to allege legal harm); 10.20.5 (waiver).
    - *Factual basis*: Undisputed facts.
    - *Tribunal Analysis*: “The Tribunal does not consider that the standard of review under Article 10.20.4 is limited to ‘frivolous’ claims or ‘legally impossible’ claims,” which, it determined, would “significantly restrict the arbitral remedy under Article 10.20.4.”<sup>51</sup> Rather, “the object and purpose” of the treaty provision “is to create, under CAFTA, an effective and flexible procedure for the swift and fair resolution of disputes.”<sup>52</sup>
    - *Takeaway*: The tribunal rejected the very type of artificial restrictions on Article 10.20.4 that Renco seeks to impose. The tribunal was not asked to address, and drew no conclusions on, whether competence objections might be raised under Article 10.20.4.
  - ***Commerce Group v. El Salvador***<sup>53</sup>
    - *Objection*: Invalid waiver.
    - *Provision invoked*: Article 10.20.5.
    - *Factual basis*: Undisputed facts.

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<sup>49</sup> See *id.* n.2.

<sup>50</sup> *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 of August 2, 2010.

<sup>51</sup> *Id.* ¶ 108.

<sup>52</sup> *Id.* ¶¶ 116-17.

<sup>53</sup> *Commerce Group Corp. et al. v. El Salvador* (ICSID Case No. ARB/09/17) Award of March 14, 2011.

- *Tribunal Analysis*: The tribunal treated the waiver objection as an Article 10.20.4 objection, assuming the facts as alleged, subject to Article 10.20.5’s expedited procedures.<sup>54</sup> It dismissed the case for failure to fulfill the waiver requirements, in view of the undisputed existence of related local litigation proceedings.<sup>55</sup>
- *Takeaway*: Confirms that a jurisdictional objection relating to the waiver requirement can be considered under the parameters of Article 10.20.4, and the tribunal can decide such an objection on the basis of undisputed facts.

24. This jurisprudence further reinforces that Peru’s preliminary objections, including those involving issues of competence, can be decided under the mandatory mechanism of Article 10.20.4. In each of these cases, the United States had the right, as a non-disputing CAFTA Party, to submit its views on the scope of preliminary objections. The United States did not do so. In fact, the United States did file a non-disputing Party submission in two of the CAFTA cases discussed above, but commented on issues unrelated to the preliminary objections.<sup>56</sup>

## 2. Preliminary Objections Under The ICSID Arbitration Rules

25. The Submission notes that “Article 41 of the ICSID Arbitration Rules . . . authorize[s] a tribunal . . . to decide objections to jurisdiction or competence as a preliminary question.”<sup>57</sup> More pertinent to this analysis is Rule 41(5), which establishes a mechanism for “making preliminary objections . . . that a claim is manifestly without legal merit.”<sup>58</sup> Notwithstanding the absence of any express reference to competence in Rule 41(5), ICSID tribunals repeatedly have ruled that a claim is “manifestly without legal merit” where the competence of the tribunal is lacking, as Peru previously detailed.<sup>59</sup> This reinforces that an objection that a claim must fail “as a matter of law,” as provided under Article 10.20.4, includes objections to competence.

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<sup>54</sup> *Id.* ¶ 55.

<sup>55</sup> *Id.* ¶¶ 100-01, 114-15.

<sup>56</sup> See *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Submission of the United States of America of May 20, 2011; *RDC v. Guatemala*, Submission of the United States of America of January 31, 2012. The United States attended the DRC hearing in March 2010. *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction of May 18, 2010 ¶ 14.

<sup>57</sup> Non-Disputing Party Submission ¶ 8, n. 6.

<sup>58</sup> ICSID Arbitration Rule 41(5).

