

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

**THE RENCO GROUP, INC.**

**CLAIMANT,**

**v.**

**THE REPUBLIC OF PERU**

**RESPONDENT.**

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**CLAIMANT'S COMMENTS ON THE SUBMISSION OF  
THE UNITED STATES OF AMERICA REGARDING  
THE INTERPRETATION OF ARTICLE 10.20(4)**

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## TABLE OF CONTENTS

I.	The USG’s Interpretation of Article 10.20(4) is Consistent with Claimant’s Interpretation.....	2
A.	Scope of Article 10.20(4) Objections .....	2
B.	The USG Confirms That the “Without Prejudice” Clause Must Be Read Together With the Second Clause of Article 10.20(4) .....	4
C.	The USG Confirms That All Competence Objections Fall Outside the Scope of Article 10.20(4).....	6
II.	The USG’s Interpretation of Article 10.20(4)(c) Supports Claimant’s Position That Competence Objections Fall Outside the Scope of Article 10.20(4) .....	8
III.	The USG’s Interpretation of Article 10.20(4)(d) Comports With Claimant’s Stated Interpretation.....	9
IV.	The USG’s Interpretation of Article 10.20(5) Comports with Claimant’s Stated Interpretation of Article 10.20(5).....	11
V.	The USG’s Reference to the <i>Methanex</i> Case Is Consistent With Its Position That Competence Objections Fall Outside the Scope of Article 10.20(4).....	12
VI.	Conclusion .....	13

By letter dated July 8, 2014, the Tribunal directed Claimant and Respondent (the “Parties”) to jointly 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 proceedings pursuant to Article 10.20(4) of the Peru-United States Trade Promotion Agreement (the “Treaty”). In addition, the Tribunal attached to its July 8, 2014 letter an article entitled “*The Use of Preliminary Objections in ICSID Annulment Proceedings*,” by Bernardo M. Cremades Roman, published on September 4, 2013 on the Kluwer Website Blog (the “Cremades Article”), and invited the Parties’ comments on the Cremades Article at the same time that they would comment on the submission of the USG.

Thereafter, the Tribunal issued Procedural Order No. 2 dated July 31, 2014 (“P.O. No. 2”) setting a deadline for the Parties to provide comments on any submission of the USG. On August 21, 2014, the USG requested a short extension of time, to September 10, 2014, to provide its comments pursuant to the invitation of the parties and the Tribunal, and the extension was granted. On September 10, 2014, the USG submitted its comments as a non-disputing party regarding the interpretation of Article 10.20(4) of the Treaty (the “USG’s Submission”).

Accordingly, pursuant to paragraph 3 of P.O. No. 2, Claimant hereby provides its comments concerning the USG’s Submission and the Cremades Article.

In summary, and as set forth more fully below, the USG supports Claimant’s interpretation of Article 10.20(4) in every respect. Most importantly, the USG categorically states that objections to the Tribunal’s competence *fall outside of the scope of this Article*. Accordingly, the Treaty does not require the Tribunal to entertain such objections in the Article 10.20(4) phase of this arbitration. The USG’s interpretation of the scope of Article 10.20(4) objections squarely contradicts Respondent’s interpretation.

Because Respondent's competence objections fall outside the scope of Article 10.20(4), as the USG's Submission clearly confirms, such objections should not be heard in the Article 10.20(4) phase of these proceedings. Instead, in accordance with *the agreement of the Parties, as reflected in Annex A to P.O. No. 1*, Respondent should put forward any competence objections in "Respondent's Counter-Memorial on Liability (including any counter-claims and/or jurisdictional objections)" and the Tribunal should consider any such objections with the merits.

As to the Cremades Article, Mr. Cremades notes in his article that jurisdictional objections may be addressed as a preliminary matter under Rule 41(5) of the ICSID Arbitration Rules. However, as Claimant noted in its May 7, 2014 submission on this issue (at page 29), ICSID Rule 41(5) is irrelevant to the issue to be decided in these arbitration proceedings. Moreover, rather than speculate as to how Mr. Cremades might envisage the relevance of his remarks to the issue before the Tribunal, Claimant decided to ask him. Attached as Exhibit A to this submission is a letter from Mr. Cremades to the Tribunal dated September 16, 2014, which speaks for itself. The Tribunal will note that not only does Mr. Cremades agree that ICSID Rule 41(5) is irrelevant to this dispute, but he also agrees with Claimant's interpretation of Treaty Article 10.20(4) for the reasons he sets forth clearly and convincingly in the attached letter.

