**PCA Case No. 2020-11**

**IN THE MATTER OF AN ARBITRATION**
**UNDER THE UNITED STATES – PERU TRADE PROMOTION AGREEMENT,**
**ENTERED INTO FORCE ON FEBRUARY 1, 2009**

**- and -**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, AS REVISED IN 2013 (the "UNCITRAL Rules")**

**- between -**

**BACILIO AMORRORTU (USA)**

**(the "Claimant")**

**- and –**

**THE REPUBLIC OF PERU**

**(the "Respondent", and together with the Claimant, the "Parties")**

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# CLAIMANT'S MEMORIAL

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**September 11, 2020**

## TABLE OF CONTENTS

**I. INTRODUCTION ..... 1**

**II. FACTS RELEVANT TO AMORRORTU AND HIS INVESTMENT IN PERU. 11**

A. Amorrortu's Early Life In Peru ..... 11

1) Amorrortu's Family Settled In Peru Over A Century Ago ..... 11
2) Amorrortu's Education And Early Professional Experience ..... 12

B. Amorrortu's Major Experience in the Petroleum Industry ..... 12

1) Amorrortu's Initial Investment In The Peruvian Oil Industry ..... 12
2) Amorrortu Was Awarded The Operation Of Block III In The 1990s ..... 15

C. Political Persecution Against Amorrortu ..... 16
D. Amorrortu's Exile From Peru And Asylum In The United States ..... 18

1) The U.S. Department Of Justice Grants Asylum To Amorrortu ..... 18
2) Lawsuits In The United States For Human Rights Violations ..... 18

E. Amorrortu's Investment In Peru As A U.S. Citizen ..... 19

1) Investment In Baspetrol ..... 19
2) Baspetrol Undertakes Several Projects Prior To Presenting A Proposal for Blocks III & IV ..... 22
3) Baspetrol Commences Direct Negotiations With PeruPetro ..... 24
4) Baspetrol's Direct Negotiation Proposal For Blocks III & IV ..... 27
5) PeruPetro Violates Amorrortu's Legitimate Right To Direct Negotiation For Blocks III & IV ..... 29

**III. GRAÑA Y MONTERO'S CORRUPTION SCHEME ..... 32**

A. Graña y Montero ..... 32
B. The Corruption Scheme ..... 35

1) Graña y Montero Is A Company Owned By A Family That Is Politically, Socially, And Economically Well-Connected And Has Control Over Information Dissemination ..... 37
2) Graña y Montero Paid Covert Funds To Electoral Campaigns ..... 37
3) Graña y Montero Contributed Millions Of Dollars In Bribes To Corrupt Public Officials To Win Major Public Projects ..... 41
4) Graña y Montero Has Acknowledged Its Responsibility In The Corruption Scheme Of Various Public Projects In Which It Acted Either Alone Or As Part Of The Consortium With Odebrecht ..... 42

a) The Lima Metro Project .... 43

i. The Corruption Scheme in the Lima Metro Project .... 44
ii. Payment of US $9,000,000 in bribes .... 47

b) The IIRSA South Project .... 47

i. The Corruption Scheme in the IIRSA South Project .... 48
ii. Graña y Montero as Stakeholder in the IIRSA South Project .... 49

c) The Construction Club .... 50

i. The Corruption Scheme in the Construction Cartel .... 50

d) The Southern Gas Pipeline Project .... 51

C. The Corruption Scheme To Award The Contracts To Operate Blocks III & IV To Graña y Montero .... 54

1) Peru Abruptly And Arbitrarily Decided To Terminate The Direct Negotiation Process Initiated By Amorrortu .... 55
2) Evidence Of Corruption In The 2014 Block III & IV Tender .... 58

a) The Bidding Rules .... 59
b) The Bidding Rules Were Unlawfully Modified At Least Twice, While The Selection Process Was Ongoing .... 59
c) Graña y Montero was illegally favored by being allowed to support its economic indicators with another Peruvian company .... 62
d) Grana y Montero sought and obtained the removal of PetroPeru from the operation of Blocks III and IV .... 63

**IV. THE TRIBUNAL HAS JURISDICTION TO DECIDE THIS DISPUTE .... 65**

A. Amorrortu Is An Investor Of The United States Of America .... 65
B. Amorrortu Has A Protected Investment Under The USPTPA .... 68

1) "Covered Investment" Is Broadly Defined In The USPTPA .... 68
2) Amorrortu Invested In An "*Enterprise*" That Two Years Later Acquired The Rights To Directly Negotiate A Contract To Operate Blocks III & IV .... 70

a) Amorrortu's Investment: Baspetrol .... 71
b) Amorrortu's Investment Right: Acquired Substantive Rights In Direct Negotiation .... 72

i. **The First Phase**: Determination Of Availability Of Subject Block For Direct Negotiation .... 74

ii. **Second Phase**: Qualification Of Oil Company, Evaluation Of Proposal, And Commencement Of Community Participation Process ............................ 76
iii. **Third Phase**: Invitation To Interested Companies ..... 79

3) The Definition Of Covered Investment In The USPTPA Includes The Right To Direct Negotiation For Blocks III & IV Acquired By Amorrortu Through Baspetrol ........................................ 86

a) Lemire v. Ukraine ...................................................... 88
b) Bosca v. Lithuania ..................................................... 91
c) EDF v. Romania......................................................... 93

C. Amorrortu Timely Commenced This Arbitration Within The Statute Of Limitations Period And Complied With All The USPTPA Requirements........................................................................ 95

**V. PERU HAS BREACHED ITS OBLIGATION UNDER THE USPTPA..........97**

A. PeruPetro Awarded Blocks III & IV As Part Of Graña y Montero's Corrupt Scheme ...................................................................... 97

1) Applicable Standard To Prove Corruption................................ 98
2) The Evidence Overwhelmingly Proves Corruption....................100

B. PERU IS RESPONSIBLE FOR THE CORRUPTION SCHEME..................104
C. PeruPetro's Corruption Violated Peru's Fair And Equitable Standard Obligations .......................................................................115

1) Fair and Equitable Treatment: Violation Of Customary Principles Of International Law ...........................................116
2) Fair And Equitable Treatment: Violation Of Legitimate Expectations ...................................................................123
3) Fair and Equitable Treatment: Violation Based On Arbitrary And Discriminatory Conduct..............................................130
4) Fair and Equitable Treatment: Violation Of Transparency .........132

**VI. PERU'S CONDUCT CAUSED SIGNIFICANT LOSSES TO AMORRORTU'S INVESTMENT.....................................................135**

A. There is a Causal Link Between Peru's Breaches and Amorrortu's Loss .........................................................................136
B. Peru's Actions Are The Proximate And Foreseeable Cause Of Amorrortu's Loss ..................................................................139
C. Peru Cannot Argue That The Amount Of Damages Caused By Its Breach Is Uncertain...............................................................142

**VII. AMORRORTU IS ENTITLED TO FULL REPARATION ......................... 144**

A. Amorrortu Is Entitled To "Full Reparation" Wiping Out The Consequence Of Peru's Breaches To The USPTPA ........................... 144
B. The Appropriate Date Of Valuation Is The Date PeruPetro Announced The International Public Bidding Process ........................ 148
C. An Income and Market-Based Valuation Methodology Is Appropriate Here ..................................................................... 150
D. Peru Must Compensate Amorrortu USD 96.9 Million ........................ 153

1) Ex-Ante Valuation ............................................................ 153
2) Ex-Post Valuation ............................................................. 155

E. Peru Must Pay Amorrortu's Interest ............................................ 157
F. Peru Must Compensate For All Costs Incurred In This Arbitration ...... 157
G. Peru May Not Deduct Additional Taxes From Award ........................ 158
H. Total Damages Due To Amorrortu ............................................... 158
I. PRAYER FOR RELIEF .................................................................. 159

## GLOSSARY OF SELECTED TERMS

| | |
|---|---|
| 1P Reserve Multiple | Median Multiple on Proved Reserve |
| Baspetrol SAC | A company organized under the laws of Peru; also referred to as ***Baspetrol*** |
| Block III | One of the hydrocarbon blocks in the Talara Basin that was awarded to Amorrortu in the 1990s and later to Graña y Montero |
| Block IV | One of the hydrocarbon blocks in the Talara Basin that was awarded to Amorrortu in the 1990s and later to Graña y Montero |
| Claimant | Bacilio Amorrortu, also referred to as ***Amorrortu*** or the ***Claimant*** |
| Corruption Scheme | The series of corrupt arrangements involving Graña y Montero and the Peruvian Government mostly regarding award of oil contracts |
| Electric Train Consortium | A consortium formed by Graña y Montero and Odebrecht |
| En Accion | A political party founded by Bacilio Amorrortu to participate in the Peruvian Democratic Constituent Congress in 1992 |
| Enagás | A consortium comprised of Odebrecht and Enagás Internacional, S.L.U. |
| FMC | FMC Technologies, and later Technip FMC. An oil company in Houston, Texas |
| Graña y Montero Petrolera | The subsidiary company of Grana y Montero, S.A.A., also referred to as ***GMP*** |
| Graña y Montero, S.A.A. | The parent company of ***GMP***. A company organized under the laws of Peru, also known as ***Graña y Montero*** |
| Halliburton | Halliburton Oil Services Company. A company organized under the laws of the United States |
| ICCGSA | Ingenieros Civiles y Contratistas Generales, S.A. A company organized under the laws of Peru |
| ILC Articles | The 2001 International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts |
| Interoceanica Consortium | A consortium formed by Odebrecht, Graña y Montero, JJC and ICCGSA, also referred to as ***Concesionaria Interoceanica Sur Tramos 2 y 3, S.A.*** |
| IIRSA South Project | The contract for construction, operation, and maintenance of sections 2 and 3 of the IIRSA South |

| | |
|---|---|
| | highway system which was awarded to the Interoceanica Consortium in June 2005. |
| JJC | JJC Contratistas Generales, S.A. A company organized under the laws of Peru |
| Lima Metro Project | One of the contracts awarded to the Electric Train Consortium based on the Corruption Scheme |
| Mercantile | Mercantile Peru Oil & Gas, SA. A company organized under the laws of Peru to which Propetsa transferred 80% of its rights in Block III |
| Ministerio de Energía y Minas del Perú | Peruvian Ministry of Energy and Mines, also referred to as ***MEM*** |
| New Bidding Rules | The approved second modification to the Bidding Rules of the International Public Bidding Process |
| Notice of Arbitration | Amorrortu's submissions of his claims to arbitration pursuant to the United States-Peru Trade Promotion Agreement, served onto Peru on February 13, 2020; referred to as the ***Notice of Arbitration*** |
| Notice of Intent | Amorrortu's notice of intent to submit his claims to arbitration, served onto Peru on September 24, 2019; referred to as the ***Notice of Intent*** |
| Occidental Peruana-OXY | Occidental Peruana, Inc. A subsidiary company of Occidental Petroleum Corporation (a U.S. corporation) organized under the laws of Peru |
| Odebrecht | Norberto Odebrecht. A company organized under the laws of Brazil |
| OXY | Occidental Petroleum Corporation. A U.S. oil company founded in 1920 and headquartered in Houston, Texas |
| Perupetro's Direct Negotiation Rules | A set of established Rules and Procedures governing the process of direct negotiation of contracts with Perupetro |
| PetroPeru | The state-owned oil company in Peru, Predecessor company of PeruPetro |
| Propetsa | Promociones Petroleras Talara, S.A. An oil company formed by Bacilio Amorrortu, and organized under the laws of Peru; referred to as ***Propetsa*** |
| Provisa | The consortium, made up of 50% ownership each of Propetsa and Visisa Serpet Asociados, which was awarded the right to operate Block III in 1993. |
| Reserve Equivalent Multiple | Total Reserve Equivalents |
| Respondent | The Republic of Peru; referred to as ***Peru*** or ***Respondent*** |

| | |
|---|---|
| Southern Marine | Southern Marine Drilling Company, a subsidiary of the James Storm Company of Corpus Christi, Texas |
| The Baspetrol Proposal | The proposal prepared by Baspetrol to initiate direct negotiation to operate Blocks III and IV, also referred to as the ***Baspetrol Proposal*** or the ***Proposal*** |
| The Construction Club | A cartel formed by Peruvian and foreign construction companies, also referred to as the ***Construction Cartel*** |
| The Direct Negotiation Commission | The commission appointed by Perupetro to negotiate direct contracts with oil companies |
| The International Bidding Process | The public bidding processes involving international bidding process numbers PERUPETRO-001-2014-LOT III and PERUPETRO-002-2014-LOT IV |
| Treaty | United States-Peru Trade Promotion Agreement, February 2009, also referred to as the ***Treaty*** or the ***Agreement*** or the ***USPTPA*** |
| Via Expresa Project | One of the contracts awarded to Graña y Montero based on the Corruption Scheme |

## LIST OF SELECTED ACRONYMS

| | |
|---|---|
| BRG | The Berkeley Research Group, Claimant's experts on damages and quantum |
| CEA | The Spanish Club of Arbitration |
| CER – 1 [BRG] | First Expert Report of Berkeley Research Group, 11 September 2020 |
| CER – 1 [Durand] | First Expert Report of Doctor Jose Francisco Durand, Ph.D., 9 September 2020 |
| CER – 1 [Quiroga] | First Expert Report of Anibal Quiroga, September 9, 2020 |
| CER – 1 [Yaya] | First Expert Report of Monica Yaya, 9 September 2020 |
| DCF | Discounted Cash Flow methodology used to calculate Claimant's lost profits |
| FMV | Fair Market Value methodology used to calculate Claimant's damages |
| GSP | The Southern Gas Pipeline Project or Gasoducto Sur Peruano, which involved the construction and operation of a pipeline that would transport natural gas from central Peru to the Pacific coast |
| IBA | The International Bar Association |
| ICC | The International Chamber of Commerce |
| IPC | The International Petroleum Company |
| INA | The United States Immigration and Naturalization Act |
| MEF | The Peruvian Ministry of Economy and Finance |
| MEM | The Peruvian Ministry of Energy and Mines |
| MTC | The Peruvian Ministry of Transport and Communication |
| NOA | The Claimant's Notice of Arbitration dated February 13, 2020 |
| NOI | The Claimant's Notice of Intent to commence this arbitration against Peru dated September 19, 2019 |
| OTC | The Offshore Technology Conference which takes place annually in Houston, Texas |
| OSCE | The Peruvian State Procurement Supervisory Agency |
| SUNAT | The Peruvian tax authority |
| USPTPA | The United States-Peru Trade Promotion Agreement which entered into force on February 1, 2009 |
| CWS – 1 [Amorrortu] | First Witness Statement of Bacilio Amorrortu, 10 September 2020 |

## LIST OF SELECTED KEY INDIVIDUALS

| | |
|---|---|
| Bacilio Amorrortu | Referred to as ***Amorrortu*** or the ***Claimant*** |
| Jorge Henrique Simões Barata | Director of Odebrecht in Peru from 2011 to 2016; also referred to as ***Jorge Barata*** |
| Luis Miguel Castilla Rubio | Minister of Economy and Finance of Peru under President Ollanta Humala; also referred to as ***Luis Miguel Castilla*** |
| Jorge Cuba Hidalgo | Vice-Minister in the Ministry of Transportation and Communication in 2009; also referred to as ***Jorge Cuba*** |
| Francisco Durand, Ph.D. | Claimant's Expert; also referred to as ***Dr. Durand*** |
| President Alberto Fujimori | President of Peru from 1990 to 2000; also referred to as ***President Alberto Fujimori*** |
| President Alan Gabriel Ludwig Garcia Peréz | President of Peru from 1985 to 1990 and again from 2006 to 2011; also referred to as ***President Alan Garcia*** |
| Carlos Eugenio Garcia Alcazar | Advisor to the Vice-minister of Transportation during the tenure of President Ollanta Humala; also referred to as ***Carlos Garcia*** |
| Hernando Graña Acuña | Graña y Montero's Head of Commercial since 1996; also referred to as ***Hernando Graña*** |
| José Alejandro Graña Miró-Quesada | CEO of Graña y Montero from 1982 to 2016; also referred to as ***Jose Graña*** |
| Nadine Heredia Alarcón de Humala | First Lady of Peru from 2011 to 2016; also referred to as ***Nadine Heredia*** |
| President Ollanta Moisés Humala Tasso | President of Peru from 2011 to 2016; also referred to as ***President Ollanta Humala*** |
| Eleodoro Octavio Mayorga Alba | Minister of Energy and Mines from 2014 to 2015; also referred to as ***Eleodoro Mayorga*** |

| Oscar Miro-Quesada Rivera | Manager of Promotion and Communications of PeruPetro in 2014; also referred to as ***Oscar Miro-Quesada*** |
|---|---|
| Carlos Nostre | Graña y Montero-Odebrecht consortium's Director for the Lima Metro Project |
| Marcelo Bahia Odebrecht | CEO of Odebrecht from 2008 to 2015 |
| Luis Enrique Ortigas | President of PeruPetro in 2013; also referred to as ***Ortigas*** |
| Jaime Quijandria | President of PetroPeru in 1992 |
| Anibal Quiroga-Leon | Claimant's Expert; also referred to as ***Expert Quiroga*** |
| Isabel Tafur | Chief Administrator of PeruPetro in 2014; also referred to as ***Tafur*** |
| President Alejandro Celestino Toledo Manrique | President of Peru from 2001 to 2006; also referred to as ***President Alejandro Toledo*** |
| Monica Yadira Yaya Luyo | Claimant's Expert; also referred to as ***Expert Yaya*** |

# I. INTRODUCTION

> Corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.
> ICC Award 1110 of 1963 at ¶ 20[1]

1. This principle, chiseled in one of the first arbitral awards denouncing the evil of corruption in international arbitration, echoes throughout this arbitration. This dispute is about corruption, the antithesis of fair and equitable treatment.