<sup>59</sup> Peru’s Submission on the Scope of Preliminary Objections of April 23, 2014, ¶¶ 46-48; see, e.g., *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3), Decision on the Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules of February 2, 2009, ¶¶ 55, 62 (“The Arbitral Tribunal therefore interprets Rule 41(5) in the sense that the term ‘legal merit’ covers all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal. . . . [Manifestly] applies with respect to the merits of the claims but also when the tribunal examines the question of jurisdiction.”); *Grynberg and RMS Production Corp. v. Grenada* (ICSID Case No. ARB/10/6), Award of December 10, 2010, ¶ 6.1 (“[T]he parties appear to find common ground as to the requirements of Article 41(5)’s ‘manifestly without legal merit’ standard. That is, that an objection under Article 41(5): (a) may go either to jurisdiction or the merits . . . .”); *Global Trading Resources Corp. & Globex Int’l, Inc. v. Ukraine* (ICSID Case No. ARB/09/11), Award of December 1, 2010, ¶ 57 (dismissing the claim for lack of jurisdiction pursuant to a Rule 41(5) objection); *Cementownia “Nowa Huta” S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2), Award of September 17, 2009, ¶ 172 (declining jurisdiction pursuant to a Rule 41(5) objection); *Accession Mezzanine Capital L.P. & Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary* (ICSID Case No. ARB/12/3), Decision on Respondent’s Objection under Arbitration Rule 41(5) of January 16, 2013, ¶¶ 49-52 (addressing jurisdictional objections); *Emmis Int’l Holding, B.V. v. Hungary* (ICSID Case No. ARB12/2), Decision of Respondent’s Objection Under ICSID Arbitration Rule 41(5) of March 11, 2013, ¶ 15 (addressing jurisdictional objection).

26. In connection with the procedures for the Non-Disputing Party Submission, the Tribunal invited the Parties to also provide observations on the article, “The Use of Preliminary Objections in ICSID Annulment Proceedings” by Bernardo M. Cremades Roman.<sup>60</sup> In that article, Mr. Cremades analyzes the origin of the ICSID preliminary objections mechanism under Arbitration Rule 41(5), and notes that “Mr. Antonio Parra, one of the driving forces behind ICSID’s 2006 amendments, described Rule 41(5) as having the purpose of allowing ‘early dismissal by arbitral tribunals of patently unmeritorious claims.’”<sup>61</sup> Further to a review of ICSID cases, Mr. Cremades concludes that patently unmeritorious claims warranting early dismissal include claims where the tribunal lacks competence: “there is little doubt that the more accepted practice is to interpret Rule 41(5) of the ICSID Arbitration Rules as to apply to both merits and jurisdiction.”<sup>62</sup> Again, this authority under an analogous regime further reinforces Peru’s interpretation of the scope of preliminary objections available under Article 10.20.4 of the Treaty.

### **III. THE SUBMISSION EXPRESSLY DISCLAIMS ANY VIEW ON THE SPECIFIC OBJECTIONS AT ISSUE, WHICH CAN BE DECIDED AS A MATTER OF LAW ON THE BASIS OF UNDISPUTED FACTS**

27. The Submission states that “[t]he United States does not, through this submission, take a position on how the following interpretation [of the Treaty] applies to the facts of this case.”<sup>63</sup> The particular objections that Peru has raised, however, underscore the fact that these objections should be heard in a preliminary phase, consistent with the Submission’s focus on the Article’s objective of providing an efficient process to eliminate claims that lack legal merit.

28. Peru has noticed three preliminary objections, each which can be resolved as a matter of law on the basis of facts as alleged or otherwise undisputed, per the requirements of Article 10.20.4. In its unfounded bid to limit Peru’s Treaty rights, Renco alleges without basis that factual issues “permeate” Peru’s objections, and that they would be “virtually impossible” for the Tribunal to decide “without a factual inquiry.”<sup>64</sup> In fact, however, even a cursory examination of the objections confirms that no further factual development or adjudication is needed to decide them as a matter of law – and, moreover, that they concern threshold issues that may extinguish, or alternatively, narrow or clarify the scope of the claims once decided.

#### **1. Waiver Violations**

29. Article 10.18 requires that “[n]o claim may be submitted to arbitration” under the Treaty unless the claimant submits a broad, written waiver “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

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<sup>60</sup> Letter from the Tribunal to the Parties dated July 8, 2014; *Bernardo M. Cremades Roman, The Use of Preliminary Objections in ICSID Annulment Proceedings*, Kluwer Arbitration Blog, September 4, 2013.

<sup>61</sup> *Bernardo M. Cremades Roman, The Use of Preliminary Objections in ICSID Annulment Proceedings*, Kluwer Arbitration Blog, September 4, 2013, at 1 (citing Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement Disputes*, 41 Int’l L. 47, 56 (2007)).

<sup>62</sup> *Id.* at 2.

<sup>63</sup> Non-Disputing Party Submission, at 1.