**I. The USG's Interpretation of Article 10.20(4) is Consistent with Claimant's Interpretation**

**A. Scope of Article 10.20(4) Objections**

While the Tribunal is already well acquainted with the parties' submissions on the scope of Article 10.20(4) objections, Claimant summarizes them here briefly in order to show how the USG has rejected Respondent's position.

- In its April 3, 2014 submission, Claimant argued that "Peru's objections to the Tribunal's competence are outside the scope of Article 10.20(4)" and that an

objection to the tribunal's competence is "different than" an objection under Article 10.20(4) to the legal sufficiency of a claim.<sup>1</sup>

- In its April 23, 2014 response Respondent argues that "Article 10.20.4 encompasses competence objections" and that the Treaty makes "no distinction" between an objection to the tribunal's competence and an objection to the legal sufficiency of a claim.<sup>2</sup>
- In its May 7, 2014 reply, Claimant reiterated its position that competence objections fall outside the scope of Article 10.20(4) and are "distinct from" and "different than" objections under Article 10.20(4) to the legal sufficiency of a claim.<sup>3</sup>

The question presently before the Tribunal is whether it is required (*i.e.*, compelled) to address and decide Respondent's five objections to its competence to hear this dispute in the 10.20(4) phase of this arbitration.<sup>4</sup> This is clear from the P.O. No. 1, which provides for a process by which the Tribunal considers Claimant's challenge to the scope of Article 10.20(4), and it is common ground between the parties.<sup>5</sup> The question is *not* whether the Tribunal has the discretion to hear competence objections as a preliminary matter outside the mandatory scope of Art. 10.20(4). The Parties have agreed, and the Tribunal has endorsed through Procedural Order No. 1, Annex A, that to the extent one or more of Peru's proposed Article 10.20(4) objections fall outside the mandatory scope of Article 10.20(4), *the Tribunal will not hear such objection(s) in this preliminary "Art. 10.20(4) Phase."* As Claimant has made clear, Claimant would not, and did not, agree to this schedule (which provides for full merits and jurisdictional submissions

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<sup>1</sup> Claimant's Submission, Apr. 3, 2014, at 5-6.

<sup>2</sup> Respondent's Submission, Apr. 23, 2014, at ¶¶ 21, 23.

<sup>3</sup> Claimant's Reply, May 7, 2014, at 2-3, 6.

<sup>4</sup> See Claimant's Submission, Apr. 3, 2014, at 3; Claimant's Reply, May 7, 2014, at 11-12. The five objections that Respondent has raised to the Tribunal's competence to hear this dispute 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; and (6) failure to submit two factual issues for determination by a technical expert prior to commencement of the arbitration. See Respondent's Submission, Mar. 21, 2014, at 4-7; Claimant's Submission, Apr. 3, 2014, at 1. The only objection that arguably falls within the ambit of Article 10.20(4) is objection (5) for alleged breach of the investment agreement. See Respondent's Submission, Mar. 21, 2014, at 6; Claimant's Submission, Apr. 3, 2014, at 1; Respondent's Submission, April 23, 2014, at ¶ 27.

<sup>5</sup> See *e.g.*, Respondent's March 21, 2014 letter to the Tribunal at 7 ("For the foregoing reasons, the preliminary objections notified herein are within the scope of Article 10.20.4 of the Treaty and this case should proceed to a full briefing of preliminary objections mandated by the Treaty.").

later in the proceedings) if Respondent were to be permitted to bring preliminary objections outside the scope of Article 10.20(4), during the “10.20(4) Phase” of these proceedings.