2. Bacilio Amorrortu (***Amorrortu*** or the ***Claimant***) is the victim of a reprehensible corruption scheme concocted at the highest spheres of the Peruvian Government (***Peru*** or ***Respondent***), a mere few years after Peru had committed to fight corruption and to afford U.S. investors, like Amorrortu, fair and equitable treatment under the United States-Peru Trade Promotion Agreement (the ***USPTPA***). The USPTPA, explicitly states as one of its objectives "*to promote transparency and prevent and combat corruption, including bribery, in international trade and investment,*"[2] and has a full chapter devoted to anti-corruption measures and transparency.[3] But Peru never took this commitment seriously. Instead, Peru set up a scheme to award government contracts through public bidding processes that had the facial appearance of transparency, but had actually been designed and

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[1] ICC Case No. 1110, Award (extract), YCA 1996 (**CLA-60**) at ¶ 20 (hereinafter, ***ICC Award 1110***).

[2] The United States-Peru Trade Promotion Agreement, signed 12 April 2006 (hereinafter, ***USPTPA*** or ***Treaty*** or ***Agreement***) (**CLA-2**), Preamble. Bacilio Amorrortu's Memorial or Statement of Claim (***Claimant's Memorial*** or ***Claimant's Statement of Claim***) is submitted pursuant to the Tribunal's Procedural Order No. 1, 29 June 2020, which procedural calendar was amended by the Tribunal's letter of 17 August 2020, and pursuant to Art. 20 of the Arbitration Rules of the United Nations Commission on International Trade Law (the ***UNCITRAL Arbitration Rules***). In accordance with Procedural Order No. 1 (¶ 5), all of Amorrortu's Exhibits and Legal Authorities are numbered using the format provided in Procedural Order No. 1 (*e.g.*, C-1 and CLA-1, respectively).

[3] USPTPA Chapter Nineteen (**CLA-42**).

manipulated to ensure that Graña y Montero (***Graña y Montero***) — a company that in conjunction with the Brazilian emporium Norberto Odebrecht (***Odebrecht***), had paid millions of dollars in unlawful bribes — was the only company "*qualified*" for the international public bidding process (the ***International Public Bidding Process***) for block III (***Block III***) and block IV (***Block IV***) of the Talara Basin (together, the ***Blocks***).

3. This was not a victimless crime. Legitimate proposals that could benefit the local communities in Peru and generate more revenue for the government were arbitrarily disqualified or simply "*lost*" in the vast abyss of the corrupt government bureaucracy, causing significant losses to any company that dared to compete with Graña y Montero. The local community was harmed. The competitors of Graña y Montero were harmed. This is hardly surprising. Corruption hurts honest investors and affected citizens alike: The former through competitive disadvantages, e.g. in tendering procedures, and the latter through the frustration of good-governance efforts and higher prices.[4] That was the case here.

4. As part of one of the largest corruption schemes in the history of Latin America, Peru and Graña y Montero snatched the contract to operate Blocks III and IV in the Talara Basin from Amorrortu and his company Baspetrol. This deprived Amorrortu of his valuable rights under Peruvian law which entitled him to a direct negotiation process to resume the operations in Blocks III and IV.

5. Since 1976, Amorrortu had been involved in drilling and extraction operations in the Talara Basin. Indeed, Block III of the Talara Basin is popularly known in the

[4] *See* S. Mbiyavanga, *Combating Corruption Through International Investment Treaty Law* (2017) (**CLA-43**), p. 133.

industry as the "*Amorrortu block*" because it has been successfully serviced and operated by the Amorrortu family company for more than twenty years.

6. In 1995, Amorrortu's company was forced to surrender the license to operate Block III because of the fierce political persecution launched by the dictatorial government of President Alberto Fujimori. This political persecution led Amorrortu to seek asylum in the United States, which he obtained from the United States Department of Justice on April 26, 2000.[5]

7. In the United States, Amorrortu embraced his adopted country and became a citizen of the United States in 2010.

8. In 2012, after the return of democracy in Peru and the execution of the USPTPA with its anti-corruption promises, Amorrortu formed Baspetrol S.A.C. (***Baspetrol***) with the expectation to operate oil fields in Peru and recover the contractual rights to operate Block III of the Talara Basin. Amorrortu assembled a team of experts in the region, all of whom had unmatched experience servicing the oil wells in the Talara Basin. Armed with this wealth of experience, unique know-how, and willingness to waive any pending claim he had against Peru for the expropriation of his former company and the abuse of human rights that led to his asylum, Amorrortu commenced a process known as "*direct negotiation*" (the ***Direct Negotiation Process***) under Peruvian law with PeruPetro, S.A. (***PeruPetro***) — the government entity responsible for the administration of oil blocks — for the operation of Blocks III and IV. The commencement of this Direct Negotiation Process gave Amorrortu a bundle of rights under Peruvian law, including the substantive right to have a good

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[5] *See* Letter from the U.S. Department of Justice, Immigration and Naturalization Service, 29 January 2001 (**C-1**).

faith exclusive consideration of the Baspetrol Proposal, through a number of well-defined phases established in ***PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts***.[6]

9. In the absence of corruption, Amorrortu would have secured the contract to operate Blocks III and IV. The commencement of a direct negotiation process in essence, guarantees the execution of a contract, particularly when the oil company has a successful track record operating the blocks.[7] Indeed, there is no record of any direct negotiation process that had not culminated in the execution of a contract after the completion of the required phases.[8] This is why the direct negotiation rights are so valuable to oil companies. Further, the Baspetrol Proposal had an attractive component which guaranteed 5% of the expected revenues to the local communities.

10. But Graña y Montero had set its eyes on Blocks III and IV, and had paid bribes in advance to the highest Peruvian authorities to obtain any government contract it desired during the administration of President Ollanta Humala in coordination with Nadine Heredia. As part of this Corruption Scheme, PeruPetro, instead of commencing the Direct Negotiation Process and honoring Amorrortu's acquired rights, as it was required to do under PeruPetro's own rules and procedures and which it had done with other similarly situated companies, shelved the Baspetrol Proposal and arbitrarily commenced a public bidding process in which, unsurprisingly, the only purportedly qualified company was Graña y Montero. As fully discussed below, this

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[6] *See*, *e.g.*, PeruPetro Procedure GFCN-008, Contracting Through Direct Negotiation, 13 August 2012 (**CLA-44**) (***PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts***).

[7] *See* First Witness Statement of Bacilio Amorrortu, 10 September 2020 (***CWS – 1 [Amorrortu]***) at ¶ 86.

[8] *Ibid*.

was the same pattern of corruption in the Southern Gas Pipeline Project from which Odebrecht and its partner, Graña y Montero, benefitted. It is also the same corrupt process through which other numerous government projects were awarded to Graña y Montero through phony public biddings.

11. The evidence of corruption is overwhelming, and more evidence continues to surface in the ongoing corruption investigation conducted by Peru's prosecutors. Indeed, on August 31, 2020, media reports of the investigation indicated that Graña y Montero's records confirm that executives met with the First Lady of Peru in April of 2014, October 2014, and February 2015 to discuss "*businesses*" and "*Blocks III and IV*" of the Talara Basin.[9] Why are the executives of Graña y Montero meeting with the First Lady, the person in charge of doling out the corrupt government contracts during the Humala administration, to talk "*business*" the month before the Baspetrol Proposal is shelved in favor of opening a public bidding in which Graña y Montero was the only qualified company? And why were they meeting to talk about Blocks III and IV right before the execution of the contracts? The answer is clear in light of the undisputed evidence of corruption and irregularities in this case: the contracts for Blocks III and IV were part of the Corruption Scheme. This conclusion cannot be seriously disputed:

i. It is undisputed that the President of Peru, together with his advisers, concocted a plan to award government contracts to Graña y Montero through a rigged public bidding processes in which Graña y Montero was the only qualified bidder;

ii. It is undisputed that Graña y Montero paid millions of dollars in bribes to obtain any government contract it requested;

[9] *See* G. Castañeda Palomino, *Gasoducto del Sur case: the prosecutor's office has an agenda with the meetings of José Graña, Jorge Barata and Nadine Heredia*, 31 August 2020 **(C-34)**.

iii. It is undisputed that the vast majority of contracts awarded during this period to Graña y Montero were awarded consistent with this corruption scheme: (1) a facially legitimate public bidding process where (2) all competitors of Graña y Montero failed to qualify and (3) Graña y Montero was the only qualified bidder;

iv. It is undisputed that Baspetrol commenced the direct negotiation process before the public bidding had been announced or decided;

v. It is undisputed that PeruPetro, contrary to its own practices and procedures, decided to open Blocks III and IV for the International Public Bidding Process without evaluating the Baspetrol Proposal;

vi. It is undisputed that the two other companies interested in participating in the International Public Bidding Process for Blocks III and IV were disqualified;

vii. It is undisputed that Graña y Montero did not comply with the qualification requirements for the International Public Bidding Process;

viii. It is undisputed that the qualification requirements were amended to allow Graña y Montero to qualify;

ix. It is undisputed that PeruPetro, acting against its own interest, relinquished its 25 % ownership interest in the Blocks in favor of Graña y Montero after its selection; and

x. It is undisputed that Graña y Montero failed to comply with its contractual commitments, and that PeruPetro has ignored these violations.

12. Not surprisingly, a number of relevant government documents have been "*lost*".[10] The same is true of most of the files of the government contracts that Graña y Montero won as the sole qualified bidder during the Humala administration.[11]

13. For years, Peru — and Graña y Montero — denied this corruption and blocked any effort to investigate its unlawful practices. Indeed, as late as February 24, 2017,

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[10] *See* First Expert Report of Monica Yaya, 9 September 2020 (***CER – 1 [Yaya]***), ¶¶ 153-164.

[11] *See* CER-1 [Yaya] at ¶¶ 153-164.

Graña y Montero issued a press release denying any involvement in any corruption scheme with Peru.[12]

14. But that defense is no longer sustainable. After years of denials, Graña y Montero has now admitted that it paid bribes to the Humala administration in exchange for the government contracts it selected, and new details have emerged from the International Public Bidding Process for Blocks III and IV confirming that Blocks III and IV were part of the package of government contracts awarded to Graña y Montero as a result of these bribes.[13] Numerous government officers involved in this Corruption Scheme are now being prosecuted in Peru, Brazil, and the United States.[14]

15. Peru's corrupt practices are in breach of its fair and equitable treatment obligations under the USPTPA, in that a government that exercises its discretion to contract based on corruption to the detriment of a foreign investor: (i) violates established customary principles of international law; (ii) betrays the investor's reasonable expectations; (iii) engages in arbitrary, grossly unfair, unjust, and discriminatory conduct; and (iv) violates its transparency obligations.

16. Peru cannot seriously deny that it has violated the USPTPA's fair and equitable treatment obligations. Instead, Peru seems to argue that this Tribunal is impotent to remedy the harm suffered by Amorrortu because the Corruption Scheme frustrated

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[12] *See* T. Céspedes et. al, *Constructora peruana Graña y Montero habría participado en sobornos de Odebrecht: medio*, 24 February 2017, https://lta.reuters.com/articulo/peru-granaymontero-idLTAKBN1632AG (last accessed 3 September 2020).

[13] *See* G. Castañeda Palomino, *Gasoducto del Sur case: the prosecutor's office has an agenda with the meetings of José Graña, Jorge Barata and Nadine Heredia*, 31 August 2020 **(C-34)**.

[14] *See* BBC News, *Odebrecht case: Politicians worldwide suspected in bribery scandal*, 17 April 2019, https://www.bbc.com/news/world-latin-america-41109132 (last accessed 11 September 2020).

Amorrortu's investment at its inception before Amorrortu had completed the Direct Negotiation Process. In other words, Peru argues that Amorrortu does not have a protected investment under the USPTPA.[15]

17. This argument has no support under the USPTPA, which clearly requires Peru to compensate protected investors for the harm caused by violations to the USPTPA, irrespective of when the violation occurs. Amorrortu is a U.S. investor with a protected investment that was frustrated by Peru's breach of its Treaty obligations.

18. ***Amorrortu is a U.S. national***. While it is true that Amorrortu was born in Peru, Amorrortu has renounced his Peruvian citizenship and does not have the citizenship of any other country, other than the United States.

19. ***Amorrortu has a protected investment***. He formed the enterprise Baspetrol and invested more than three years of his time and effort to recruit a top tier team of professionals with the expertise to service the oil industry in Talara. Amorrortu also contributed his multi-million dollar claim against Peru for the abuses committed during the Fujimori dictatorship. He leveraged this investment to commence a Direct Negotiation Process through Baspetrol and acquire a bundle of substantive rights, including the right to negotiate directly with PeruPetro with mutual good faith. This investment, and the bundle of rights created by virtue of this investment, fall under the broad definition of investment of the USPTPA, which explicitly includes an investment in "*an enterprise.*"[16] The USPTPA also protects as an investment any rights acquired by Amorrortu under Peruvian law, to wit: the right

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[15] *See* Peru's Reply to Amorrortu's Notice of Arbitration, 21 March 2020 (hereinafter, ***Peru's Reply to Amorrortu's NOA***) at ¶¶ 5, 8.

[16] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

to a good faith Direct Negotiation Process.[17] Furthermore, the USPTPA protects attempts through "*concrete actions*" to make an investment.[18]

20. Several arbitral tribunals have recognized that a party who has acquired rights under the applicable state law to negotiate in good faith a government contract has a protected investment. The awards in the case of *Lemire v. Ukraine*[19] and *Bosca v. Lithuania*[20] are illustrative on this point. *Lemire* and *Bosca* make clear that an investor who has acquired the exclusive legal right to negotiate a contract with a government entity has a protected investment.[21] The tribunal in *EDF v. Romania* assumed, as an established principle of law, that a party that had been selected by a government agency to commence a contract preparation and negotiation process had acquired rights protected as an investment under the applicable trade agreement.[22] The gist of these decisions is that an investor who makes an initial investment in an enterprise and then acquires the right to exclusively negotiate a contract to expand that enterprise, has a protected investment. That protected investment is entitled to the fair and equitable treatment by the host state.

21. Peru's suggestion that Amorrortu does not have a protected investment ignores that Amorrortu invested in an enterprise — a form of investment that is

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[17] USPTPA Chapter One (**CLA-6**), Art. 1.3.; *See* First Expert Report of Anibal Quiroga, 9 September 2020 (***CER – 1 [Quiroga]***) at ¶¶ 131-156.

[18] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

[19] *See Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**CLA-34**), ¶¶ 84-98 (hereinafter, ***Lemire v. Ukraine***).

[20] *See Luigiterzo Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013 (**CLA-46**) at ¶¶ 164-178 (hereinafter, ***Bosca v. Lithuania***).

[21] *See Lemire v. Ukraine* (**CLA-34**) at ¶¶ 84-98; *see also Bosca v. Lithuania* (**CLA-46**) at ¶¶ 164-178.

[22] *See EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**CLA-4**) at ¶¶ 221 et seq. (hereinafter, ***EDF v. Romania***).

explicitly enumerated in the USPTPA — and acquired the right to expand his investment through the Direct Negotiation Process for the license contract to operate, maintain, and exploit Blocks III and IV. Amorrortu's investment in Baspetrol and his legal rights in the Direct Negotiation Process are protected under the USPTPA and entitled to fair and equitable treatment.