<sup>64</sup> Claimant’s Reply on Scope of Respondent’s Article 10.20(4) Objections of May 7, 2014, at 26.

proceeding with respect to any measure alleged to constitute a breach” of the Treaty. From the outset of this proceeding, Renco exhibited fundamental flaws in its pleadings and waivers – flaws which have not been cured, and which Renco continues to exploit to pursue other proceedings.

30. As illustrated in Figure 1, below, (i) Renco and its affiliate, Doe Run Peru, filed waivers that impermissibly reserved the right to bring claims in other fora; (ii) Renco later filed a separate waiver that contained the same reservation; (iii) Doe Run Peru invalidly purported to unilaterally withdraw its waiver; and (iv) Doe Run Peru and another Renco affiliate, Doe Run Cayman Ltd., have pursued constitutional *Amparo* and administrative proceedings in Peru with respect to measures alleged in this case to constitute a breach of the Treaty. Those proceedings are ongoing. The objections regarding Renco’s waivers, and breach of the waivers, can be resolved as a matter of law based on these undisputed facts – and necessarily impact if and how this proceeding and Renco’s claims may unfold. Peru is legitimately seeking to avoid further aggravation of this dispute through Renco’s ongoing violations of the waiver.

## **2. Temporal Violations**

31. Article 10.1.3 of the Treaty limits arbitrable disputes to those that arise from facts that took place after the Treaty entered into force on February 1, 2009. Article 10.18.1 precludes adjudication of claims submitted to arbitration more than three years after a claimant knew, or should have known, of facts giving rise to an alleged breach, and that it has incurred damages therefrom. Renco has violated both temporal limitations. Figure 2 gives two discrete examples focused on extension of the period for environmental compliance, and the response of Peru to the U.S. lawsuits. Even if resolution of this objection does not result in the dismissal of the entirety of Renco’s claim, resolution of the temporality violations as a threshold matter is critical because it will clarify the scope of issues that can be contested and adjudicated in subsequent phases.

## **3. Contract Claim Failures**

32. Renco raises Treaty claims based on alleged breaches of, *inter alia*, third-party claim provisions in the Stock Purchase Agreement (“Contract”) in connection with lawsuits that are proceeding against Renco and its affiliates in U.S. court. Even assuming the truth of the facts as Renco has alleged, the claims fail under the plain language of the Contract, and thus warrant dismissal as a matter of law. As illustrated in Figure 3, for example, Doe Run Peru (the party to the Contract) is not a party to the U.S. lawsuits, and expert procedure requirements under the Contract were not observed. As with the other objections, resolution of this objection has significant implications for the scope of Renco’s claims that remain, if any, after the preliminary phase. In fact, Renco concedes – for self-interested motivations addressed further below – that part of this objection must be addressed in the Article 10.20.4 preliminary phase.<sup>65</sup>

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<sup>65</sup> See, e.g., Letter from Renco to the Tribunal dated April 3, 2014, at 2 (“Objection Number (5) is a proper objection under Article 10.20(4).”).

# Waiver Objection

FIGURE 1

## Waiver requirement under the Peru-U.S. Treaty

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February 1, 2009

Treaty, Article 10.18.2



“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.”

## Initial waiver by the Claimant (Renco) and the Enterprise (DRP)

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April 4, 2011

Notice of Arbitration ¶ 78; see also Memorial ¶ 216



“Renco and its affiliate DRP waive their 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, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, **Claimants** reserve the right to bring such claims in another forum for resolution of merits.”

## Current waiver by the Claimant and withdrawal of waiver by the Enterprise

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August 5, 2011

Letter from DRP to Respondent purporting to withdraw the prior waiver; see Submission on the Scope of Preliminary Objections ¶ 25



August 9, 2011

Notice of Arbitration ¶ 67; see also Memorial ¶ 217



“Renco waives its 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, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. To the extent that the tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, **Claimant** reserves the right to bring such claims in another forum for resolution on the merits.”

## Examples of Initiation or Continuation of Procedures subject to waiver requirement

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September 14, 2011

Constitutional action (*Amparo*) by the Enterprise regarding DRP insolvency; the proceeding is ongoing.



January 18, 2012

Administrative action by the Enterprise (with later addition of Doe Run Cayman) seeking annulment of administrative act regarding DRP insolvency; the proceeding is ongoing.