As is clear, the USG’s interpretation of Article 10.20(4) clearly compels a negative answer to the question before the Tribunal. As stated by the USG, an objection to the tribunal’s competence to hear a dispute “fall[s] outside [the] scope” of Article 10.20(4).<sup>6</sup> Likewise, the USG categorically states that “objections asserted under [Article 10.20(4)] are distinct from objections to the tribunal’s competence.”<sup>7</sup> The USG explains that Article 10.20(4) establishes an “efficient and expeditious process” for “dispos[ing] of claims that cannot prevail as a matter of law” and that it “thus provides a further ground for dismissal,” which is in addition to, and “distinct from,” an objection that the dispute is not within the tribunal’s competence.<sup>8</sup> Thus, according to the USG, a tribunal is *required* under Article 10.20(4) to address and decide an objection by the respondent to the *legal sufficiency of a claim*, but not an objection to the *tribunal’s competence to hear the dispute*, which falls outside the scope of this article.

As discussed below, the USG’s Submission is overwhelmingly consistent with Claimant’s submissions regarding the interpretation of the scope of Article 10.20(4) and diametrically opposed to Respondent’s.

**B. The USG Confirms That the “Without Prejudice” Clause Must Be Read Together With the Second Clause of Article 10.20(4)**

For the Tribunal’s convenience, Claimant quotes the introductory language of Article 10.20(4), with different type face for the two interrelated clauses that comprise the single introductory sentence:

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<sup>6</sup> USG’s Submission, Sept. 10, 2014, at ¶ 6 n.4.

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

<sup>8</sup> *Id.* at ¶¶ 5, 6 & n.4, 9.

**4. Without prejudice to a tribunal’s *authority* to address *other* objections as a preliminary question, *such as an objection that a dispute is not within the tribunal’s competence*, a tribunal *shall* address and decide as a preliminary question any objection that, as a matter of law, a *claim* submitted is not a *claim* for which an *award* in favor of the claimant may be made *under Article 10.26*. (emphasis added).**

The USG’s Submission follows Claimant’s approach (and the approach of the Vienna Convention) to the interpretation of Article 10.20(4), squarely rejecting Respondent’s approach. In particular, the USG reads the second clause of Article 10.20(4) together with Article 10.20(5) and with the “without prejudice” clause of Article 10.20(4):

Paragraph 5 of Article 10.20 of the Agreement provides that 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*,” emphasizing that objections asserted under paragraph 4 are distinct from objections to the tribunal’s competence. Likewise, [the “without prejudice” clause in] 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.”<sup>9</sup>

The USG, as does Claimant, reads the second clause of Article 10.20(4) together with the “without prejudice” clause, which describes an “objection that a dispute is not within the tribunal’s competence” as an “other” objection.<sup>10</sup> On the basis of this language (among other things), the USG concludes that an objection to the tribunal’s competence “fall[s] outside [the] scope” of Article 10.20(4).<sup>11</sup>

Respondent addressed the “without prejudice” clause only in the last paragraph of its discussion of the text of Article 10.20(4), asserting that the negotiating history of the Treaty “underscores that the use of the word ‘competence’ in [the ‘without prejudice’ clause] was not

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<sup>9</sup> *Id.* at ¶ 6 n.4 (emphasis in original).

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

<sup>11</sup> *Id.*

intended to exclude competence objections from the scope of Article 10.20.4 objections. *Just the opposite.*”<sup>12</sup>

Respondent’s suggestion that the language of the “without prejudice” clause was intended to *include* competence objections within the scope of Article 10.20(4) objections, and that the Tribunal is therefore compelled to hear them, is contradicted by both a plain reading of the Treaty and the USG’s Submission.

**C. The USG Confirms That All Competence Objections Fall Outside the Scope of Article 10.20(4)**

Respondent also argues that Article 10.20(4) distinguishes between a preliminary objection to the tribunal’s competence *as a matter of law* and a preliminary objection to the tribunal’s competence *based on disputed facts*.<sup>13</sup> Respondent contends that: (1) a tribunal is required to address and decide the former type of objection under the second clause of Article 10.20(4); and (2) the “without prejudice” clause preserves the tribunal’s discretionary authority to address and decide the latter type of objection under the applicable arbitration rules.<sup>14</sup>

In its May 7, 2014 reply, Claimant rejected Respondent’s attempt to re-write the Treaty in this way, pointing out that:

(i) “there certainly is no basis in the text of Article 10.20(4), or elsewhere in the Treaty . . . to distinguish between different types of objections to competence”;

(ii) “an objection that a dispute is not within the tribunal’s competence” is *different than, not included within, and not the same as* “an objection that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26”; and

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<sup>12</sup> Respondent’s Submission, Apr. 23, 2014, at ¶ 11 (emphasis added).