22. If Peru had complied with its obligation to protect Amorrortu's investment, Baspetrol would be operating Blocks III and IV, contributing its expertise and know-how to the development of the Talara community, and contributing its proposed 5 % of the revenues generated to the development of the local community. There is simply no doubt that the exclusive Direct Negotiation Process to which Amorrortu was entitled, would have culminated with the execution of the contracts to operate Blocks III and IV in favor of Baspetrol.

23. The quantification of damages here is facilitated by the fact that Graña y Montero has received the benefits of the operation of the Blocks for approximately five years. This performance, which Amorrortu had achieved during his tenure as operator of Block III and, without a doubt, would have achieved, provides the Tribunal with a concrete basis to quantify the value of the contract that was snatched from Baspetrol and the harm that Amorrortu has suffered.

24. The tribunals in *Lemire*, *EDF*, and *Bosca* had to wrestle with the speculation surrounding the possibility that the state may decide not to conclude the negotiation process. That speculation is not present here. PeruPetro had a mandate to award the contracts to operate Blocks III and IV, and the Direct Negotiation Process, with its well established exclusive phases and decision tree, all but guarantees the contracts to a company like Baspetrol, which commenced the Direct Negotiation

Process and which was supported by the experience Amorrortu has of operating the Blocks. There was only one other bidder for Block IV, and there was no other bidder for Block III, than Graña y Montero. Indeed, PeruPetro had struggled to attract bidders for most of its blocks. Therefore, PeruPetro had a binary choice between the corrupt Graña y Montero and Baspetrol. This binary choice between a co-conspirator of the Treaty violation, on one side, and the Claimant, on the other, is what distinguishes this case from *Bosca* and the struggle to quantify damages with a reasonable degree of certainty.

25. The inescapable truth that will remain a constant throughout this arbitration is that PeruPetro had no basis to abort its Direct Negotiation Process with Baspetrol, a company led by the same expert that had successfully serviced and operated the Blocks for more than two decades, and deprive Amorrortu of his rights to a direct negotiation. The only reason that Baspetrol is not operating Blocks III and IV today is because of the Corruption Scheme of Peru and Graña y Montero, which this Tribunal must condemn with an exemplary award that punishes Peru for its flagrant and callous violation of its Treaty obligations.

## II. FACTS RELEVANT TO AMORRORTU AND HIS INVESTMENT IN PERU

### A. AMORRORTU'S EARLY LIFE IN PERU

#### 1) AMORRORTU'S FAMILY SETTLED IN PERU OVER A CENTURY AGO

26. The Amorrortu family has been servicing the oil industry in the Talara Basin since the beginning of the twentieth century. In 1914, Amorrortu's family moved to Talara, Peru from Piura, Peru to work in the oil refinery that the International

Petroleum Company (***IPC***) operated in Talara. IPC was a subsidiary oil company of the Standard Oil of New Jersey, later known as Exxon.[23]

2) <u>AMORRORTU'S EDUCATION AND EARLY PROFESSIONAL EXPERIENCE</u>

27. On October 7, 1953, Amorrortu was born in Talara, where his family had settled and had lived for over four decades.[24] Due to his family's deep connection with the oil industry, Amorrortu attended Exxon School number 7 (***Escuela Fiscalizada***) in Talara, where he excelled in his studies and received awards including an unprecedented special award for academic excellence.[25] Amorrortu completed his primary education in 1965.[26]

28. Amorrortu then proceeded to the San Miguel de Piura School where he also excelled and eventually completed his high school studies in 1970.[27] In 1971, Amorrortu was admitted to the National University of Engineering where he studied petroleum engineering earning his Bachelor's Degree in 1975.[28] He received his professional petroleum engineering degree in 1983.[29]

## B. AMORRORTU'S MAJOR EXPERIENCE IN THE PETROLEUM INDUSTRY

1) <u>AMORRORTU'S INITIAL INVESTMENT IN THE PERUVIAN OIL INDUSTRY</u>

29. Amorrortu's professional career begins in 1972, when he started working with his father — an oil professional who worked for IPC for over 35 years — who was then an offshore drilling manager at Southern Marine Drilling Co. (***Southern***

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[23] *See* CWS – 1 [Amorrortu], ¶ 5.

[24] *Ibid*.

[25] *Id*. at ¶ 6.

[26] *Ibid*.

[27] *Id*. at ¶ 7.

[28] *Ibid*.

[29] *Ibid*.

***Marine***).[30] Southern Marine was a subsidiary of the Marine Drilling Company-James Storm Company of Corpus Christi, Texas.[31] Under the tutelage of his father, Amorrortu started gaining relevant experience in offshore drilling and in the optimization of oil wells in the Talara region.[32]

30. Working for Marine Drilling, at age 24, Amorrortu became the youngest rig manager in Peru. He was simultaneously a supervisor and an engineer in the seven offshore drilling and repair platforms that the company was operating in Talara – the two main types of platforms being the National 80-B and Skytop 4610.[33]

31. Amorrortu became one of the leaders of the oil industry in Talara when the international companies that had been operating in the region left Peru due to the nationalization policies of the Peruvian Government. The nationalization of the oil fields in Peru began in 1969, when Peru formed PetroPeru (***PetroPeru***) to take over the oil fields that had been operated by the private sector.[34] International companies slowly began to leave Peru as a result of the nationalization process, leaving a vacuum for companies capable of servicing the wells managed by PetroPeru and the few international companies that remained. Local Peruvian professionals in the country's oil industry were able to provide the services needed by PetroPeru.[35] Amorrortu was a prominent professional among the local Peruvians that filled the vacuum left by international companies in Talara.

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[30] *Id*. at ¶ 8.

[31] *Ibid*.

[32] *Ibid*.

[33] *Id*. at ¶ 9.

[34] *See* PeruPetro S.A., History, https://www.petroperu.com.pe/english/about-us/history/ (last accessed 18 August 2020).

[35] *Ibid*.

32. On July 5, 1977, Amorrortu created Promociones Petroleras Talara, S.A. (***Propetsa***). On November 8, 1978, Propetsa was declared suitable to support the Peruvian oil industry and was duly registered in the Hydrocarbons Public Registry.[36]

33. Propetsa's business was initially to provide well and workover services to Occidental Peruana, Inc. (***Occidental Peruana-OXY***), a subsidiary of Occidental Petroleum Corporation (***OXY***), a U.S. oil company founded in 1920 and headquartered in Houston, Texas.[37] Amorrortu was in charge of overseeing Propetsa's operations.[38] The operations included maintenance and well services, as well as evaluation, completion of wells, and logistics or operations optimization.[39]

34. In June 1982, Propetsa started providing regular maintenance and optimization services to PetroPeru's operations in the Talara Basin.[40] These services were specialized and required sophisticated equipment, most of which were imported at expensive rates.[41] The services provided by Propetsa included the provision of backup trucks for transportation of equipment and tanker trucks for transportation of oil or water.[42] Additional services included optimizing unproductive wells (or recently drilled wells), and then extracting the oil.[43] To provide these services, Propetsa imported pumps, fluid tanks, rotary equipment, and monitor equipment.[44]

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[36] *See* Propetsa's Registration in Public Hydrocarbons Registry, 21 May 1990 (**C-33**).

[37] *See* CWS – 1 [Amorrortu], ¶ 10.

[38] *Ibid*.

[39] *Ibid*.

[40] *Id*. at ¶ 16.

[41] *Id*. at ¶ 15.

[42] *Id*. at ¶ 17.

[43] *Ibid*.

[44] *Ibid*.

35. Propetsa soon became one of the leading oil companies in the Talara Basin and, under Amorrortu's leadership, was able to do more than just cover the void left by the international companies that had abandoned the area.

2) AMORRORTU WAS AWARDED THE OPERATION OF BLOCK III IN THE 1990S

36. Amorrortu was able to leverage the success of Propetsa and his successful experience optimizing the oil wells in the Basin to obtain the contract to operate Block III, one of the oil blocks in the then recently divided Talara Basin as discussed below.

37. On May 21, 1990, the Public Hydrocarbons Registry certified Propetsa as having the capacity to undertake oil exploration and exploitation in Peru.[45] This meant that Propetsa went from being only a service company to also being an operating company.[46]

38. In 1991, Peru embarked on the privatization of PetroPeru. As part of this privatization plan, the Talara Basin was divided into 14 oil and gas blocks, which were offered to local and foreign investors through either direct negotiations or public bidding. In October 1991, PetroPeru issued a request for proposal to enter into a contract to conduct drilling and extraction operations in the Talara Basin, specifically in Block III.[47] To take advantage of this opportunity, Propetsa presented a proposal. Another company submitted a similar proposal. Both companies decided to form a consortium with 50% ownership each. The consortium was called Propetsa-Visisa Serpet Asociados (***Provisa***). Amorrortu served as the leader of Provisa and was responsible for Provisa's operations.[48] Provisa submitted a proposal which was

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[45] *See* Propetsa's Registration in Public Hydrocarbons Registry, 21 May 1990 (**C-33**), p. 3.

[46] *See* CWS – 1 [Amorrortu] at ¶ 17.

[47] *See* Supreme Decree No. 177-92-EF, 28 October 1992 (**CLA-5**).

[48] *See* CWS – 1 [Amorrortu] at ¶ 21.

approved; the Hydrocarbon Exploitation Services Contract was ultimately signed on March 4, 1993.[49] Under this contract, Provisa had the right to operate Block III for 20 years.[50]

### C. POLITICAL PERSECUTION AGAINST AMORRORTU

39. Given his success and work in favor of the local communities in Talara, and the Piura Region, Amorrortu became a local and regional leader that eventually led the opposition against the Fujimori regime. In retaliation, the Fujimori regime persecuted Amorrortu, expropriated all his assets, and cancelled the debt that was owed to Amorrortu's companies.

40. Amorrortu had begun his political career in the late 1980s by forming a political party focused on the interest of the oil community. Notably, and in line with his deep interest in the Peruvian oil sector, the Party's insignia was an oil tower.[51]

41. In October 1992, Amorrortu, on the platform of ***En Acción***, collected the 230,000 signatures required for his party to participate in the general elections of the Democratic Constituent Congress.[52] Soon Amorrortu was seen as a threat to the political establishment and the eventual dictatorial regime of President Alberto Fujimori.[53]

42. The Fujimori regime launched a plan to attack Amorrortu physically and economically. Amorrortu and his family soon became the targets of the so-called Fujimori death squads — a paramilitary group at the service of the dictatorship known

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[49] *See* Hydrocarbons Exploitation Services Contract signed between PetroPeru and PROVISA, 4 March 1993 (**C-4**).

[50] *Ibid*.

[51] *See* Press Conference, Main NorthWest Peru Newspaper, El Tiempo, 16 September 1992 (**C-35**).

[52] *See* CWS – 1 [Amorrortu] at ¶ 14.

[53] *Ibid*.

for their attacks on opposition leaders. Amorrortu was the victim of multiple physical assaults, ambushes, and kidnap attempts.[54]

43. Financially, the Fujimori regime forced PetroPeru to stop paying a multi-million dollar debt owed to Amorrortu's company Propetsa, even though the government records confirmed the existence and legitimacy of the debt.[55]

44. Due to the political persecution and PetroPeru's refusal to pay the acknowledged debt, Propetsa was forced to transfer 80% of its rights in Block III to Mercantile Peru Oil & Gas, SA (***Mercantile***).[56] Consequently, the original consortium proceeded to own 20% of the rights in Block III and, more precisely, Propetsa only owned 10%.[57]

45. On December 19, 1995, PeruPetro on one hand, and Mercantile, Propetsa, Visisa and Serpet on the other hand, entered into a License Agreement for the transfer of the operations of Block III.[58]

46. Eventually, on August 13, 1997, through Supreme Decree No. 015-97-EM, the totality of Provisa's participation in Block III was ultimately transferred to Mercantile.[59] This is how Amorrortu's first participation in the operation of Block III came to an end.[60]

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[54] *Id*. at ¶¶ 27, 38.

[55] *Id*. at ¶ 27.

[56] *See* CWS – 1 [Amorrortu] at ¶ 24.

[57] *Ibid*.

[58] *Id*. at ¶ 25.

[59] *See* CWS – 1 [Amorrortu] at ¶ 26.

[60] *Ibid*.

### D. AMORRORTU'S EXILE FROM PERU AND ASYLUM IN THE UNITED STATES

#### 1) THE U.S. DEPARTMENT OF JUSTICE GRANTS ASYLUM TO AMORRORTU

47. Considering the growing danger to his life, Amorrortu was forced to seek political asylum in the United States. He filed an asylum application in March 2000,[61] which was approved on January 29, 2001.[62]

48. Subsequently, Amorrortu applied for permanent residence in the U.S. on July 23, 2001. The application was granted on August 23, 2005.[63]

49. During this period, Amorrortu, besides working full-time on his *pro-se* claim against Peru in U.S. Courts, remained active in the oil industry by constantly participating in oil-themed conferences and enrolling in in college courses, for credit, in topics related to business innovation and project management.[64]

#### 2) LAWSUITS IN THE UNITED STATES FOR HUMAN RIGHTS VIOLATIONS

50. In December 2006 Amorrortu filed his first lawsuit against Peru in the United States District Court for the Southern District of Texas as a *pro se* litigant denouncing the human rights violations committed by Peru.[65] In his filings, Amorrortu narrated the story of his political persecution by Peru and the government's role in depriving him of accounts receivable from his oil business in Peru.[66] However, these actions were dismissed pursuant to the Foreign Sovereign Immunities Act.[67]

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[61] *See* Letter from Coane & Associates to US INS, 16 March 2000 (**C-30**).

[62] *See* Letter from the U.S. Department of Justice, Immigration and Naturalization Service, 29 January 2001 (**C-1**).

[63] *See* CWS – 1 [Amorrortu] at ¶ 28; *see also* Department of Homeland Security, Application to Adjust to Permanent Resident Status, Approval Notice, 23 August 2005 (**C-38**).

[64] *See* CWS – 1 [Amorrortu] at ¶ 30.

[65] *Id*. at ¶ 41.

[66] *Ibid*.

[67] *Id*. at ¶ 42.

51. In 2006, Amorrortu participated in discussions before the U.S. House Ways and Means and the Senate Finance Committees regarding the USPTPA.[68] In his presentation, Amorrortu discussed the political persecution he suffered in Peru and the violation of his human rights.[69] His contention was that the USPTPA should be suspended until Peru realizes the gross abuse of his rights by government officials.[70]

52. Nevertheless, the USPTPA was eventually ratified by both the United States and Peru. Peru ratified the Treaty in June 2006[71] and the United States ratified it in December 2007.[72] However, Amorrortu's participation was not in vain, as the USPTPA included a robust section addressing corruption and requiring government transparency in Peru.

## E. AMORRORTU'S INVESTMENT IN PERU AS A U.S. CITIZEN

### 1) INVESTMENT IN BASPETROL

53. During his exile in the U.S., Amorrortu considered the possibility of eventually investing in Peru given his familiarity with the protections offered to foreign investors by the USPTPA and his participation in the ratification process in the United States. To this end, in 2012, he formed Baspetrol. Baspetrol was incorporated under the laws of Peru, with the expectation to operate oil fields in Peru and recover the

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[68] *Id*. at ¶ 31.

[69] *Ibid*.

[70] *Ibid*.

[71] *See* United States Committee on Finance https://www.finance.senate.gov/download/2006/06/29/united-states-peru-trade-promotion-agreement (last accessed 3 September 2020).

[72] *See* Foreign Trade Information System, Organization of American States http://www.sice.oas.org/TPD/AND_USA/PER_USA_e.ASP#:~:text=On%2025%20June%202007%2C%20the,Congress%20on%2010%20May%202007.&text=On%2014%20December%202007%2C%20The%20U.S.%20President%20signed%20into%20law%20H.R (last accessed 3 September 2020).

contractual rights to operate Block III of the Talara Basin. Baspetrol was funded with an initial capital of 200,000 Peruvian Nuevos Soles, equivalent of approximately US $80,000, with respective shares of 100 Soles each.[73]

54. Considering his experience in the Talara Basin, Amorrortu understood the peculiarities of the oil Blocks within the Basin. He knew that the Blocks consisted of marginal oil fields.[74] The fields are small and have limited production capacity, albeit with proven oil reserves. Amorrortu understood that daily production volumes could be increased.[75] To achieve this level of efficiency, Amorrortu knew that an operation and optimization plan based on studies with advanced geology, modeling, seismic science, and specific expertise was needed.[76]

55. Amorrortu put together a team of oil experts and past allies in the sector and developed an elaborate plan that would ensure not only the efficiency of the exploitation process, but would also promote the development of the local host communities of Talara, Negritos, and Miramar-Vichayal.[77]

56. In preparation for the negotiations with PeruPetro,[78] Amorrortu: (i) searched and reviewed the laws in force in Peru regarding commercial entities based in Peru; (ii) reviewed and researched, based on Amorrortu's participation on the USPTPA's elaboration, the protections offered to U.S. investors under the USPTPA; (iii) met

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[73] *See* CWS – 1 [Amorrortu] at ¶ 65.