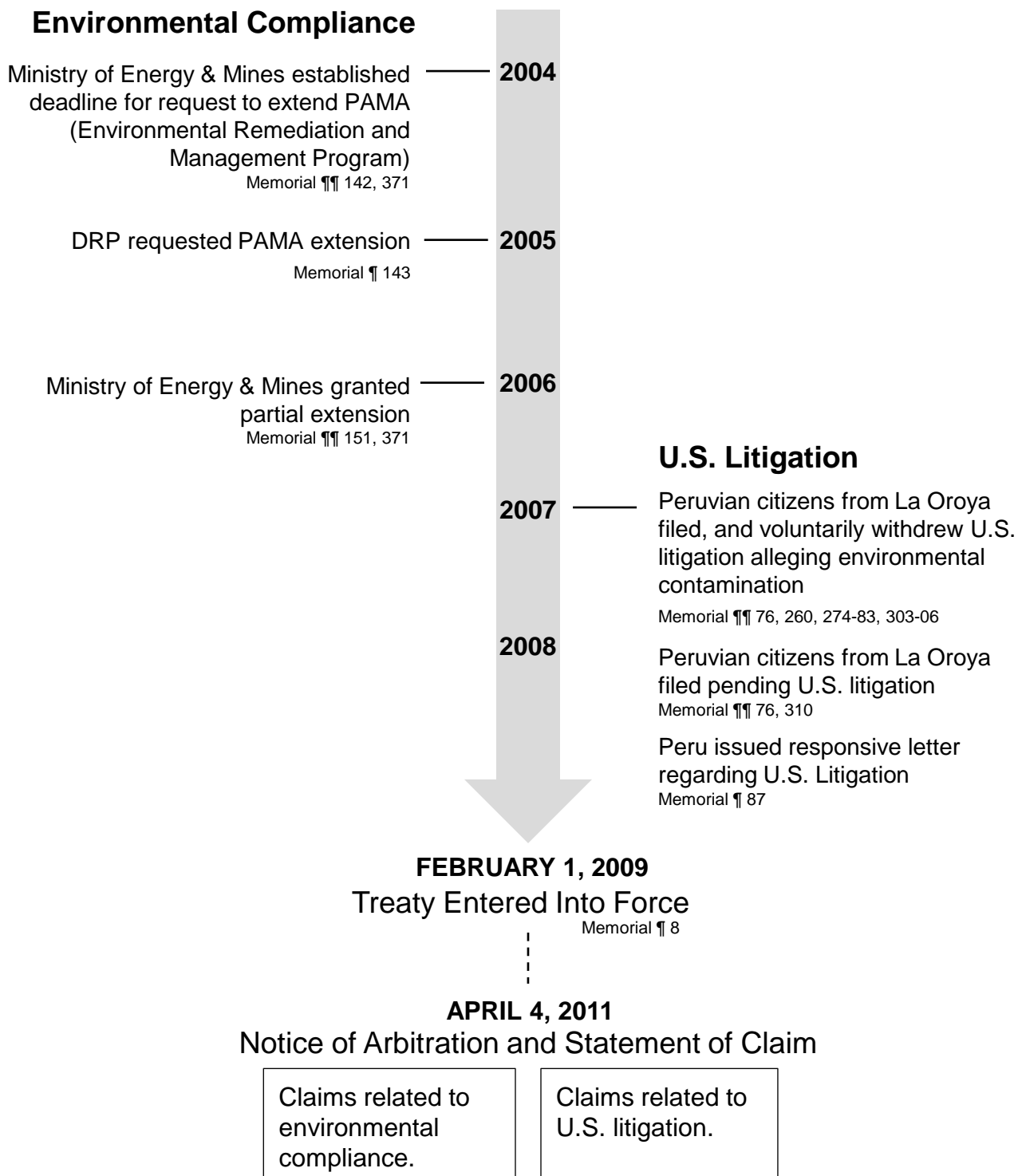




# Temporal Objection

FIGURE 2

Illustrative examples of claims by Renco based on facts that predate the Treaty and which arose more than 3 years before filing the claims