<sup>13</sup> *See id.* at ¶¶ 8, 18.

<sup>14</sup> *See id.*

(iii) the Treaty therefore “only requires a tribunal to address an objection as a preliminary question under Article 10.20(4) when the objection is directed to the legal sustainability of a particular claim, not the tribunal’s jurisdiction to hear the dispute.”<sup>15</sup>

The USG’s Submission confirms Claimant’s interpretation and rejects Respondent’s interpretation. In particular, the USG categorically states 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.”<sup>16</sup> The USG also states that “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.*”<sup>17</sup> This is exactly what Claimant has stated in its briefing on this issue. Indeed, at the preliminary hearing in London, Claimant’s counsel offered to have the Tribunal decide any jurisdictional objections in an initial phase of the case (not under Article 10.20(4), but under the power of a tribunal to direct it under the UNCITRAL Rules), and Respondent rejected the invitation.<sup>18</sup> The USG’s statements leave no room for Respondent to argue that a preliminary objection to the tribunal’s competence *as a matter of law* falls within the scope of Article 10.20(4).

Respondent’s position that Article 10.20(4) distinguishes between two types of preliminary objection to the tribunal’s competence also flies directly in the face of the “without prejudice” clause and the first sentence of Article 10.20(5), both of which broadly refer to “[an / any] objection that [a / the] dispute is not within the tribunal’s competence” without qualifying or limiting the scope of such competence objection in any way. In fact, the Treaty drafters’ use

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<sup>15</sup> Claimant’s Reply, May 7, 2014, at 5, 6.

<sup>16</sup> USG’s Submission, Sept. 10, 2014, at ¶ 6 n.4.

<sup>17</sup> *Id.* at ¶ 10 (emphasis added).

<sup>18</sup> Transcript of Preliminary Hearing, July 18, 2013, at 162:24-165:22.

of the word “any” before the words “objection that the dispute is not within the tribunal’s competence” in Article 10.20(5) clearly and unambiguously shows that the Treaty treats *all* competence objections differently than objections under Article 10.20(4).<sup>19</sup>

## **II. The USG’s Interpretation of Article 10.20(4)(c) Supports Claimant’s Position That Competence Objections Fall Outside the Scope of Article 10.20(4)**

Article 10.20(4)(c) provides in pertinent part: “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 USG 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 this subparagraph “*does not address, and does not govern, other objections, such an objection to competence, which the tribunal may already have authority to consider.*”<sup>20</sup> These statements squarely contradict Respondent’s contention that Article 10.20(4)(c) governs preliminary objections to the tribunal’s competence, whenever the respondent (in its sole discretion) requests that the tribunal apply this evidentiary standard to such objections.<sup>21</sup>

Far from governing preliminary objections to the tribunal’s competence, the text of Article 10.20(4)(c) actually makes clear that Article 10.20(4) only encompasses objections to the legal sufficiency of a claim. Under Article 10.20(4)(c), the tribunal is required to assume to be

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<sup>19</sup> The Merriam-Webster online dictionary defines “any” as “every” and “all.” See <http://www.merriam-webster.com/dictionary/any>.

<sup>20</sup> USG’s Submission, Sept. 10, 2014, at ¶ 9 (emphasis added).