[74] *Id*. at ¶ 61.

[75] *Ibid*.

[76] *Ibid*.

[77] *Ibid*.

[78] On November 18, 1993, through Art. 6 of the Organic Hydrocarbons Legislation No. 26221, PeruPetro, S.A. (hereinafter, ***PeruPetro***) was created. PeruPetro became the state-entity in charge of supervising oil contracts. This meant, in practice, that PetroPeru became a contractor for PeruPetro.

with the Consulate of Peru in Houston to determine the applicable business regulations; (iv) researched and reviewed available public information related to technical and operational situations of Blocks III and IV, as the contracts related thereto were about to end; (v) conducted financial analysis to determine the approximate amount of pre-operational investment required from June 2012 to the start of operations, which could have been April 2015; (vi) put together equipment, technical, operational, administrative, and executive staff who would potentially operate Blocks III and IV; (vii) scheduled an exploratory trip to Peru, including the cities of Lima, Piura, and Talara, to check on-site needs and available facilities at the pre-operating stage; (viii) scheduled meetings with all former technical employees of his former company, including those who continued to work for Interoil in Blocks III and IV; and (ix) coordinated with lawyers and colleagues in the oil industry, both in Houston and Peru, to develop the investment.[79]

57. In June 2012, Amorrortu's partners and team of professionals began their efforts, from Houston and Talara, to open the Baspetrol offices in Peru.[80] In October 2012, Baspetrol opened its offices in Talara.[81] Then, on July 8, 2013, Baspetrol was granted a municipal operating license by the Provincial Municipality of Talara.[82]

58. As with any legitimate business investment, the opening of Baspetrol offices in Talara involved several costs, including costs associated with: (i) the opening of bank accounts for Baspetrol in Talara both for U.S. Dollars and national currency; (ii)

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[79] *See* CWS – 1 [Amorrortu] at ¶ 62.

[80] *Id*. at ¶ 63.

[81] *Id*. at ¶ 62.

[82] *See* CWS – 1 [Amorrortu] at ¶ 65; *see also* Public Services Management Resolution 397-7-2013/GSP-MPT, Talara Municipality, 8 July 2013 (**C-40**).

hiring the head of the office, Yhony Zavala Galvez; (iii) hiring the General Accountant of the Association of Public Accountants of Piura as the company's accountant, Edmundo Lazo Palacios; (iv) hiring coordinators of the operational technical staff, both in Talara and Piura, Freddy Castillo and Luis Arrese, respectively; (v) registration of Baspetrol with the Peruvian tax authority, SUNAT, and with the State Procurement Supervisory Agency (***OSCE***); and (vi) travel, and other expenses, to register Baspetrol.[83]

59. Amorrortu also made contacts with various international companies in order to remain competitive for different projects in the oil and gas sector.[84] These efforts also included meetings with senior officials of the Peruvian government such as then Minister of the MEM, Eleodoro Mayorga (***Eleodoro Mayorga***), and making presentations to project managers such as the Talara Refinery Modernization Project. He was also able to enlist the support of international companies such as Fluor Corporation for these projects.[85]

2) BASPETROL UNDERTAKES SEVERAL PROJECTS PRIOR TO PRESENTING A PROPOSAL FOR BLOCKS III & IV

60. The period immediately following the start of Baspetrol's operations in Peru was extremely active for Amorrortu. He essentially dedicated full time to Baspetrol. For instance, from November 2012 to early 2014, Amorrortu made several trips to Talara with his team to coordinate the various projects in which Baspetrol was trying to participate.[86]

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[83] *See* CWS – 1 [Amorrortu] at ¶ 62.

[84] *Id*. at ¶ 67.

[85] *See* CWS – 1 [Amorrortu] at ¶ 67; *see also* Letter from Andrés Beran, Fluor Enterprises, to Bacilio Amorrortu, 2 January 2013 (**C-41**).

[86] *See* CWS – 1 [Amorrortu] at ¶ 68.

61. During this period, Amorrortu held several meetings, in Houston, Texas, with oil executives who were available to provide support for the project.[87] He also contacted a number of experienced engineers who had experience in the Talara area and were familiar with the fields.[88]

62. In April 2014, with the help of these experienced professionals, Amorrortu organized the structure of all the executive, operational, administrative, and logistical personnel of Baspetrol to operate in Talara.[89]

63. Further, between January 2013 and May 2014, Amorrortu held meetings and multiple conversations with local companies as follows:[90]

i. Felecin Ingenieros S.A.C.: The company specializes in maintenance and assembly services for mechanical well pumping units, mechanical, and electrical production engines, various electricity services, assembly and transportation in general.

ii. VOA S.R.L.: This is an oil well servicing and work-over company.

iii. Servicios Petroleros y Conexos S.R.L.: The company specializes in maintenance and cleaning of oil well pipes, wireline tools and equipment in oil wells and metal welding.

iv. Special Services San Antonio: The company specializes in oil well cementing works. It also offers oil well drilling and production tooling services.

v. Talara Fast Service E.I.R.L.: The company specializes in the maintenance of mobile units and trucks as well as the supply of automotive parts.

vi. Other companies: Companies that sell fuel, spare parts, hardware, catering, rental of mobile units, etc.

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[87] *Id*. at ¶ 69.

[88] *Ibid*.

[89] *Id*. at ¶ 71.

[90] *Id*. at ¶ 72.

64. Each of these specialized local companies worked or were committed to work with Baspetrol.

65. Additionally, considering the importance of support from international companies in the proposal to PeruPetro for the operation of Blocks III and IV, Amorrortu took the following actions:[91]

i. Coordination with U.S. Halliburton Oil Services Company (***Halliburton***) to form the Baspetrol team. Amorrortu brought together some professionals including technicians and operations managers who were previous employees of Halliburton in Talara in the 70s, 80s, and 90s.

ii. Communication with FMC Technologies (presently TechnipFMC) (***FMC***): Amorrortu kept in touch with a Senior Manager of FMC in Houston in order to sign a service contract with Baspetrol. FMC had an active presence for years providing oil services and sale of oil equipment, pipelines, and connections in the Talara area, and could have taken advantage of the opportunity offered by Baspetrol to potentially operate the Blocks around April 2015. In fact, this Senior Manager had invited Amorrortu, on several occasions, to participate in the Offshore Technology Conference (***OTC***), which takes place annually in Houston, where companies such as FMC and other important oil service companies offer their latest innovations, technologies, and equipment to the market.

66. By engaging in the foregoing activities, Amorrortu not only prepared Baspetrol to become the best entity to operate Blocks III and IV, but also continued to maintain contact with various oil and oil service companies which allowed him to keep abreast of advances in both onshore and offshore oil technology.[92]

3) BASPETROL COMMENCES DIRECT NEGOTIATIONS WITH PERUPETRO

67. Aware that in 2013 the original contract to operate Block III would come to an end, Amorrortu contacted Luis Ortigas (***Ortigas***), the President of PeruPetro, and expressed his interest to take over the exploration and exploitation of Block III.[93]

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[91] *Id*. at ¶ 73.

[92] *Id*. at ¶ 74.

[93] Letter from Bacilio Amorrortu to Luis Ortigas, 31 July 2013 (**C-31**).

68. On August 12, 2013, PeruPetro indicated that Block III would not be available for direct negotiation.[94] Amorrortu also learned that PeruPetro was purportedly contemplating extending the contract to Interoil.[95]

69. On January 16, 2014, Amorrortu sent an email to PeruPetro expressing his disagreement with the decision to extend Interoil's contract regarding Block III. He also reiterated his willingness and ability to operate Block III.[96]

70. On February 6, 2014, Amorrortu had a telephone conference with Ortigas, where he gave Ortigas more details about his plan to modernize the oil industry in the Talara Basin. And on March 20, 2014, Amorrortu, through Baspetrol, reiterated to PeruPetro that Baspetrol was available for immediate operation of Block III.[97] The MEM was copied in this communication.

71. Under very controversial circumstances, on March 20, 2014, PeruPetro approved a temporary operation contract in favor of Interoil for Blocks III and IV for an additional 12-month period.[98]

72. Ortigas agreed to meet with Amorrortu on May 22, 2014, shortly after PeruPetro approved the temporary operation contracts for Blocks III and IV in favor of Interoil.[99] In that meeting,[100] Amorrortu once again went over his professional

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[94] *See* Letter from Luis Ortigas to Bacilio Amorrortu, 12 August 2013 (**C-6**). Direct negotiation is a form of contracting areas and lots for oil exploration and/or exploitation, recognized by Art. 11 of Law 26221, called the Organic Hydrocarbons Law, in force since November 1993 until the present.

[95] Amorrortu later learned that the purported extension to Interoil was nothing more than a smoke screen to cover the rigged public bidding process in favor of Graña y Montero.

[96] *See* Email from Bacilio Amorrortu to Maria Angelica Cobena, 16 January 2014 (**C-7**).

[97] *See* Email from Bacilio Amorrortu to Maria Angelica Cobena, 20 March 2014, (**C-28**).

[98] *See* Directory Agreement No. 034-2014, 20 March 2014 (**C-3**).

[99] *See* CWS – 1 [Amorrortu] at ¶ 79.

[100] *See* Email exchange between Bacilio Amorrortu, Maria Angelica Cobena, and Magali

background in the oil industry in Talara, the abuses he experienced from the government of Peru, the political persecution, and his subsequent political asylum in the U.S.[101]

73. During the meeting, Ortigas instructed Amorrortu to prepare a proposal for direct negotiation (the ***Baspetrol Proposal*** or the ***Proposal***) for the operation of Blocks III and IV. Ortigas further told Amorrortu that the Baspetrol Proposal would be subject to a legal-technical-economic analysis by PeruPetro' Administration and that it would be discussed by PeruPetro's Board, which is the process required by PeruPetro's Rules and Procedures.[102]

74. Accordingly and in compliance with Ortigas' instructions, Amorrortu sent the Baspetrol Proposal via email to PeruPetro on May 28, 2014.[103] A hard copy of the Proposal was also submitted to PeruPetro at their offices in Lima, Peru.[104] The Proposal complied with all the requirements as instructed by Ortigas, including the additional proposal to operate Talara's Block IV.[105]

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Hernandez, May 2014 (**C-8**).

[101] *See* CWS – 1 [Amorrortu] at ¶ 80.

[102] Unbeknownst to Amorrortu and contrary to PeruPetro's practices and guidelines, in April of 2014, PeruPetro had already decided to open a public bidding process designed to benefit Graña y Montero. The commencement of a public bidding process is a highly unusual decision given that Baspetrol had expressed an interest in direct negotiation, and PeruPetro had a practice of commencing the direct negotiation process at the request of any oil company interested in an oil block, particularly an oil company with the experience of Amorrortu.

[103] *See* Email from Bacilio Amorrortu to Maria Angelica Cobena, 28 May 2014 (**C-9**).

[104] *See* Receipt of Baspetrol Proposal Stamped by PeruPetro, 28 May 2014 (**C-10**).

[105] Proposal from Baspetrol SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, 27 May 2014 (**C-11**).

4) BASPETROL'S DIRECT NEGOTIATION PROPOSAL FOR BLOCKS III & IV

75. The Baspetrol Proposal provided, among other things, relevant technical information showcasing Amorrortu's expertise and Baspetrol's qualification to operate Blocks III and IV. The Proposal explained that even if Blocks III and IV were "*marginal oil fields*", these require a significant technical process for efficient operation. The process consists of drilling new wells and extending existing ones, as well as "*increasing recovery*", reconditioning, well servicing, and improvements to production facilities in wells and on the surface. According to the Proposal, this process would ensure increased and sustained daily production.[106]

76. The Proposal guaranteed that Baspetrol would engage a first-class international technical team consisting of international experts in the oil field, complemented by local Peruvian technicians and engineers with extensive experience in marginal oil field operations. Amorrortu further emphasized that this team had access to the latest technology to ensure sustained and growing hydrocarbon production. For example, this team had expertise in the use of advanced drilling technology, specifically horizontal and directional drilling, which would optimize the recovery of hydrocarbons in Blocks III and IV. The Proposal indicated that Amorrortu had strong professional relationships with these experts, most of whom had worked with multinational oil companies.[107]

77. Additionally, the technology was environmentally friendly. Therefore, considering the population that lives in the area where Blocks III and IV are located,

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[106] *See* Proposal from Baspetrol SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, 27 May 2014 (**C-11**), Part IV, p. 9.

[107] *Ibid*.

as well as the agricultural landscape, this conscious environmental control would minimize the risks to humans and the environment that is usually associated with oil and gas exploration. These protections would also ensure the safety of the personnel working in the Blocks.[108]

78. Further, the Proposal indicated that the technical information obtained from Blocks III and IV would be evaluated with a focus on carrying out deep analyses of the reservoirs and seismic information, and if necessary, a reinterpretation using the latest technology.[109]

79. The Proposal also guaranteed that all Peruvian personnel who were working in Blocks III and IV would continue in their jobs. The Proposal also emphasized Baspetrol's plan to partner with PetroPeru in the operation of the Blocks.[110]

80. Most importantly, the Proposal had an economic framework that fulfilled PeruPetro's expectations with respect to an increase in oil production in the Blocks and an increase of the financial return for PeruPetro.[111] To this end, the Baspetrol Proposal contemplated significant and realistic investments in the drilling of new oil wells, in the re-activation of existing oil wells, and allocated 50% of the revenue to PeruPetro.[112]

81. In sum, the Proposal was very attractive and beneficial for PeruPetro and the local community of Talara.

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[108] *Id*. pp. 9-10.

[109] *Id*. p. 10.

[110] *Id*. pp. 13-16.

[111] *Id*. p. 11.

[112] *Id*. p. 13.

5) <u>PeruPetro Violates Amorrortu's Legitimate Right To Direct Negotiation For Blocks III & IV</u>

82. In direct contradiction to Ortigas' statements to Amorrortu and in violation of the direct negotiation process commenced by Baspetrol, on July 14, 2014, PeruPetro commenced a public bidding process and invited oil companies interested in the exploitation of hydrocarbons to participate in International Public Bidding Process No. PERUPETRO-001-2014-LOT III and International Public Bidding Process No. PERUPETRO-002-2014-LOT IV (the ***International Public Bidding Process***).[113] Given this unusual development, Amorrortu immediately traveled to Peru to meet again with Ortigas.

83. On July 16, 2014, Amorrortu met with Ortigas in Peru. At the meeting, Ortigas informed Amorrortu for the first time that the Board of Directors of PeruPetro had rejected the Baspetrol Proposal and instead opted for a public bidding of Blocks III and IV.[114] Ortigas gave no explanation as to why the Board rejected the Baspetrol Proposal. This statement turned out to be false.

84. Upon leaving the meeting with Ortigas, Amorrortu met with Isabel Tafur (***Tafur***), the Chief Administrator of PeruPetro, who informed Amorrortu that her office had no knowledge of the Baspetrol Proposal.[115] This meant that the Baspetrol Proposal was never transmitted to the General Management of PeruPetro. Tafur then requested a copy of the Proposal which Amorrortu sent to her a few hours later.[116]

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[113] *See* PeruPetro S.A., Press Release, 14 July 2014 (**C-12**).

[114] *See* CWS – 1 [Amorrortu] at ¶ 89.

[115] *Id*. at ¶ 90.

[116] *See* CWS – 1 [Amorrortu] at ¶ 90; *see also* Letter from Bacilio Amorrortu to Isabel Tafur, 16 July 2014 (**C-32**).

85. Again, completely ignoring the law and the implications of a direct negotiation, on August 20, 2014, PeruPetro sent a letter to Amorrortu, inviting Baspetrol to participate in the International Public Bidding Process for Block III, "*in line with the proposal that [Baspetrol] presented [to PeruPetro on May 28, 2014]*."[117] PeruPetro ignored that Amorrortu had commenced a Direct Negotiation Process, that Baspetrol had been qualified, and that Amorrortu was entitled to have the Baspetrol Proposal evaluated through this exclusive process.[118]

86. On October 31, 2014, in order to prevent PeruPetro from using the pretext of non-participation in the International Public Bidding Process to deny the Baspetrol Proposal altogether, Amorrortu presented a bid as part of the public tender.[119] Notably, and consistent with international best practices regarding corporate social responsibility, the Baspetrol Proposal allocated 5% of the project's earnings to the development of the local community.[120] However, the Baspetrol Proposal as expected, and as further discussed below, had no chance to succeed because the process was rigged from the beginning in favor of Graña y Montero.