# Contract Objection

FIGURE 3

## The Enterprise (DRP) did not Satisfy prerequisites to Arbitration

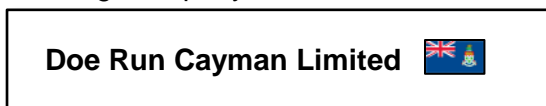


## The Enterprise (DRP) is a party to the Contract, but not a Defendant in U.S. Litigation

### Defendants in U.S. Litigation



### Holding Company



### Party to Contract



Sources: C-2; C-50; C-165

#### IV. THE RELEVANCE OF THE SUBMISSION AND THE ISSUES FOR DECISION

##### A. The Decision On The Scope Of Preliminary Objections Rests With The Tribunal

###### 1. The Tribunal Alone Has The Authority To Decide The Issue Before It

33. From the beginning, Renco has sought to impose its U.S.-centric view on this international arbitration, which arises under a Treaty negotiated by two State Parties. Renco urged adoption of an English-language proceeding with the Republic of Peru,<sup>66</sup> refused to consider any Latin American location as an arbitral seat,<sup>67</sup> and repeatedly has argued that U.S. rules of procedure and judicial precedent should inform the interpretation of the Treaty.<sup>68</sup> Tribunals have rejected such an approach, including in the context of preliminary objections; in the *Pac Rim* case, the CAFTA tribunal held that there is “no reason to equate such common law court procedures to provisions in [the treaty] agreed by Contracting Parties with different legal traditions and national court procedures.”<sup>69</sup>

34. Peru and the United States are each Parties to the Treaty. Article 10.20.2 of the Treaty provides that a “non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.”<sup>70</sup> As the text indicates, 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.”<sup>71</sup> The Non-Disputing Party Submission itself states that “[t]he United States does not, through this submission, take a position on how the following interpretation [of the Treaty] applies to the facts of this case.”<sup>72</sup>

35. Commentators confirm that “[c]learly such submissions are not binding on tribunals,”<sup>73</sup> which remain the adjudicatory bodies responsible for deciding issues as they arise in specific cases. Thus, numerous tribunals have considered submissions by non-disputing Parties, and reached different conclusions with respect to matters of Treaty interpretation.<sup>74</sup> The Tribunal should do the same here.

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<sup>66</sup> First Session Tr., 61:1-63:12.

<sup>67</sup> First Session Tr., 22:5-27:22.

<sup>68</sup> Claimant’s Reply on Scope of Respondent’s Article 10.20(4) Objections of May 7, 2014, at 9; see Letter from Renco to the Tribunal dated April 3, 2014, at 7-8. *But see* Peru’s Submission on the Scope of Preliminary Objections of April 23, 2014 ¶ 19.

<sup>69</sup> *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 of August 2, 2010, ¶ 117.

<sup>70</sup> Peru-United States Trade Promotion Agreement.

<sup>71</sup> 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) pp. 1128-1–1128-5, 1128-4 (addressing NAFTA’s analogous provision for non-disputing Party submissions).

<sup>72</sup> Non-Disputing Party Submission ¶ 1.

<sup>73</sup> 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) pp. 1128-1–1128-5, 1128-4.

<sup>74</sup> See, e.g., *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award of November 15, 2004, ¶¶ 29-30 (“[T]he United States in its written observation before this Tribunal . . . refers to *Barcelona Traction* as authority . . . . The Tribunal however does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection.”); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Decision on Jurisdiction of January 5, 2001, ¶ 52 (holding that the “definition of

## **2. Renco Seeks To Cherry-Pick Objections For Its Own Tactical Purposes**

36. Through its objection, Renco is attempting to dictate which of Peru's objections should be heard at this stage of the arbitration, regardless of what the Treaty requires. The competence/merits divide that Renco has attempted to create between Article 10.20.4 and Article 10.20.5 is simply a vehicle for Renco to handpick the objections that it wishes to address now.

37. Renco has conceded that Peru's preliminary objection regarding the plain meaning of the Contract with respect to the U.S. lawsuits falls within the scope of Article 10.20.4. Renco's attempt to circumscribe Peru's rights by excluding the other objections that Peru has a right to raise is telling. Renco is seeking to address the objection that it is most concerned about – the one with direct relevance to the U.S. lawsuits.