<sup>21</sup> See Respondent’s Submission, Apr. 23, 2014, at ¶ 7 (contending that “Article 10.20.4 broadly establishes Peru’s right to make ‘*any* objection’ as a preliminary matter, as long as . . . [t]he objection assumes the facts as alleged by Renco to be true, or otherwise involves facts not in dispute, per Article 10.20.4(c)” (emphasis in original)).

true “claimant’s factual allegations *in support of any claim* in the notice of arbitration [and] the statement of claim” (emphasis added). If an objection to the tribunal’s competence fell within the scope of Article 10.20(4), then Article 10.20(4)(c) would have required the tribunal to assume to be true *all* of claimant’s factual allegations in the notice of arbitration and the statement of claim, not just those “in support of any claim.” For example, a tribunal hearing competence objections under Article 10.20(4) would have been required to accept as true claimant’s jurisdictional allegations regarding its qualification as an “investor” under the Treaty, even though such allegations are not made “in support of any claim.”<sup>22</sup> The Treaty drafters’ inclusion of the phrase “in support of any claim” in Article 10.20(4)(c) thus confirms that objections to the tribunal’s competence fall outside the scope of Article 10.20(4).

### **III. The USG’s Interpretation of Article 10.20(4)(d) Comports With Claimant’s Stated Interpretation**

Article 10.20(4)(d) 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.” According to 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.”<sup>23</sup>

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<sup>22</sup> Arguably, jurisdictional allegations are made “in [indirect] support of” all of the claimant’s claims. Under that reading of the phrase “in support of any claim,” however, the phrase is completely superfluous, because every allegation in a notice of arbitration or statement of claim *indirectly* supports the claimant’s claims. Moreover, if the Treaty drafters had intended to require the tribunal to assume to be true all of the claimant’s factual allegations, including jurisdictional allegations, they would have omitted the phrase “in support of any claim.”

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

Claimant rejected these contentions in its reply and explained that Respondent’s position impermissibly contradicts the clear and express text of Article 10.20(4) and 10.20(5) which *excludes* competence objections from the scope of 10.20(4) while confirming that the tribunal retains the authority to hear preliminary objections to competence under the applicable arbitration rules.<sup>24</sup> In addition, Claimant explained that Articles 10.20(4) and 10.20(5) were inspired by the U.S. motion to dismiss procedure as set forth in Rule 12(b)(6) of the Federal Rules of Civil Procedure, as Peru itself acknowledges.<sup>25</sup> Rule 12(b)(6) allows a defendant to move to dismiss a claim for failure to state a claim upon which relief may be granted.<sup>26</sup> While a defendant challenging the legal sufficiency of a claim at the outset of a U.S. legal proceeding must simultaneously bring a motion objecting to the court’s jurisdiction, as failure to do so would result in the waiver of such provisions, Article 10.20(4)(d) logically confirms that there will be no similar waiver under the Treaty, notwithstanding its similarity to Rule 12(b)(6).<sup>27</sup>

The USG rejects Respondent’s “necessary corollary” argument and adopts Claimant’s reading of Article 10.20(4)(d):

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.<sup>28</sup>

Thus, rejecting Respondent’s “necessary corollary” argument, the USG states that Article 10.20(4)(d) merely “confirms” that if a respondent chooses to bring a preliminary objection to

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<sup>24</sup> Claimant’s Submission, May 7, 2014, at 18; USG’s Submission, Sept. 10, 2014, at ¶6.

<sup>25</sup> Respondent’s Submission, Mar. 21, 2014, at n. 20.

<sup>26</sup> Claimant’s Reply, May 7, 2014, at 18-19.

<sup>27</sup> *Id.*

<sup>28</sup> USG’s Submission, Sept. 10, 2014, at ¶ 10.

the legal sufficiency of the claimant's claims under Article 10.20(4), it is not required (under penalty of waiver) simultaneously to request a preliminary decision on any objection to the tribunal's competence under the applicable arbitration rules. Nothing more can or should be read into the text of Article 10.20(4)(d).

#### **IV. The USG's Interpretation of Article 10.20(5) Comports with Claimant's Stated Interpretation of Article 10.20(5)**

The first sentence of Article 10.20(5) provides: "In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis *an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence.*" (Emphasis added.)