87. On November 3, 2014, PeruPetro informed Amorrortu that Baspetrol did not meet the technical requirements of the International Public Bidding Process.[121] As

[117] Letter from PeruPetro, S.A. to Bacilio Amorrortu, 20 August 2014 (**C-13**); *see also* CWS – 1 [Amorrortu] at ¶ 91.

[118] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**); *see also* CER – 1 [Quiroga] at ¶¶ 18, 23-25, 110-115.

[119] *See* Letter from Bacilio Amorrortu to "*Comisión de la Licitación Pública Internacional No. PERUPETRO-001-2014*", 31 October 2014 (**C-14**); *see also* CWS – 1 [Amorrortu] at ¶ 92.

[120] *See* Proposal from Baspetrol SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, 27 May 2014 (**C-11**), p. 13.

[121] *See* Letter from Roberto Guzman to Bacilio Amorrortu, 3 November 2014 (**C-15**); *see* CWS – 1 [Amorrortu] at ¶ 93.

further detailed below, the process was purposely designed to exclude Baspetrol and award the contract to Graña y Montero. On December 12, 2014, PeruPetro announced Graña y Montero as the only company to qualify for the bid for Blocks III and IV.[122]

88. Considering the glaring irregularities in the process, Amorrortu sent letters to PeruPetro indicating how the process was discriminatory against Baspetrol,[123] and how the outcome of the bid would negatively affect the communities of Talara and the Vichayal District.[124] Amorrortu also sent a compilation of these letters to the MEM, the Peruvian Congress (Piura Congressman, Leonidas Huayama), and the U.S. State Department.[125] But what Amorrortu did not know at the time was that the perceived favoritism in favor of a local company was in fact part of one of the largest corruption schemes in the history of Latin America.

[122] *See* PeruPetro, S.A., Press Release, 6 April 2015 (**C-29**).

[123] *See* Letter from Bacilio Amorrortu to Isabel Tafur, 5 February 2015 (**C-16**).

[124] *See* Letter from Bacilio Amorrortu to Isabel Tafur, 15 December 2014 (**C-17**)

[125] *See* CWS – 1 [Amorrortu] at ¶ 97.

## III. GRAÑA Y MONTERO'S CORRUPTION SCHEME

> ". . . no tribunal charged with upholding the rule of law should countenance the insidious practice of corruption."[126]

89. The factual background set out below (and the accompanying expert reports) will assist the Tribunal in understanding the rampant corruption that ultimately resulted in the breach of Amorrortu's rights under the USPTPA on July 14, 2014, when Peru arbitrarily decided to open the International Public Bidding Process for Blocks III and IV; a process designed to benefit Graña y Montero.

### A. GRAÑA Y MONTERO

90. Graña y Montero is the largest and oldest construction group in Peru and a group with the best social, political, and economic connections in Peru.[127] The group was founded in 1933 by Carlos Graña, Alejandro Graña, and Carlos Montero. Graña y Montero is a family group, whose shareholders and directors are part of rich families of colonial origin who owned large estates.[128]

91. During the tenure of President Alberto Fujimori, Graña y Montero experienced a rapid growth.[129] President Fujimori's administration was characterized by a resurgence of corruption in the purchase and sale of arms, in the privatization of state companies, in the sale of foreign debt bonds, and in public bidding processes.[130]

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[126] Global Arbitration Review, *Why tribunals should not ignore "red flags" of corruption*, 12 August 2020, https://globalarbitrationreview.com/article/1229354/why-tribunals-should-not-ignore-%E2%80%9Cred-flags%E2%80%9D-of-corruption (last accessed August 18, 2020).

[127] *See* First Expert Report of Doctor Jose Francisco Durand, Ph.D., 9 September 2020 (***CER – 1 [Durand]***), ¶ 17.

[128] *Id*. at ¶ 18.

[129] *Id*. at ¶ 20.

[130] *Id*. at ¶ 66.

92. In 1991, the government of President Fujimori began the privatization process of the Talara oil fields.[131] For this purpose, PeruPetro was created within the framework of the Hydrocarbons Law of August 24, 1993.[132] On October 8, 1993, Block V of the Talara Basin was awarded to Graña y Montero, and in July 1995, Graña y Montero received Block I.[133] It is precisely during this time that Propetsa, as part of the Provisa Consortium, obtained the license to operate Block III. However, as previously explained, due to the political persecution suffered by Amorrortu at that time, he had no choice but to give up its rights in Block III.[134]

93. During the administration of President Alan Garcia and President Ollanta Humala, Graña y Montero experienced a new resurgence. This growth has been primarily supported by the company's political connections and its association with Odebrecht.[135] Graña y Montero became the darling of government projects, surprisingly winning as the sole bidder in approximately 60% of the government contracts for which it bid, including some of the most lucrative contracts.[136]

94. In 2016, allegations of corruption in connection with megaprojects in which Graña y Montero participated with Odebrecht began to surface and Odebrecht revealed that it had paid US $29 Million in bribes to Peruvian officials.[137] However, Graña y Montero maintained that it was unaware of any corruption scheme, and

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[131] *Id*. at ¶ 143.

[132] *Id*. at ¶ 144.

[133] *Id*. at ¶ 143.

[134] *See* CWS – 1 [Amorrortu] at ¶ 35.

[135] *See* CER – 1 [Durand] at ¶ 20.

[136] *See* CER-1 [Yaya] at ¶ 83.

[137] *See* M. Taj et. al, *Odebrecht settlement spurs bribery inquiries across Latin America*, 22 December 2016, https://www.reuters.com/article/us-brazil-corruption-latinamerica/odebrecht-settlement-spurs-bribery-inquiries-across-latin-america-idUSKBN14B2BD (last accessed 4 September 2020).

emphasized that Odebrecht had acted alone. Indeed, between January and February 2017, Graña y Montero repeatedly and emphatically denied its participation in corruption and claimed that the company had been surprised by Odebrecht's wrongdoing.[138]

95. This defense crumbled in December 2017 when Jose Graña Miro-Quesada (***Jose Graña***), CEO of Graña y Montero from 1982 to 2016,[139] and Hernando Graña (***Hernando Graña***), Jose Graña's cousin, who served as Graña y Montero's Head of Commercial since 1996,[140] and several other executives from Graña y Montero, were arrested as part of the Lava Jato corruption scandal.[141]

96. Despite these arrests, Graña y Montero continued maintaining its innocence until June 2019, when its executives finally admitted that Graña y Montero was one of the main co-conspirators in a corruption scheme that extended to the highest spheres of the government in Peru.[142]

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[138] *See* M. Taj et. al, *UPDATE 2-Shares of Peru's Grana y Montero drop on Odebrecht bribes report*, 24 February 2017, https://www.reuters.com/article/peru-grana-y-montero-idUSL1N1G91D0 (last accessed 4 September 2020).

[139] *See* CER – 1 [Durand] at ¶ 19.

[140] *Id*. at ¶ 26.

[141] E. Salcedo-Albaran et. al., *Lava Jato Peru* (2019) (**CLA-47**), pp. 12-13. "*Lava Jato is the name under which we refer to the group of investigations, procedures, and large-scale corruption scandals recently discovered in Latin America. Lava Jato is characterized by the participation of Brazilian companies, mainly the construction company Odebrecht. Lava Jato was initially the name of the first legal procedure in Brazil against corruption, institutional co-opting[,] and asset laundering of the semi-public oil company from Brazil, Petrobras. [ . . .] Lava Jato Peru . . . [is] the corruption structure that began in Brazil in the Odebrecht company, and it spread to Peru thanks to Peruvian businessmen who agreed to finance political parties and campaigns in exchange for being favored with infrastructure contracts.*"

[142] *See* Agencia EFE, *Constructora admite un soborno por 3,7 millones de dolares en el Gobierno de Humala*, 7 June 2019, https://www.efe.com/efe/america/politica/constructora-admite-un-soborno-

97. In February 2020, Graña y Montero released a *mea culpa* statement asking Peruvians for forgiveness for not acting with transparency before.[143]

### B. THE CORRUPTION SCHEME

Graña y Montero's executives "knew that we paid [a bribe] . . . their role had [been] decisive in obtaining results."
Testimony of Jorge Barata
Director of Odebrecht in Peru[144]

98. There is no doubt now that Graña y Montero is — and has always been — a corrupt company. The company was Odebrecht's preferred partner in Peru,[145] and was involved with Odebrecht in several megaprojects tainted with corruption. In fact, Graña y Montero is also referred to as the "*Peruvian Odebrecht.*"[146]

99. As explained by doctor Francisco Durand, Ph.D. (***Dr. Durand***), "*Graña y Montero, as a group, and Jose Graña as CEO, developed a corruption scheme [(the* ***Corruption Scheme****)], which was considerably dependent on Graña y Montero's ability to exercise undue influence on the government.*"[147]

100. This Corruption Scheme involved Graña y Montero's family, friends, and political connections, and the company's influence over the news through El

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por-3-7-millones-de-dolares-en-el-gobierno-humala/20000035-3995567 (last accessed 4 September 2020).

[143] *See* Peru21, *Graña y Montero cambia de nombre y hace mea culpa: "Le pedimos perdón a todos los peruanos"*, 4 February 2020, https://peru21.pe/peru/grana-y-montero-cambia-de-nombre-y-hace-mea-culpa-le-pedimos-perdon-a-todos-los-peruanos-noticia/ (last accessed 4 September 2020).

[144] J. Rapp, *Arrests and raids: the latest in the Odebrecht corruption scandal*, 9 December 2017, https://perureports.com/arrests-raids-latest-odebrecht-corruption-scandal/6298/ (last accessed 16 August 2020).

[145] *See* F. Durand, *Odebrecht La Empresa Que Capturaba Gobiernos* (2018) (**CLA-48**), p. 107.

[146] CER – 1 [Yaya] at ¶ 80.

[147] CER – 1 [Durand] at ¶ 41.

Comercio, the largest media conglomerate in Peru.[148] Indeed, according to expert Monica Yaya (***Expert Yaya***), Jose Graña himself owns 80% of Peru's media,[149] allowing the company to substantially control what the media says about Graña y Montero. In addition, Graña y Montero also benefited from the corruption model developed by Odebrecht.[150]

101. Further, the Corruption Scheme consisted in (i) financing political campaigns, (ii) illicit, (iii) the use of the "*revolving door*" — that is, the movement of personnel between roles in the government and roles in the industries affected by the legislation and regulations issued by those governmental officials — (iv) bribery, and (v) the use of the company's network of influence.[151]

102. Both the financing of campaigns and the payment of bribes were organized by Odebrecht through the Department of Structured Operations. This department is now informally known as the "*bribery department,*" where a tally of unaccounted payments and the pseudonyms used to cover the real names of the people and officials part of the Corruption Scheme was kept.[152] As analyzed by Dr. Durand, "*[t]he payments are made through money transfers to offshore companies . . . and cash is delivered to politicians during political campaigns . . . at the request of the managers of each country.*"[153] In this sense, as we will explain below, the agreement between Graña y Montero and Odebrecht required Odebrecht to make the initial

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[148] *See* CER – 1 [Durand] at ¶¶ 46-50.

[149] *See* CER – 1 [Yaya] at ¶ 81.

[150] *See* CER – 1 [Durand] at ¶¶ 41-43.

[151] *Id*. at ¶ 43.

[152] *Id*. at ¶ 83.

[153] *Ibid*.

bribery payments and then Graña y Montero would repay Odebrecht back its portion.[154]

1) GRAÑA Y MONTERO IS A COMPANY OWNED BY A FAMILY THAT IS POLITICALLY, SOCIALLY, AND ECONOMICALLY WELL-CONNECTED AND HAS CONTROL OVER INFORMATION DISSEMINATION

103. The Graña family is a family with great social presence. It is related to other well-known Peruvian families that belong to the privileged circle of families in Lima, Peru. According to Dr. Durand *"[t]hese families are known as the owners of Peru."*[155] In particular, the Graña family is related to the Miro-Quesada family. The Miro-Quesada family owns El Comercio, the oldest and most important newspaper in Peru.[156]

104. In 2013, Graña y Montero bought the national newspaper chain Correo and, by 2016, the group El Comercio controlled 9 of the 12 newspapers in circulation in Peru.[157]

105. According to Dr. Durand, "*[t]he benefits of the influence . . . Graña y Montero . . . exercises over El Comercio is evident . . . [in] avoiding negative news and comments about Odebrecht, its relationship with Graña y Montero and about Jose Graña's actions that could hurt [the group's] reputation.*"[158]

2) GRAÑA Y MONTERO PAID COVERT FUNDS TO ELECTORAL CAMPAIGNS

106. The Graña y Montero-Odebrecht association strategically wielded political influence from the beginning to the end of the political cycle of each government: it

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[154] *See* CER – 1 [Durand] at ¶ 85.

[155] *Id*. at ¶ 46.

[156] *See* CER – 1 [Durand] at ¶¶ 46-47.

[157] *Id*. at ¶ 48.

[158] *Id*. at ¶ 50.

began with the illegal financing of electoral campaigns of various political parties, which includes the neutralization of investigations, the concealment of payment of bribes, and the management of public opinion to avoid scandals or complaints.[159]

107. The illegal financing of political campaigns is a particularly important instrument when it comes to creating a "*debt*" that the sponsored political party or candidate will have to pay back when he or she is elected.[160] Graña y Montero made important concealed donations to political parties regardless of its political ideology.[161]

108. For example, in the general elections of 2011, Graña y Montero made concealed donations to the candidature of Keiko Fujimori Higuchi.[162] These contributions were made together with Odebrecht.[163] Furthermore, in the presidential elections of 2011, Odebrecht contributed US $200,000 to the political party of President Alan Garcia;[164] US $300,000 to the political party of President Pedro Pablo Kuczynski;[165] US $700,000 to the political party of President Alejandro

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[159] *Id*. at ¶ 38.

[160] *Id*. at ¶ 60.

[161] *Id*. at ¶ 61.

[162] *Ibid*.

[163] *Id*. at ¶ 62.

[164] *See* S. Tegel, Former Peruvian president dead; shot himself as police attempted to make arrest, 17 April 2019, https://www.washingtonpost.com/%20world/the_americas/former-peruvian-president-alan-garcia-reportedly-shoots-self-before-arrest/2019/%2004/17/d1cf1d9a-610f-11e9-bf24-db4b9fb62aa2_story.html?arc404=true (last accessed 18 August 2020). Former Peruvian President, Alan Garcia, shockingly killed himself on April 17, 2019, after officers had been dispatched to and arrived at his home to arrest him in connection with the allegations of taking bribes from Brazilian construction company, Odebrecht.

[165] *See* R. Mella et. al, *A quién y con cuánto*, 28 February 2018, https://www.idl-reporteros.pe/jorge-barata-apoyo-a-campanas-de-keiko-fujimori-alan-garcia-ollanta-humala-alejandro-toledo/ (last accessed 18 August 2020).

Toledo;[166] US $1,200,000 to Keiko Fujimori;[167] and US $ 3,000,000 to President Ollanta Humala.[168] All of these contributions were illegal and concealed through the use of straw persons.[169]

109. Jose Graña and Hernando Graña admitted that, in 2013, Graña y Montero made payments of up to US $200,000 to ensure that Susana Villarán, the then Mayor of the Municipality of Lima, was not removed from office.[170] In return, Graña y Montero obtained the contract to build the Via Expresa project (the ***Via Expresa Project***).

110. At first, Graña y Montero categorically rejected, in various instances, that the company or its employees were involved in any sort of bribery or corruption scheme carried out by Odebrecht. However, in February 2018, Marcelo Odebrecht (***Marcelo Odebrecht***), Odebrecht's former CEO, testified before the Peruvian prosecutors, and he confirmed that Graña y Montero knew about the Odebrecht bribes. During his testimony, Marcelo Odebrecht testified, in relevant part, that:

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[166] *See* N. Casey et. al, *Former Peru President Arrested in U.S. as Part of Vast Bribery Scandal*, 16 July 2019, https://www.nytimes.com/2019/07/16/world/americas/peru-toledo-arrested.html (last accessed 18 August 2020). Former Peruvian President was arrested on July 14, 2019 by U.S. marshals after the Peruvian government requested his extradition. He was wanted in Peru on suspicion of taking USD $20 Million American Dollars in bribes from Brazilian construction company, Odebrecht.

[167] *See* R. Mella et. al, *A quién y con cuánto*, 28 February 2018, https://www.idl-reporteros.pe/jorge-barata-apoyo-a-campanas-de-keiko-fujimori-alan-garcia-ollanta-humala-alejandro-toledo/ (last accessed 18 August 2020).