38. A recent filing in connection with the U.S. lawsuits reveals that Renco is actively seeking to have Peruvian law apply to the U.S. proceeding, and for the court to consider the findings of this Tribunal with respect to the Contract issues. According to Renco and the other defendants, "if the law of Peru governs on this issue, Article 1971 changes the shape of this litigation by moving to the forefront the issue of whether or not Doe Run Peru achieved compliance with the Stock Transfer Agreement and met its PAMA obligations. Defendants' case demonstrating its compliance with the Stock Transfer Agreement and the PAMA is presented in its submission to the Panel arbitrating the dispute between Defendant Renco Group, Inc. and Peru."<sup>75</sup> Renco previously also used the existence of this arbitration to transfer the U.S. lawsuits from state to federal court.<sup>76</sup>

39. While attempting to circumscribe Peru's rights on other objections, Renco is willing to address the one preliminary objection that could greatly impact the U.S. lawsuits. Renco's preference on this issue is irrelevant. Peru has a right to raise preliminary objections in conformity with Article 10.20.4.

## **3. Renco Seeks To Influence The Proceeding Through External Pressures**

40. The transmittal letter to the Submission states that "no meetings on this issue of treaty interpretation were held with either disputing party prior to the date of this written submission."<sup>77</sup> That statement is not definitive with respect to Renco's ongoing efforts to influence the U.S. government with respect to this matter, including recent records reflecting lobbying before the Department of State and

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'measure' in Article 201 (which includes 'requirement') is by no means consistent with this argument" raised by Mexico in its non-disputing party submission); *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Decision on Jurisdiction of December 6, 2000, ¶ 44 ("Particularly it is not clear whether Article 1117(3) does distinguish between 'making a claim' and 'submitting a claim to arbitration', as the United States Government alleges . . .").

<sup>75</sup> Defendants' Reply to Plaintiffs' Memorandum In Opposition To Defendants' Motion For A Determination Of Foreign Law, *Reid v. Doe Run Resources Corp.*, Case No. 4:11-CV-00044CDP, September 15, 2014. Renco has submitted its Memorial from this arbitration in the U.S. lawsuits.

<sup>76</sup> Memorandum Opinion, *A.O.A. v. Doe Run Resources Corp.*, Case: 4:11-cv-00059-CDP, June 22, 2011 (E.D. Missouri) ("Defendants The Renco Group Inc., DR Acquisition Corporation, Renco Holdings Inc., and Ira L. Rennet removed the case on January 7, 2011, claiming that plaintiffs' actions are related to an arbitration currently set between The Renco Group and the government of Peru, and that the cases are therefore removable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.").

<sup>77</sup> Letter from the U.S. State Department to the Tribunal and the Parties dated September 10, 2014.

other parts of the U.S. government, which may directly or indirectly influence or seek to influence the positions of the U.S. government.

41. Peru raised concerns about Renco's efforts to influence this proceeding through external measures, including lobbying, at the outset of this proceeding.<sup>78</sup> At the time, it was widely reported that Renco had "been flexing its political muscle on Capitol Hill" by hiring multiple lobbying firms, and spending hundreds of thousands of dollars in connection with this dispute.<sup>79</sup> Peru recently discovered that Renco has continued its lobbying efforts. Publicly available lobbying disclosure documents<sup>80</sup> indicate that the subject-matter focus of Renco's lobbying includes "the trade promotion agreement between the United States and Peru," "issues surrounding Doe Run Peru and U.S./Peru Trade Promotion Agreement," and "[p]rotection of U.S. private investment in Peru from expropriation."<sup>81</sup>

42. In fact, Peru discovered that Renco hired a new firm for lobbying in early 2014, incurring US\$ 90,000 in fees relating to lobbying activities.<sup>82</sup> According to the firm, it "possess[es] familiarity with the inner workings of many federal agencies, as well as unparalleled knowledge of the priorities and concerns of the executive branch."<sup>83</sup> Moreover, based on a review of public disclosure documents, during the first quarter of 2014, the U.S. State Department was – for the first time since the dispute began – the target of Renco's lobbying efforts, whether through direct or indirect methods.<sup>84</sup> The only role that the U.S. State Department has in this dispute is in the making of non-disputing Party submissions under the Treaty; in fact, the State Department is precluded from exercising diplomatic protection on behalf of Renco while its dispute is being heard in international arbitration. These findings compelled Peru to bring this issue to the Tribunal's attention before the deadline for the Non-Disputing Party Submission, and to

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<sup>78</sup> Respondent's Letter of September 9, 2011 in Response to Claimant's Amended Notice of Arbitration and Statement of Claim dated August 9, 2011 ("Renco appears to be directly or indirectly involved in other allegedly related processes such as engaging lobbyists in the United States and Peru.").