Again, supporting Claimant's interpretation and rejecting Respondent's interpretation, the USG states that the phrase "an objection under paragraph 4 *and any objection that the dispute is not within the tribunal's competence*" in this sentence "emphasiz[es] that objections asserted under paragraph 4 are distinct from objections to the tribunal's competence."<sup>29</sup> This is entirely consistent with Claimant's 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."<sup>30</sup>

Respondent, on the other hand, completely ignored the phrase in its submissions, failing even to refer to it a single time and baldly asserting that Article 10.20(5) "in no way limits the

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<sup>29</sup> See *id.* at ¶ 6 n.4 (emphasis in original).

<sup>30</sup> See Claimant's Submission, Apr. 3, 2014, at 6; Claimant's Submission, May 7, 2014, at 13-14.

scope of Peru's rights under Article 10.20.4."<sup>31</sup> Respondent's position that Article 10.20(5) has no impact on the interpretation of Article 10.20(4) flies directly in the face of the USG's Submission and Claimant's oft-stated position.

Respondent also contends that when considering an objection to its competence as part of an Article 10.20(5) procedure, a tribunal must assume to be true the factual allegations in the notice of arbitration and the statement of claim, in accordance with Article 10.20(4)(c).<sup>32</sup> Claimant rejected this position, arguing that "if respondent brings a competence objection under Article 10.20(5), the facts are not assumed to be true because Article 10.20(4) is not implicated in that scenario, and nothing in Article 10.20(5) says that the facts will be assumed true when a competence objection is brought under Article 10.20(5)."<sup>33</sup>

While the USG does not directly address this issue in its discussion of Article 10.20(5), it implicitly rejects Respondent's position by stating that Article 10.20(4)(c) only applies to an "objection under paragraph 4" of Article 10.20 and that it "does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider [under the applicable arbitration rules]."<sup>34</sup>

**V. The USG's Reference to the *Methanex* Case Is Consistent With Its Position That Competence Objections Fall Outside the Scope of Article 10.20(4)**

The USG explains in its Submission that it introduced the Article 10.20(4) and Article 10.20(5) expedited review mechanisms into its investment agreements that permit a respondent State to assert preliminary objections in an efficient manner as a result of its experience in *Methanex v. United States*, an arbitration under the NAFTA and the UNCITRAL Arbitration

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<sup>31</sup> See Respondent's Submission, April 23, 2014, at ¶ 3. See also *id.* at ¶ 15.

<sup>32</sup> *Id.* at ¶¶ 21-22.

<sup>33</sup> Claimant's Reply, May 7, 2014, at 17.

<sup>34</sup> USG's Submission, Sept. 10, 2014, at ¶ 9.

Rules.<sup>35</sup> The USG explains that: (1) in an August 2002 Partial Award, the *Methanex* tribunal “concluded that it lacked authority to rule on the United States’ preliminary objection that, even accepting all of the claimant’s allegations of fact, the claims should be dismissed for ‘lack of legal merit’”; and (2) “[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>36</sup>

The USG’s explanation of the origin of the Article 10.20(4) and Article 10.20(5) expedited review mechanisms is fully consistent with its position that objections to the tribunal’s competence “fall outside [the] scope” of Article 10.20(4). In its August 2002 Partial Award, the *Methanex* tribunal, in the jurisdictional stage of that proceeding, 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.<sup>37</sup> The USG’s subsequent introduction of the Article 10.20(4) procedure was clearly intended to provide arbitral tribunals with the authority that the *Methanex* tribunal concluded that it 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.

## **VI. Conclusion**

Accordingly, based upon Claimant’s prior submissions, as unequivocally confirmed by the USG’s Submission, it is clear that Peru’s five competence objections fall decidedly outside

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<sup>35</sup> *Id.* at ¶¶ 2-3.

<sup>36</sup> *Id.* at ¶ 2.

<sup>37</sup> *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Partial Award, Aug. 7, 2002, at ¶¶ 109, 126, 172.

the scope of Article 10.20(4) of the Treaty and the Tribunal is not, as argued by Respondent, required (*i.e.*, compelled) to hear them in the Article 10.20(4) phase of this arbitration. Accordingly, Claimant respectfully requests that the Tribunal issue an award declaring that 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 P.O. No. 1, Respondent will bring its objections to the Tribunal's competence during the merits phase of the case.

Dated: New York, New York  
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