[168] *See* Andean Air Mail and Peruvian Times, *Top Graña y Montero Executives Resign to Save Company*, 28 February 2017, https://www.peruviantimes.com/28/top-grana-y-montero-executives-resign-to-save-company/28836/ (last accessed 19 August 2020).

[169] *See* La República, *Odebrecht usó a socios en el Perú como intermediarios*, 23 January 2018, https://larepublica.pe/politica/1174954-odebrecht-uso-a-socios-en-el-peru-como-intermediarios/ (last accessed 11 September 2020).

[170] *See* CER – 1 [Durand] at ¶ 65.

> *An important point. It was not Odebrecht who invented the bribes. If we had a political relationship of grade 10, our partners reached 40, 50, 60. . . . It is very likely that in the case of bribes related to specific projects have been negotiated and paid by Peruvian businessmen.*[171]

111. He further explained that Odebrecht viewed its partnership with Graña y Montero as "*a unique team*", that is:

> *With Graña most of our projects were made in a single body. That is, it was a unique team, where there were people from Odebrecht and Graña, and they treated the project as a whole. As far as I know, Graña was our main partner, consorting in a large part of the projects. It is the largest construction company in Peru. And that story comes from the time of Trujillo, with Chavimochic, from the 80's. Then Graña has a history with us of 30 years of consortium, since our first project in Peru.* [172]

112. Indeed, Marcelo Odebrecht stated that Graña y Montero helped Jorge Barata to establish contact with Peruvian politicians; and that the role of Graña y Montero was decisive in choosing the projects in which bribes could be paid, and in suggesting the name of presidential candidates that should receive financing.[173]

113. The illegitimate contributions on the part of Graña y Montero and Odebrecht to President Ollanta Humala's (***President Ollanta Humala***) campaign is of critical importance in this case. As Expert Yaya explains, "*during the government of the President of the Republic Ollanta Humala Tasso, the companies belonging to the Graña y Montero group, . . . won as the **<u>sole bidder</u>** 60% of the selection processes in which they participated . . ..*" And that "***<u>the companies of the Graña y Montero</u>***

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[171] IDL-Reporteros, *Marcelo Odebrecht: el audio completo*, 22 January 2018, https://www.idl-reporteros.pe/marcelo-odebrecht-el-audio-completo/ (last accessed 19 August 2020).

[172] IDL-Reporteros, *Marcelo Odebrecht: el audio completo*, 22 January 2018, https://www.idl-reporteros.pe/marcelo-odebrecht-el-audio-completo/ (las accessed 19 August 2020).

[173] *See* A. Zambrano, *Odebrecht falls on GyM*, November 2017 **(C-42)**

***__group had the privilege that the Requirements of the selection processes were designed to suit them, . . . maliciously avoiding all types of competition__***. *In the processes in which other bidders were present, they were negatively discriminated through unmotivated answers or with apparent motivation*."[174]

114. In addition, according to Dr. Durand, the government of President Ollanta Humala is the government "*that ha[d] more cases of lobbying, favoritism and corruption involving both the president, Nadine Heredia, and several ministers who participated in the decision to award blocks III and IV to Graña y Montero.*"[175] President Ollanta Humala and Nadine Heredia (***Nadine Heredia***) are known as "the presidential couple" precisely because of the influence exercised by Nadine Heredia on everything related to her husband's presidential administration.[176]

3) GRAÑA Y MONTERO CONTRIBUTED MILLIONS OF DOLLARS IN BRIBES TO CORRUPT PUBLIC OFFICIALS TO WIN MAJOR PUBLIC PROJECTS

115. Graña y Montero was aware that Odebrecht made illicit payments to top officials. Graña y Montero then paid its proportional share of the bribes in the form of differential dividends. Graña y Montero and Odebrecht characterized these payments as legitimate payments for the "additional risks" Odebrecht allegedly incurred for the benefit of the consortium. In other words, under the Corruption Scheme, Odebrecht would make the payment, and then Graña y Montero would be required to reimburse Odebrecht for Graña's proportional share of the bribe.[177]

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[174] *See* CER – 1 [Yaya] at ¶ 83. (emphasis in the original).

[175] CER – 1 [Durand] at ¶ 73.

[176] *Ibid*.

[177] *See* A. Zambrano, *Odebrecht falls on GyM*, November 2017 **(C-42)**

116. The term "*additional risks*" appears in numerous corporate documents of the Graña y Montero-Odebrecht consortium as distribution of differential dividends in favor of Odebrecht, including:

i. the 2012 Profit Distribution Agreement of the Electric Train Consortium;[178]

ii. the 2015 Liquidation Agreement of the Electric Train Consortium;[179] and

iii. the June 1, 2011 Minutes of the General Meeting of Shareholders of the IIRSA South project.[180]

117. In his report, Dr. Durand states that during the Graña y Montero-Odebrecht association, both companies "*obtain[ed] various [public works] contracts through bribes and other complementary forms of influence over politicians and officials.*"[181]

118. In the decade spanning 2006 to 2016, the investment in public works grew exponentially. Some of the most expensive projects occurred during that period and, most of them, were tainted with corruption. Similarly, at around the same time, Graña y Montero was favored by Peru in the bidding process for the Quinua-San Francisco highway, in the purchase of important urban land in Lima, and in the International Public Bidding Process of the oil Blocks III and IV of Talara.[182]

4) GRAÑA Y MONTERO HAS ACKNOWLEDGED ITS RESPONSIBILITY IN THE CORRUPTION SCHEME OF VARIOUS PUBLIC PROJECTS IN WHICH IT ACTED EITHER ALONE OR AS PART OF THE CONSORTIUM WITH ODEBRECHT

119. In June 2019, after categorically denying its knowledge and involvement, Graña y Montero finally acknowledged its involvement in the corruption scheme

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[178] *See* Profit Distribution Agreement of the Electric Train Consortium, 29 February 2012 (**C-44**).

[179] *See* Liquidation Agreement of the Electric Train Consortium, 4 May 2015 (**C-45**).

[180] *See* Minutes of the General Meeting of Shareholders of the IIRSA South Project, 1 June 2011 (**C-46**).

[181] CER – 1 [Durand] at ¶ 23.

[182] *Id*. at ¶ 72.

undertaken together with Odebrecht in various megaprojects in Peru.[183] As a result, by August 2019, Graña y Montero's former executives were collaborating with the Peruvian Prosecutor's Office on several investigations: (i) the Lima Metro Project, (ii) the IIRSA South Project, (iii) the IIRSA North Project and (iv) the Construction Club, and the South Peruvian Gas Pipeline.[184]

a) The Lima Metro Project

120. The Lima Metro project (the ***Lima Metro Project***) involved the design and construction of Line 1 of Lima's metropolitan railway. Its construction originally commenced during former President Alan Garcia's (***President Alan Garcia***) first tenure in 1986. However, the project was abandoned when the country plunged into economic recession. On December 15, 2016, in his testimony before the Brazilian Federal Prosecutor's Office in Bahia, Brazil, Jorge Barata stated that:

> *The Lima Metro was an emblem of the inefficiency of the first government of Alan Garcia. The government of Alberto Fujimori did not resume the project to maintain the failure characterization on the previous government. The same thing happened with the government of Alejandro Toledo. No one gave priority to the project.*[185]

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[183] *See* Agencia EFE, *Constructora admite un soborno por 3,7 millones de dolares en el Gobierno de Humala*, 7 June 2019, https://www.efe.com/efe/america/politica/constructora-admite-un-soborno-por-3-7-millones-de-dolares-en-el-gobierno-humala/20000035-3995567 (last accessed 4 September 2020).

[184] *See* Gestion, *Caso Lava Jato: ¿Cómo se convirtieron José y Hernando Graña en colaboradores eficaces de la fiscalía?*, 25 August 2019, https://gestion.pe/peru/politica/caso-lava-jato-como-se-convirtieron-jose-y-hernando-grana-en-colaboradores-eficaces-de-la-fiscalia-noticia/ (last accessed 4 September 2020).

[185] *See* IDL-Reporteros, *Cómo Odebrecht pactó las coimas del Metro de Lima*, 21 September 2017, https://www.idl-reporteros.pe/como-odebrecht-pacto-las-coimas-del-metro-de-lima/ (last accessed 19 August 2020).

121. In 2006, when former President Alan Garcia won the presidency for a second term, the completion of this failed project became one of his number one priorities.[186] However, by 2008, President Alan Garcia had been unable to secure a company that could complete the project.[187]

i. *The Corruption Scheme in the Lima Metro Project*

122. On February 19, 2009, President Alan Garcia traveled to Cusco with Jorge Barata for the inauguration of a section of the Interoceanic Highway. During that trip, President Alan Garcia communicated to Jorge Barata his desire to inaugurate the Lima Metro before he left office, and asked Jorge Barata what needed to be done for Odebrecht to become involved.[188] Jorge Barata made clear that the Lima Metro Project should be reconfigured as a public bidding project to avoid the perception of corruption.[189] Shortly thereafter, President Alan Garcia signed Emergency Decree No. 032-2009, which redefined the Lima Metro Project as a public works project, transferred control of the project to the Ministry of Transportation and Communication (***MTC***), and directed the Ministry of Economy and Finance to assign a budget to the project.[190]

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[186] *Ibid*.

[187] *Ibid*.

[188] *Ibid*.

[189] *See* IDL-Reporteros, *Cómo Odebrecht pactó las coimas del Metro de Lima*, 21 September 2017, https://www.idl-reporteros.pe/como-odebrecht-pacto-las-coimas-del-metro-de-lima/ (last accessed 19 August 2020); *see also* IDL-Reporteros, *Así habló Barata: García y Barata hablan sobre el Metro de Lima en el avión presidencial*, 4 May 2019, https://youtu.be/3O8-BdhAxls (last accessed 19 August 2020).

[190] Decreto de Urgencia No. 032-2009, 27 February 2009 (**CLA-49**); *see also* RPP Noticias, *Corrupción en Perú | Las principales 14 investigaciones que implican a políticos, magistrados y empresarios*, 18 November 2018, https://rpp.pe/politica/judiciales/corrupcion-en-peru-14-investigaciones-que-siguen-

123. For this purpose, the MTC created a bidding and technical committee for the Lima Metro project.[191] The bidding committee created the technical specifications for the project, and opened the project to a bidding process.[192]

124. During the bidding process for the first phase of Line 1,[193] the then MTC's Vice-Minister Jorge Cuba (***Jorge Cuba***) approached Carlos Nostre (***Carlos Nostre***), the Graña y Montero-Odebrecht consortium's Director for the Lima Metro Project, and offered to support the Consortium in obtaining the contract.[194] In return, Jorge Cuba demanded a payment of US $1.4 Million for himself and additional payments for members of the bidding committee, who would ensure that the consortium between Graña y Montero and Odebrecht would get the appropriate score.[195] Jorge Cuba

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abiertas-en-la-fiscalia-y-que-implican-a-politicos-y-empresarios-noticia-1161668 (last accessed 19 August 2020).

[191] *See* IDL-Reporteros, *Cómo Odebrecht pactó las coimas del Metro de Lima*, 21 September 2017, https://www.idl-reporteros.pe/como-odebrecht-pacto-las-coimas-del-metro-de-lima/ (last accessed 19 August 2020).

[192] *Ibid*.

[193] The contract for the design and construction of Line 1 of the Lima Metro Project was awarded in two separate phases.

[194] *See* IDL-Reporteros, *Cómo Odebrecht pactó las coimas del Metro de Lima*, 21 September 2017, https://www.idl-reporteros.pe/como-odebrecht-pacto-las-coimas-del-metro-de-lima/ (last accessed 19 August 2020). Barata stated that "*Cuba made a proposal [to Nostre] that he could help us in exchange for a compensation of 1.4 million dollars so that we could be winners of that process. Carlos Nostre informed me and I authorized it.*"); *see also* IDL-Reporteros, *Barata narra cómo negoció y acordó las coimas por el Tramo 1 del Metro*, 15 October 2017, https://youtu.be/2Uy04AK0z4E (last accessed 19 August 2020).

[195] *See* CER – 1 [Durand] at ¶ 90; *see also* IDL-Reporteros, *Cómo Odebrecht pactó las coimas del Metro de Lima*, 21 September 2017, https://www.idl-reporteros.pe/como-odebrecht-pacto-las-coimas-del-metro-de-lima/ (last accessed 19 August 2020).

proposed the amendment of the technical specifications for the project so that the Graña y Montero-Odebrecht consortium would be the most suitable for the project.[196]

125. Indeed, according to Jorge Barata, *". . . the conversations with Jorge Cuba progressed in the sense that he said that he could create a series of technical conditions in the project and some subjective ones so that we could have a higher technical score and thus be benefited in the bidding process.*"[197]

126. Accordingly, Graña y Montero and Odebrecht formed the consortium, named the **Electric Train Consortium,** and submitted a proposal.[198] On June 22, 2011, the bidding committee awarded Graña y Montero and Odebrecht the contract for the construction of the first phase of Line 1 of the Lima Metro Project—in the process, three other companies were disqualified.[199]

127. The Electric Train Consortium also made illegal payments to win the concession for Line 1, Phase II, of the Lima Metro Project.[200] Jorge Barata testified that, "*Jorge Cuba said that they wanted to build the second phase and do it in the same manner,*

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[196] *See* IDL-Reporteros, *Cómo Odebrecht pactó las coimas del Metro de Lima*, 21 September 2017, https://www.idl-reporteros.pe/como-odebrecht-pacto-las-coimas-del-metro-de-lima/ (last accessed 19 August 2020).

[197] *See* IDL-Reporteros, *Cómo Odebrecht pactó las coimas del Metro de Lima*, 21 September 2017, https://www.idl-reporteros.pe/como-odebrecht-pacto-las-coimas-del-metro-de-lima/ (last accessed 19 August 2020); *see also* IDL-Reporteros, *Barata narra cómo negoció y acordó las coimas por el Tramo 1 del Metro*, 15 October 2017, https://youtu.be/2Uy04AK0z4E (last accessed 19 August 2020).

[198] *See* CER – 1 [Durand] at ¶ 88.

[199] *Ibid*.

[200] *See* IDL-Reporteros, *Cómo Odebrecht pactó las coimas del Metro de Lima*, 21 September 2017, https://www.idl-reporteros.pe/como-odebrecht-pacto-las-coimas-del-metro-de-lima/ (last accessed 19 August 2020).

*with the same procedures. Only that this time the payment would be of USD $6.7 Million American Dollars.*"[201]

ii. *Payment of US $9,000,000 in bribes*

128. As part of the Corruption Scheme, Graña y Montero was required to reimburse Odebrecht for its proportional share of the bribes. In this sense, Graña y Montero had to assign a percentage of its proceeds to Odebrecht as compensation for the "*additional risks*" Odebrecht incurred for the benefit of the consortium. All of these bribes are documented in the Consortium's Profit Distribution Agreements.[202] The stock ownership in this project was divided 67% to Odebrecht and 33% to Graña y Montero.[203]

129. In total, Graña y Montero's share of the bribes for the Lima Metro Project, was approximately US $9 Million.[204]

130. On July 2018, Graña y Montero was named as a civilly liable third party in the case of the Lima Metro Project.[205]

b) <u>The IIRSA South Project</u>

131. A consortium formed by Odebrecht, Graña y Montero, JJC Contratistas Generales, S.A. (***JJC***), and Ingenieros Civiles y Contratistas Generales, S.A.

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[201] IDL-Reporteros, *Barata relata cómo se pactaron las coimas por el Tramo 2 del Metro*, 15 October 2017, https://www.youtube.com/watch?v=lfUeG0QSuxU&list=PLZsvZXsro2QZ8XDe077-2j_DhR8Y_jGYN&_index=6&t=0s (last accessed 19 August 2020).

[202] *See* Profit Distribution Agreement of the Electric Train Consortium, 29 February 2012 (**C-44**); *see also* Liquidation Agreement of the Electric Train Consortium, 4 May 2015 (**C-45**).

[203] *See* Profit Distribution Agreement of the Electric Train Consortium, 29 February 2012 (**C-44**).

[204] *See* Profit Distribution Agreement of the Electric Train Consortium, 29 February 2012 (**C-44**); *see also* Liquidation Agreement of the Electric Train Consortium, 4 May 2015 (**C-45**).

[205] *See* Gestion, *Graña y Montero incluida como tercero civil responsable en caso Metro de Lima*, 17 July 2018, https://gestion.pe/economia/empresas/grana-montero-incluida-tercero-civil-responsable-caso-metro-lima-238666-noticia/ (last accessed 4 September 2020).