<sup>79</sup> See, e.g., Avni Patel, *Members of Congress, Obama Administration Go to Bat For Billionaire Investor*, ABC News (Mar. 8, 2011) ("The Renco Group has been flexing its political muscle on Capitol Hill in recent months, spending at least \$245,000 since November to hire five Washington firms to lobby members of Congress on its behalf to advocate their point of view in the Peru dispute."), available at <http://abcnews.go.com/Blotter/members-congress-obama-administration-bat-billionaire-investor/story?id=13084422>.

<sup>80</sup> Pursuant to lobbying disclosure regulations in the United States, registered lobbyists are required to file quarterly forms describing their lobbying activities. See Lobbying Disclosure Act of 1995.

<sup>81</sup> Lobbying Report by Clarine Nardi Riddle, Kasowitz, Benson, Torres, and Friedman LLP (Q1, 1/1 – 3/31, 2014); Lobbying Report by Jonathan Alexander, Monument Strategies LLC (Q4, 10/1 - 12/31, 2013); Lobbying Report by Palmer C. Hamilton, Jones Walker (Q4, 10/1 - 12/31, 2010); Lobbying Report by Palmer C. Hamilton, Jones Walker (Q4, 10/1 - 12/31, 2011), available at <http://disclosures.house.gov/ld/ldsearch.aspx>, <http://soprweb.senate.gov/index.cfm?event=selectfields>.

<sup>82</sup> Center for Responsive Politics, Renco Group, Itemized Lobbying Expenses for the Renco Group 2014.

<sup>83</sup> Kasowitz, Benson, Torres, and Friedman LLP, Government Affairs, <http://www.kasowitz.com/government-affairs-practice-areas>; see Megan R. Wilson, *Lieberman Staffer To Lead New Lobby Shop*, The Hill, June 12, 2013, available at <http://thehill.com/business-a-lobbying/305015-lieberman-staffer-to-lead-new-lobby-shop>.

<sup>84</sup> Lobbying Report by Clarine Nardi Riddle, Kasowitz, Benson, Torres, and Friedman LLP (Q1, 1/1 – 3/31, 2014), available at <http://disclosures.house.gov/ld/ldsearch.aspx>. Since 2010, most of Renco's activities have been directed at the U.S. Congress. Since the dispute with Peru began, it appears that the only other executive agency targeted by Renco was the Office of the U.S. Trade Representative. See Lobbying Report by Timothy J. Keeler, Mayer Brown (Q.1, 1/1 – 3/31, 2011) (Listing the "U.S. Trade Representative (USTR)," and specifying the lobbying activity as "[a]dvising on interaction with the Government of the Republic of Peru regarding legal obligations and acknowledgement of full liability of injury claims."); see also Center for Responsive Politics, The Renco Group Lobbying Summary (listing Renco's lobbying expenditures and targeted agencies), available at <https://www.opensecrets.org/lobby/clientsum.php?id=D000022220>.

request an equal opportunity for each Party to meet with the U.S. State Department prior to the filing of the Submission.<sup>85</sup> That request was not granted.<sup>86</sup>

43. Under the Treaty, Peru and the United States agreed on proper avenues and mechanisms for the resolution of investor-State disputes. Renco's attempts to influence the outcome of this proceeding through activities external to the present arbitration should not be countenanced.

### **B. The Submission Underscores That The Tribunal Can, And Should, Decide All Preliminary Objections At This Juncture**

44. Even if Peru's preliminary objections did not fall within the mandatory scope of Article 10.20.4, as they do, the objections still can and should be decided now to safeguard due process and to ensure efficiency. The Non-Disputing Party Submission repeatedly states that Article 10.20.4 supplements, rather than displaces or limits, the Tribunal's authority to decide preliminary objections.<sup>87</sup> Thus, the Submission emphasizes that 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.<sup>88</sup> "Indeed," the Submission states, "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."<sup>89</sup>

45. Article 10.20.4 of the Treaty grants Peru the right to raise preliminary objections. Renco has already conceded that at least one of Peru's objections should be decided during the preliminary objections phase.<sup>90</sup> It is common ground, among the Parties and the United States, that the purpose of Article 10.20.4 is to protect a respondent State from the time and cost of protracted proceedings when claims can be dismissed at a preliminary phase as a matter of law, without factual development. Peru first signaled its intent to raise Article 10.20.4 objections at the First Session of the Tribunal, more than one year ago. Since then, Renco has pursued a strategy to circumscribe Peru's Treaty rights and the scope of available objections – and also a strategy of delay, to allow developments to advance in other venues that potentially could shape this dispute. At the same time, Renco has pushed for the early resolution of only those issues that it deems most relevant to its own case. As a result, Peru still has not even had the opportunity to brief the preliminary objections that it has noticed.

