

IN THE ARBITRATION UNDER CHAPTER TEN
OF THE UNITED STATES-PERU TRADE PROMOTION AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

THE RENCO GROUP, INC.

Claimant/Investor,

-and-

REPUBLIC OF PERU,

Respondent/Party.

(ICSID Case No. UNCT/13/1)

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 10.20.2 of the United States-Peru Trade Promotion Agreement (“U.S.-Peru TPA” or “Agreement”), which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Expedited Review Mechanisms in U.S. International Investment Agreements

2. In August 2002, an arbitral tribunal constituted under NAFTA Chapter Eleven 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.”¹ The 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.²

¹ *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Partial Award ¶¶ 109, 126 (Aug. 7, 2002) (quoting U.S. submission).

² *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part VI (Aug. 3, 2005) (deciding that the tribunal lacked jurisdiction over any of the claims and, even if the tribunal had jurisdiction, the claims would have failed on the merits).

3. In 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.

Articles 10.20.4 and 10.20.5 of the U.S.-Peru TPA

4. The U.S.-Peru TPA contains such mechanisms in Articles 10.20.4 and 10.20.5,³ which provide:

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

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not

³ See United States-Peru Trade Promotion Agreement, Office of the U.S. Trade Representative Summary of the Agreement, House Document 110-60 (Oct. 1, 2007) at 1622, available at www.gpo.gov.

within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

5. Paragraphs 4 and 5 establish complementary mechanisms for a respondent State to seek to efficiently and cost-effectively dispose of claims that cannot prevail as a matter of law, potentially together with any preliminary objections to the tribunal's competence.
6. Paragraph 4 authorizes a respondent to make "any objection" that, "as a matter of law," a claim submitted is not one for which the tribunal may issue an award in favor of the claimant. Paragraph 4 clarifies that its provisions operate "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question." Paragraph 4 thus provides a further ground for dismissal, in addition to "other objections," such as preliminary objections to the tribunal's competence.⁴ Consistent with the "without prejudice" clause, a tribunal retains the authority to hear preliminary objections to competence asserted under the applicable arbitration rules.
7. Subparagraph (a) requires that a respondent submit any such objection "as soon as possible after the tribunal is constituted," and generally no later than the date for the submission of the counter-memorial. This contrasts with the expedited procedures contained in paragraph 5, which authorize a respondent, "within 45 days after the tribunal is constituted," to make an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence.
8. Subparagraph (b) states that a tribunal "shall" hear and decide as a preliminary question any objection made under paragraph 4. This mandatory requirement complements the tribunal's discretion, under the applicable arbitration rules,⁵ to decide an objection to competence as a preliminary matter.⁶
9. Subparagraph (c) states that, for any objection under paragraph 4, a tribunal "shall assume to be true" the factual allegations supporting a claimant's claims. The tribunal "may also

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*" (emphasis supplied), emphasizing that objections asserted under paragraph 4 are distinct from objections to the tribunal's competence. Likewise, the chapeau of paragraph 4 gives as an example of the "other objections" that fall outside its scope "an objection that a dispute is not within the tribunal's competence."

⁵ Article 10.16.3 of the Agreement authorizes the claimant to designate the ICSID Arbitration Rules, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules, or any other rules agreed by the disputing parties.

⁶ Article 41 of the ICSID Arbitration Rules, Article 45 of the ICSID Additional Facility Rules, Article 21 of the 1976 UNCITRAL Arbitration Rules and Article 23 of the 2010 UNCITRAL Arbitration Rules all authorize a tribunal constituted under them to decide objections to jurisdiction or competence as a preliminary question.

consider any relevant facts not in dispute.” This evidentiary standard facilitates an efficient and expeditious process for eliminating claims that lack legal merit. 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.

10. Subparagraph (d) states that the respondent “does not waive any objection as to competence . . . 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.” 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.

11. In sum, paragraph 4 was intended to supplement, not limit, the tribunal’s authority under the available arbitration rules to decide preliminary objections, such as competence objections, separately from the merits. 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. Indeed, 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. This is consistent with the Agreement’s text, context, and object and purpose.

12. Paragraph 5 provides an expedited procedure for deciding all preliminary objections, whether permitted by paragraph 4 or the applicable arbitral rules. If the respondent makes a request within 45 days of the date of the tribunal’s constitution, “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.” Paragraph 5 thus modifies the applicable arbitration rules by *requiring* a tribunal to decide on an expedited basis any paragraph 4 objection as well as any objection to competence, provided that the respondent makes the request within 45 days of the date of the tribunal’s constitution.

Respectfully submitted,



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