(***ICCGSA***) called **Concesionaria Interoceanica Sur Tramos 2 y 3, S.A.** (the ***Interoceanica Consortium***), presented a bid for the contract for the construction, operation, and maintenance of Sections 2 and 3 of the IIRSA South highway system (the ***IIRSA South Project***) was awarded in June 2005.[206] The Interoceanica Consortium was awarded the contract in June 2005.[207]

132. Graña y Montero and the other minority stakeholders jointly appointed Fernando Almenara, a Graña y Montero employee, to serve as the Administrator and Finance Manager of the IIRSA South Project.[208]

i. *The Corruption Scheme in the IIRSA South Project*

133. On August 26, 2004, Jorge Barata, Marcelo Odebrecht, and former President Alejandro Toledo (***President Alejandro Toledo***), met at Peru's Government Palace to discuss the IIRSA South Project.[209] While they were at the Palace, Avi Dan On — President Alejandro Toledo's head of security — approached Jorge Barata as an intermediary of President Alejandro Toledo and offered to support Odebrecht's bid for the IIRSA South Project in exchange for bribes.[210]

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[206] *See* J. Mendoza, *La inverosímil cronología de la Interoceánica*, 28 February 2017, https://gestion.pe/blog/economia-aplicada/2017/02/la-inverosimil-cronologia-de-la-interoceanica-por-juan-mendoza.html/ (last accessed 11 September 2020).

[207] *See* IDL-Reporteros, *Barata narra cómo negoció las coimas por IIRSA Sur*, 17 December 2017, https://www.youtube.com/watch?v=LIqd_E2lX0g (las accessed 20 August 2020).

[208] *See* J. Mendoza, *La inverosímil cronología de la Interoceánica*, 28 February 2017, https://gestion.pe/blog/economia-aplicada/2017/02/la-inverosimil-cronologia-de-la-interoceanica-por-juan-mendoza.html/ (last accessed 11 September 2020).

[209] *See* R. Mella et. al, *Cómo y cuándo se pagaron las coimas a Alejandro Toledo*, 17 December 2017, https://www.idl-reporteros.pe/barata-confiesa-alejandro-toledo/ (last accessed 4 September 2020).

[210] *See* IDL-Reporteros, *Jorge Barata confiesa que le solicitan US$35 millones por carretera Interoceánica*, 17 December 2017, https://www.youtube.com/watch?v=OeydgLDxBGY (last accessed 20 August 2020).

134. Thereafter, in a meeting held in November 2004 in the presidential suite of the Copa Cabana Marriot Hotel in Rio de Janeiro, between Jorge Barata, President Alejandro Toledo, Avi Dan On, Sabi Gideon, and Josef Maiman, Jorge Barata ultimately agreed to pay President Alejandro Toledo US $35 Million for the IIRSA South Project.[211] However, Odebrecht only paid US $20 Million due to President Alejandro Toledo's inability to influence Proinversion, Peru's agency in charge of awarding the contract and the agency engaged in the promotion of business opportunities.[212]

135. When President Alan Garcia took office in 2006, the IIRSA South Project was already underway, and, to facilitate the smooth completion of the project, Odebrecht agreed to pay US $1.3 Million to President Alan Garcia.[213] Odebrecht paid an additional amount of US $3 Million to Luis Nava, President Alan Garcia's secretary.[214]

ii. *Graña y Montero as Stakeholder in the IIRSA South Project*

136. Similar to the payment procedure for the Lima Metro Project, as a stakeholder in this project, Graña y Montero was required to reimburse Odebrecht for their

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[211] *See* IDL-Reporteros, *Barata narra cómo negoció las coimas por IIRSA Sur*, 17 December 2017, https://www.youtube.com/watch?v=LIqd_E2lX0g (last accessed 20 August 2020).

[212] *See* IDL-Reporteros, *Jorge Barata explica por qué pagó solo US$20 millones a Alejandro Toledo*, 17 December 2017, https://www.youtube.com/watch?v=qvjLZ8Y8e_0 (last accessed 20 August 2020).

[213] *See* Buenos Aires Times, *Odebrecht boss details alleged 'money routes' to Peru politicians*, 25 April 2019, https://www.batimes.com.ar/news/latin-america/odebrecht-boss-details-alleged-money-routes-to-peru-politicians.phtml (last accessed 4 September 2020).

[214] *See* Buenos Aires Times, *Odebrecht boss details alleged 'money routes' to Peru politicians*, 25 April 2019, https://www.batimes.com.ar/news/latin-america/odebrecht-boss-details-alleged-money-routes-to-peru-politicians.phtml (last accessed 20 August 2020).

proportional share of the bribes.[215] In March 2018, Graña y Montero was named as a civilly liable third party in the case of the IIRSA South Project.[216]

c) The Construction Club

137. The Construction Club (the ***Construction Club*** or the ***Construction Cartel***) was a cartel formed by Peruvian and foreign construction companies that, instead of competing with each other, colluded to share the public works contracts tendered by Provias Nacional, an agency of the MTC, involving the construction, improvement, rehabilitation and maintenance of Peru's National Road Network.[217]

138. Graña y Montero formed part of the Construction Cartel and indeed was its most prominent representative in Peru.[218]

i. *The Corruption Scheme in the Construction Cartel*

139. The Corruption Scheme implemented by the Construction Cartel follows the same plan as the other projects — and as we will see below, the project for Blocks III and IV of the Talara Basin. The Construction Cartel scheme confirms that a critical component of the plan was to intervene at the inception of the project and arrange

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[215] *See* IDL-Reporteros, *Marcelo Odebrecht: el audio completo*, 22 January 2018, https://www.idl-reporteros.pe/marcelo-odebrecht-el-audio-completo/ (last accessed 4 September 2020).

[216] *See* Gestion, *Incorporan a G&M, JJ Camet e ICCGSA como terceros civiles responsables en el caso IIRSA Sur*, 19 December 2018, https://gestion.pe/peru/politica/judicial-incorpora-grana-montero-jj-camet-e-iccgsa-terceros-civiles-responsables-caso-iirsa-sur-253321-noticia/ (last accessed 4 September 2020).

[217] *See* Compras Estatales, *¿Qué es el 'club de la construcción' y cómo operaba en el Ministerio de Transportes? (Video)*, 17 February 2020, https://comprasestatales.org/que-es-el-club-de-la-construccion-y-como-operaba-en-el-ministerio-de-transportes-video/ (last accessed 20 August 2020).

[218] *See* Gestion, *Caso Odebrecht: Revelan que el 'Club de la Construcción' existía, por lo menos, desde hace 23 años*, 23 February 2019, https://gestion.pe/peru/politica/odebrecht-exgerente-confirmo-existencia-club-construccion-peru-nndc-259535-noticia/ (last accessed 4 September 2020).

for a rigged public tender where the handpicked company would be benefitted with the *buena pro*.

140. The process, in a nutshell, is as follows: after the publication of public tenders on the Provias Nacional website, representatives of the Construction Cartel would hold a meeting with Rodolfo Priale de la Peña (***Rodolfo Priale***), a corrupt businessman, to determine which company would be selected by the Cartel.[219] Then, Rodolfo Priale would communicate to Carlos Eugenio Garcia Alcazar (***Carlos Garcia***), advisor to the Vice-minister of Transportation during the tenure of President Ollanta Humala, the identity of the selected company.[220] The selected company would then be declared the winner of the bid. As explained in Section III (C) below, an almost identical plan was put in place for the public bidding of Blocks III and IV.

d) The Southern Gas Pipeline Project

141. The Southern Gas Pipeline project or Gasoducto Sur Peruano (***GSP***) involved the construction and operation of a pipeline that would transport natural gas from central Peru to the Pacific coast.

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[219] *See* Ministerio Público, Fiscalía de la Nación, *Caso Club de la Construcción*, https://www.mpfn.gob.pe/equipo_especial/caso_uno/ (last accessed 20 August 2020); *see also* Peru21, *Detienen a ex funcionario del MTC vinculado al caso 'Club de la Construcción' [VIDEO]*, 12 January 2018, https://peru21.pe/lima/caso-club-construccion-detienen-ex-funcionario-mtc-391715-noticia/ (last accessed 20 August 2020); Compras Estatales, *¿Qué es el 'club de la construcción' y cómo operaba en el Ministerio de Transportes? (Video)*, 17 February 2020, https://comprasestatales.org/que-es-el-club-de-la-construccion-y-como-operaba-en-el-ministerio-de-transportes-video/ (last accessed 20 August 2020).

[220] *See* Ministerio Público, Fiscalía de la Nación, *Caso Club de la Construcción*, https://www.mpfn.gob.pe/equipo_especial/caso_uno/ (last accessed 20 August 2020); *see also* Diario Expreso (Peru), *Sobenes confirma que tuvo tratos con el "Club de la Construcción"*, 12 February 2019, https://www.pressreader.com/peru/diario-expreso-peru/20190212/281500752510187 (last accessed 20 August 2020).

142. The GSP contract was awarded in June 2014 to a consortium comprised of Odebrecht and Enagás Internacional, S.L.U. (***Enagás***).[221] In August and September 2015, Graña y Montero and Odebrecht entered into a memorandum of understanding and addendum, by which Graña y Montero joined GSP as a minority shareholder.[222]

143. However, by April 2016, Odebrecht became the subject of an investigation by Brazilian authorities in connection with corrupt activities in Brazil.[223] Consequently, the Peruvian banks decided to withhold financing for the GSP.[224]

144. According to the investigation files contained in the Public Ministry of Peru, in this case "*. . . it is pointed out that the Energy Safety Committee in charge of the process, in order to favor the Consortium . . . would have disqualified the competing consortium, using legal reports issued by law firms . . . linked to the 'winning' Consortium.*"[225] As it has been discussed, this is precisely the appearance of legality employed by governmental authorities in conjunction with Graña y Montero-Odebrecht to cloak the Corruption Scheme that ran extensively in contracts with the

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[221] *See* Andean Air Mail & Peruvian Times, *Odebrecht, Enagas Win Bid for Peru Gas Pipeline*, 1 July 2014, https://www.peruviantimes.com/01/odebrecht-enagas-win-bid-for-peru-gas-pipeline/22388/#:~:text=Peru's%20government%20awarded%20on%20Monday,country's%20south%20highlands%20and%20coast (last accessed 4 September 2020).

[222] Memorandum of Understanding Odebrecht - Graña y Montero (**BRG-32**), pp. 870-874.

[223] *See* D. Gallas, *Brazil's Odebrecht corruption scandal explained*, 17 April 2019, https://www.bbc.com/news/business-39194395 (last accessed 4 September 2020).

[224] *See* G. Parra-Bernal et. al, *Odebrecht Peru deal hits snag as banks fret over $4.1 billion loan: sources*, 21 July 2016, https://www.reuters.com/article/us-odebrecht-m-a-peru/odebrecht-peru-deal-hits-snag-as-banks-fret-over-4-1-billion-loan-sources-idUSKCN1012RC (last accessed 4 September 2020).

[225] Ministerio Público, Fiscalía de la Nación, https://www.mpfn.gob.pe/equipo_especial/caso_gaseoductosurperuano/ (last accessed 21 August 2020).

government, including the award of the license contract to operate Blocks III and IV.[226]

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[226] The Corruption Scheme Also Included Payments To Arbitrators. In addition, Odebrecht bribed arbitrators to obtain favorable awards and generate fraudulent cost overruns. According to Jorge Barata, Jorge Horacio Canepa Torre (***Arbitrator Canepa***) is the only arbitrator Odebrecht was authorized to pay to obtain decisions in favor of Odebrecht. On February 22, 2019, Luiz da Rocha Soares, Odebrecht's former international treasurer, testified before Peruvian prosecutors that Odebrecht paid US $3 Million in bribes to Arbitrator Canepa in exchange for the favorable arbitration awards. In September 2017, Peru's Prosecutor's Office found out that Arbitrator Canepa had paid government officials and other arbitrators to render arbitration awards in favor of Odebrecht. As a consequence, Arbitrator Canepa requested to be treated as a protected witness and identified other arbitrators who allegedly formed part of the bribery scheme to benefit the Corruption Scheme. This situation led the Peruvian Preparatory Investigation Court to order, on November 4, 2019, the detention of 14 arbitrators who sat as arbitrators in cases between Odebrecht and Peru. The imprisonment of these arbitrators sent shockwaves throughout the international arbitration community. Indeed, the President of the International Chambers of Commerce (***ICC***), ***Alexis Mourre***, sent at least two letters to the Peruvian Ministry of Justice attesting to the good character and morale of some of the detained arbitrators, and requesting their release. Other institutions like the International Bar Association (***IBA***) and the Spanish Club of Arbitration (***CEA***) also sent letters to the Peruvian Ministry of Justice expressing their concern about the detention of the arbitrators. *See* C. Ríos Pizzaro, *Mixing Righteous and Sinners: Summary of the Odebrecht Corruption Scandal and the Peruvian Jailed Arbitrators*, 10 December 2019, http://arbitrationblog.kluwerarbitration.com/2019/12/10/mixing-righteous-and-sinners-summary-of-the-odebrecht-corruption-scandal-and-the-peruvian-jailed-arbitrators/?doing_wp_cron=1598067836.0671849250793457031250 (last accessed 21 August 2020); *see also* La Ley, *Esta es la resolución que ordenó la prisión preventiva por 18 meses contra 14 árbitros*, 6 November 2018, https://laley.pe/art/8769/esta-es-la-resolucion-que-ordeno-la-prision-preventiva-por-18-meses-contra-14-arbitros (last accessed 21 August 2020); Letter from ICC to Peruvian Ministry of Justice, 7 November 2019 (**C-48**); *see also* Letter from ICC to Peruvian Ministry of Justice, 14 November 2019 (**C-49**); CIAR Global, *Cantuarias suma más apoyos: La IBA, el CEA y Catherine Rogers condenan el trato recibido por el árbitro peruano*, 15 November 2019 https://ciarglobal.com/cantuarias-suma-mas-apoyos-la-iba-el-cea-y-catherine-rogers-condenan-el-trato-recibido-por-el-arbitro-peruano/ (last accessed 22 August 2020).

## C. THE CORRUPTION SCHEME TO AWARD THE CONTRACTS TO OPERATE BLOCKS III & IV TO GRAÑA Y MONTERO

145. Peru cannot seriously dispute that corruption drove the decision to abort Amorrortu's Direct Negotiation Process for Blocks III and IV, in favor of the rigged International Public Bidding designed to favor Graña y Montero.

146. The corruption scheme set up by Graña y Montero and Peru does not consist of a single act by which a person or company bribes a civil servant in order to gain some unjustified advantage. During the administration of President Ollanta Humala and First Lady Nadine Heredia, the country was under the rule of a government which had basically established an endemic system of corruption and Graña y Montero was one of the most prominent participants in this conspiracy.[227]

147. The pending criminal investigation of the former presidential couple has generated a vast amount of material and has confirmed that Graña y Montero paid numerous bribes to the Humala administration in exchange for any government contract the company desired, including granting contracts to exploit the Blocks III and IV.[228] These Blocks were strategically important for Graña y Montero, as it became the main operator of the oil fields in Talara.[229]

148. The evidence of corruption discovered by this investigation continues to surface and to confirm that Amorrortu's Direct Negotiation Process was aborted by order of Nadine Heredia because Blocks III and IV had been requested by Graña y Montero. As explained by Dr. Durand, the agenda of Jose Graña confirms that on April 28, 2014, he met with Nadine Heredia to discuss "*business.*" This meeting takes

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[227] *See* CER-1 [Yaya] at ¶ 37.

[228] *See* CER – 1 [Durand] at ¶ 44.

[229] See CER – 1 [Durand] at ¶ 32.

place approximately a month before PeruPetro shelved Baspetrol's Direct Negotiation Proposal to conduct a rigged public bidding process. Further, there was another meeting on February 10, 2015 explicitly to discuss "Blocks III and IV" two months after Grana y Montero had purportedly won the bid for the Blocks as the only qualified company and two months before the execution of the contract to operate the Blocks, in which PeruPetro surprisingly, and acting against its own interest, ceded its 25% ownership in the operate to Grana y Montero.[230]

149. Why are the executives of Graña y Montero meeting with the First Lady, the person in charge of doling out the corrupt government contracts during the Humala administration, to talk "*business*" the month before the Baspetrol Proposal is shelved in favor of opening a public bidding in which Graña y Montero was the only qualified company? And why were they meeting to talk about Blocks III and IV? These are the questions that Peru will not be able to answer without admitting the inescapable truth in this case: Blocks III and IV were part of the package of government contracts that Graña y Montero received in exchange for its multimillion dollar bribes.