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<sup>85</sup> Letter from Peru to the Tribunal dated September 9, 2014; *see also* Letter from Peru to the U.S. Department of State dated September 9, 2014.

<sup>86</sup> Letter from the Tribunal to the Parties dated September 9, 2014.

<sup>87</sup> Non-Disputing Party Submission ¶ 6 ("Consistent with the "without prejudice" clause, a tribunal retains the authority to hear preliminary objections to competence asserted under the applicable arbitration rules,"); *id.* ¶ 8 ("Subparagraph (b) . . . complements the tribunal's discretion, under the applicable arbitration rules, to decide an objection to competence as a preliminary matter."); *id.* ¶ 11 ("In sum, paragraph 4 was intended to supplement, not limit, the tribunals authority under the available arbitration rules to decide preliminary objections, such as competence objections . . .").

<sup>88</sup> *Id.* ¶ 11 Submission ¶ 11 ("Thus, if a respondent makes a preliminary objection under paragraph 4, the tribunal also retains the authority under the applicable arbitration rules to hear any preliminary objections to competence"); *id.* ¶ 10 ("Subparagraph (c) does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider.").

<sup>89</sup> *Id.*

<sup>90</sup> *See, e.g.*, Renco Letter to the Tribunal, April 3, 2014 ("Objection number (5) is a proper objection under Article 10.20(4).").

46. At this juncture, after six months of time and cost have been incurred, the Tribunal only needs to allow Peru to proceed with the filing of its objections, as is its right pursuant to the Treaty. The Non-Disputing Party Submission confirms that, even apart from its authority under Article 10.20.4, the Tribunal has the authority to address any objections as to jurisdiction now.<sup>91</sup> Renco’s purported concerns about “piecemeal” objections or “two bites at the apple” are invented, specifically so that Renco can attempt to dictate which objections the respondent State can bring, undermining the very object and purpose of preliminary objections under the Treaty. All of Peru’s objections can be resolved as a preliminary matter on the basis of undisputed facts – and, thus, would not need to be addressed again later in the proceeding. None of the disputed objections will require any of the purported procedural problems that Renco suggests. Indeed, Peru reconfirms that, to the extent that all of its pending objections are heard, and the dispute is not dismissed, Peru will make any jurisdictional and admissibility objections with its Counter-Memorial on the Merits, and not seek bifurcation. Peru only agreed to the procedural schedule with the understanding that it could bring all of its preliminary objections at this time, reserving other arguments that would not be based on undisputed facts for a later phase.

47. For the avoidance of any doubt, Peru thus requests that the Tribunal determine to decide all of the preliminary objections that Peru has notified under the authority granted it by Article 10.20.4 of the Treaty or, alternatively, under its authority pursuant to Article 23(3) of the UNCITRAL Arbitration Rules. Indeed, determining these threshold objections now may serve to resolve certain claims outright – or, in the alternative, to clarify the scope of issues to be decided at a later stage. Delaying the resolution of any of the objections will unduly prolong this already drawn-out proceeding, and aggravate the complexity of the dispute. Further to the observations in the Submission, reasons of economy and efficiency weigh heavily in favor of hearing all of the objections during the preliminary phase.

48. In this, the first investment arbitration under the Treaty, it is particularly important that the State’s rights under the Treaty not be artificially or prematurely circumscribed. Accordingly, all of Peru’s objections should be fully briefed and considered during the preliminary objections phase, as the Treaty provides.

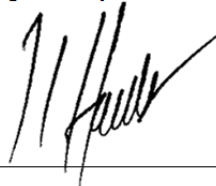
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<sup>91</sup> See Non-Disputing Party Submission ¶¶ 6, 8, 11.

**V. CONCLUSION**

49. For the reasons set forth above and in Peru's submissions of April 23, 2014, March 21, 2014, and July 29, 2013, Peru respectfully requests that the Tribunal rule that the case should proceed to a full briefing of all of the preliminary objections, as the Treaty mandates.

Respectfully submitted,



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