1) PERU ABRUPTLY AND ARBITRARILY DECIDED TO TERMINATE THE DIRECT NEGOTIATION PROCESS INITIATED BY AMORRORTU

150. As described above, the wholly rigged International Public Bidding Process that took place at the time, was undertaken to favor Graña y Montero. As such, given that Peru has provided no basis for abruptly and arbitrarily (without any notice or reason) abandoning the direct negotiation process with Amorrortu, Peru breached its obligations under the USPTPA.

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[230] *See* G. Castañeda Palomino, *Gasoducto del Sur case: the prosecutor's office has an agenda with the meetings of José Graña, Jorge Barata and Nadine Heredia*, 31 August 2020 **(C-34)**.

151. Indeed, when an interested party wants to initiate a direct negotiation with the government, the party must follow a series of specific steps once a direct negotiation begins.[231] If the proposal does not satisfy the requirements, the relevant government entity has a duty to communicate to the interested party the reasons for rejecting the proposal.[232] Certainly, as explained by Expert Yaya, all decisions taken by the state must be duly reasoned.[233]

152. Neither Ortigas nor Tafur attempted to justify (or explain) why Amorrortu's Proposal was supposedly rejected by PeruPetro's Administration,[234] or why the Board was never informed of the Baspetrol Proposal.[235] In other words, clearly, Peru had no intention to engage in the direct negotiation of Blocks III and IV, because it had already *promised* them to Graña y Montero — a company with an established and consistent corruption profile.

153. Amorrortu anticipates that Peru will in this arbitration seek to rely upon the supposed rejection of Amorrortu's Proposal by PeruPetro's Board, or that the decision to open the Blocks III and IV to an International Public Bidding was taken before Amorrortu submitted the Proposal on May 28, 2014, in an attempt to justify the fraudulent International Public Bidding of Blocks III and IV. This will be vehemently disputed by Amorrortu.

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[231] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**); *see also* CER – 1 [Quiroga] at ¶¶ 110-115.

[232] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**); *see also* CER – 1 [Quiroga] at ¶ 170.

[233] See CER – 1 [Yaya] at ¶¶ 33-34.

[234] *See* NOA at ¶ 27; *see also* CWS -1 [Amorrortu] at ¶ 87.

[235] *See* NOA at ¶ 28; *see also* CWS -1 [Amorrortu] at ¶ 90.

154. The pertinent question is, if it is true that the decision to open the Blocks to an international public bidding was taken before Amorrortu submitted the Baspetrol Proposal in May 2014, why did PeruPetro not notify Amorrortu of such decision? The answer is simple — all these purported decisions were part of a plan to benefit Graña Y Montero. In truth, Peru cannot deny that Ortigas expressly invited Amorrortu to submit a proposal for direct negotiation.[236] In fact, the Baspetrol Proposal was submitted twice to PeruPetro: First on May 28, 2014[237] and then a second time to Tafur.[238]

155. However, as Tafur informed Amorrortu, the Baspetrol Proposal never made it to PeruPetro's Administration.[239] Indeed, there is no evidence that Peru ever followed the strict guidelines of a direct negotiation.[240] And this is hardly surprising, as Dr. Durand states in his expert report, the *"[s]tudies and the opinions of specialists on institutionalized corruption in Peru . . . argue that the problem is not the law. The Peruvian legislative model is modern and advanced according to international standards.* ***The problem is [in the] execution, where 'operators' within the public sector ignore or distort them****.*"[241] He further states that, "*[c]ollusion and corruption hide behind the formal argument that 'all the requirements of the law have been met.' The state 'operators,' with the authorization of high-level decision makers*

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[236] *See* NOA at ¶ 23; *see also* CWS -1 [Amorrortu] at ¶¶ 79-85.

[237] *See* Email from Bacilio Amorrortu to Maria Angelica Cobena, May 28, 2014 (**C-9**).

[238] *See* CWS -1 [Amorrortu] at ¶ 90.

[239] *See* NOA at ¶ 28; *see also* CWS -1 [Amorrortu] at ¶ 90.

[240] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**).

[241] CER – 1 [Durand] at ¶ 78.

*[. . .] in collusion with the 'managers of business interests' or lobbyists managed by corrupt companies, decide the 'course of selection processes'.*"[242]

156. Clearly, Peru's officials did not simply fail to give reasons as to why the Baspetrol Proposal was not taken into consideration. Rather, the relevant Peruvian officials consciously took actions to deprive Amorrortu of his legitimate and reasonable expectation to obtain a contract to resume the oil drilling and extraction operations in Blocks III and IV. Indeed, Peru has seized Amorrortu's opportunity to negotiate in good faith and under the strict parameters of the Direct Negotiation Process a contract to operate these Blocks. This was organized corruption.

2) EVIDENCE OF CORRUPTION IN THE 2014 BLOCK III & IV TENDER

157. There is no question that the International Public Bidding Process for Blocks III and IV was staged and plagued with corruption to benefit Graña y Montero. What's more, to Amorrortu's surprise, and contrary to Ortigas' representations and the rights acquired by Amorrortu once he began the direct negotiation process with Peru; on July 14, 2014, PeruPetro opened the International Public Bidding Process for the operation of Blocks III and IV.[243] Certainly, there were evident irregularities with respect to (a) the Bidding Rules, (b) the modification of the Bidding Rules, and (c) the selection of Graña y Montero as a qualified company to participate in the International Bidding Process. This evidence of corruption has only begun to emerge in the recent months after Graña y Montero confessed its participation in the Corruption Scheme. Indeed, in 2017, Graña y Montero vehemently denied any wrongdoing. Critically, the evidence implicating Graña y Montero did not surface until

[242] CER – 1 [Durand] at ¶ 78.

[243] *See* Perupetro, S.A., Press Release, 14 July 2014 (**C-12**).

2018 when Odebrecht identified the company in its confession. In fact, Graña y Montero did not admit any wrongdoing until 2019.

a) The Bidding Rules

158. The bidding process was marred with irregularities. The ***Bidding Rules*** were ostensibly neutral, but were in fact meant to favor Graña y Montero. This is not difficult to identify seeing as Graña y Montero was a member of the Construction Cartel. As noted above, the Construction Cartel played a major role in working with the government to rig public tenders in order to benefit a handpicked company with the buena pro.

159. The Bidding Rules were not followed. For example, after an in-depth analysis of the file, Expert Yaya concluded that there was "*no evidence that the bidders received the Technical Indicators that would determine their qualification.*"[244] Simply, there is no evidence that the interested companies received any document stating the requirements they needed to comply with in order to qualify as bidders in the International Public Bidding Process.

b) The Bidding Rules Were Unlawfully Modified At Least Twice, While The Selection Process Was Ongoing

160. The first modification to the Bidding Rules contained the determination of a new value to be considered as a Minimum Indicator of Proved Reserves.[245] This change was requested by Graña y Montero on October 2, 2014,[246] and it obviously favored Graña y Montero, because it allowed it to qualify as a bidder in the International Public Bidding Process. Indeed, on December 12, 2014, Peru awarded

[244] CER – 1 [Yaya] at ¶¶ 22, 200, 241.

[245] *See* Memorandum No. CONT-0107-2014, 12 September 2014 (**C-50**).

[246] *See* CER – 1 [Yaya] at ¶¶ 187, 227.

Graña y Montero with the buena pro to operate both Blocks.[247] In this sense, Expert Yaya concludes that this situation reinforces her conclusion that "*the officials of the Peruvian government were in charge of preparing the Bidding Rules at the convenience of the Graña y Montero group.*"[248]

161. The second modification in the Bidding Rules of the International Public Bidding Process was the approval of new Bidding Rules (the ***New Bidding Rules***).[249] This modification approved a fundamental change in Format I that corresponded to the Letter of Interest to Participate in the International Public Bidding No. PERUPETRO-001-2014 (that is, the bid for Block III).[250] By virtue of this new Format I, the Annual Average Production for the 2012-2013 period could be accredited with field production at the wellhead.[251] This modification had no legal motivation.[252]

162. The modification of Format I is of significance because it reveals that Graña y Montero did not qualify as a bidder in the International Public Bidding Process. Indeed, the review of the entire communication process between Graña y Montero and Perupetro, demonstrates that in the first letter of interest to qualify for Block III, Graña y Montero exceeded the minimum required, while when the same Format is submitted with supporting information, the amount is reduced to values that do not reach the minimum required. This is visible from the snapshot below. Clearly the amount that enabled Graña y Montero to exceed the minimum required includes a production of LGN that does not correspond to Block III, but to the Cryogenic Plant

[247] *See* CER – 1 [Durand] at ¶¶ 161, 169.
[248] CER – 1 [Yaya] at ¶ 187.
[249] *Id*. at ¶¶ 182, 224.
[250] *See* PeruPetro Board Agreement No. 071-2014, 30 June 2014 (**C-36**).
[251] *See* CER – 1 [Yaya] at ¶ 182.
[252] *Id*. at ¶¶ 182-183.

that Graña y Montero has in the district of Parinas. Yet, the Perupetro Committee unlawfully declared it valid.

*Primera Carta de Interés.*
*21.08.14*
*Ubicación: Postores – Lote III / 1.GRAÑA Y MONTERO p. 14*

**Petróleo + GN + LGN de Planta Pariñas**

| INDICADOR TÉCNICO(*) | |
|---|---|
| Producción promedio anual de petróleo (1), BPD | 3,246 (**) |
| Pozos exploratorios perforados (2) | _ |
| Líneas Sísmicas 2D registradas (2) | _ |
| Líneas Sísmicas 3D registradas (2) (3) | _ |
| Pozos de desarrollo perforados (2) | 119 (***) |
| Reservas probadas de hidrocarburos ( en millones de barriles equivalentes , MMBOE (4) (5) | 22.6 |

(*) Se refiere únicamente a indicadores costa adentro

(**) Considera producción de petróleo, gas natural (boe) y líquidos de gas natural producidos por GMP S.A..

(***) Considera 59 Pozos perforados para GMP S.A. y 60 Pozos adicionales perforados en el Noroeste.

(1) Producción promedio de los últimos dos años (2013 y 2012)
(2) Información de la sumatoria de las actividades realizadas en los cinco (5) últimos años (2009 al 2013).
(3) Para efectos de la Licitación, un (1) kilómetro cuadrado de sísmica 3D equivale a tres (3) kilómetros de sísmica 2D.
(4) Para efectos de conversión, se utilizará un ratio de conversión de BOE de 6000 pies cúbicos de gas natural.
(5) Información de las reservas probadas al término del último año.

*Segunda Carta de Interés.*
*05.09.14*
*Ubicación: Postores – Lote III / 1.GRAÑA Y MONTERO p. 4*

**Petróleo**

| INDICADOR TÉCNICO(*) | |
|---|---|
| Producción promedio anual de petróleo (1), BPD | 1,497 (**) |
| Pozos exploratorios perforados (2) | _ |
| Líneas Sísmicas 2D registradas (2) | _ |
| Líneas Sísmicas 3D registradas (2) (3) | _ |
| Pozos de desarrollo perforados (2) | 119 (**) |
| Reservas probadas de hidrocarburos ( en millones de barriles equivalentes , MMBOE (4) (5) | 22.6 (**) |

(*) Se refiere únicamente a indicadores costa adentro
(**) Antigüedad en Actividades de Explotación de Hidrocarburos e Indicadores Técnicos corresponden a la subsidiaria Graña y Montero Petrolera S.A. (GMP S.A.), constituida el 05 de Noviembre de 1984.

(1) Producción promedio de los últimos dos años (2013 y 2012)
(2) Información de la sumatoria de las actividades realizadas en los cinco (5) últimos años (2009 al 2013).
(3) Para efectos de la Licitación, un (1) kilómetro cuadrado de sísmica 3D equivale a tres (3) kilómetros de sísmica 2D.
(4) Para efectos de conversión, se utilizará un ratio de conversión de BOE de 6000 pies cúbicos de gas natural.

GMP presentó 2 cartas de interés con diferentes valores de producción. En la primera incluyó petróleo, GN y LGN de Planta Pariñas. En la segunda, solo petróleo.

GMP filed two Letters of Interest with different production values. In the first one GMP included petroleum, natural gas, and liquid natural gas. In the second one GMP only included petroleum.

163. Additionally, the New Bidding Rules resulted from the suggestions submitted by Oscar Miro-Quesada Rivera (***Oscar Miro-Quesada***), Manager of Promotion and Communications of PeruPetro. However, he was not authorized to submit these changes because PeruPetro had a Committee for these purposes. In other words, Oscar Miro-Quesada was not authorized to modify the most fundamental rules in a public tender: the bidding rules.[253]

164. The Bidding Rules specified that the oil company or the consortium had to comply with certain technical indicators, according to which bidders had to have proven reserves of 18.27 thousand barrels (***MB***) as of December 31, 2013, a

[253] *See* CER – 1 [Yaya] at ¶ 186.

production of 2.89 MB per day as an average in the years 2012 and 2013 and, 90 development wells drilled in the last five (5) years (2009 - 2013). According to official information from the MEM and PeruPetro, Graña y Montero Petrolera, S.A. (***GMP***) did not satisfy these requirements. Specifically, GMP relied on its production in Block I (oil and gas) and Block V (oil), which was below the required minimum — producing only 2,200 barrels per day in 2012 and 2519 in 2013. GMP did not reach the minimum number of developed wells in its blocks either. And GMP used its equipment service contracts to fulfill the drilling requirements. Yet, these failures were simply ignored by PeruPetro, and GMP was selected as the sole qualified bidder.[254]

c) Graña y Montero was illegally favored by being allowed to support its economic indicators with another Peruvian company

165. With respect to the Economic Indicators of the International Public Bidding Process, Article 3 of Supreme Decree No. 030-2004-EM authorized interested foreign companies to submit supporting financial information from their parent company.[255] In this regard, Expert Yaya observes that GMP was illegally favored by the loose interpretation of Article 3 of Supreme Decree No. 030-2004-EM because PeruPetro's Committee authorized GMP to qualify by using the financial information from its Peruvian parent company: Graña y Montero S.A.A.[256] In this sense, Expert Yaya concludes that "*because Graña y Montero and GMP are separate legal entities, the group mixed the data of both companies to comply with the Technical Indicators, an act approved by . . . [PeruPetro] defrauding the interest of Peru to choose the best*

[254] *See* CER – 1 [Quiroga] at ¶ 66.

[255] *See* Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, 18 August 2004 (**CLA-3**).

[256] *See* CER – 1 [Yaya] at ¶¶ 24, 193, 203, 234, 244.

*bidder*."[257] Expert Yaya further qualifies the International Public Bidding Process as a "*sham constructed to [benefit] GMP.*"[258]

166. Notably, despite the fact that Graña y Montero was the company that participated as a bidder in the International Public Bidding of Blocks III and IV, Peru granted the buena pro to GMP, a completely different and separate entity. Again, PeruPetro somehow justified this irregularity, which should have disqualified the corrupt company.

d) Grana y Montero sought and obtained the removal of PetroPeru from the operation of Blocks III and IV

167. Pursuant to guidelines elaborated by PeruPetro, PetroPeru had the right to participate up to 25% in the license contracts of Blocks III and IV.[259] Indeed, as of February 2015, PetroPeru had the intention to exercise this right.[260] However, on March 20, 2015, Peru abruptly changed PetroPeru's Board of Directors.[261] Ultimately, the new Board decided not to approve PetroPeru's participation in the license contracts to exploit Blocks III and IV as Graña y Montero's partner.[262] With this,

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[257] *Id*. at ¶¶ 196, 237.

[258] *Id*. at ¶ 26.

[259] *See* Gestion, *Petroperú podrá participar hasta con 25% en cinco lotes petroleros*, 17 October 2013, https://gestion.pe/impresa/petroperu-podra-participar-25-cinco-lotes-petroleros-50606-noticia/ (last accessed 4 September 2020).

[260] *See* CER – 1 [Durand] at ¶ 174; *see also* Letter from PetroPeru to the Peruvian Securities Superintendence, 4 February 2005 (**C-52**).

[261] *See* Gestion, *Petroperú cambia de presidente: sale Pedro Touzzet y entra Germán Velásquez*, 20 March 2015, https://gestion.pe/economia/petroperu-cambia-presidente-sale-pedro-touzzet-entra-german-velasquez-82038-noticia/ (last accessed 4 September 2015).

[262] *See* CER – 1 [Durand] at ¶¶ 16, 187.

Graña y Montero achieved 100% participation in the exploitation of Blocks III and IV.[263]

168. Accordingly, Dr. Durand confirms that "*the presidential couple, the responsible members and the officials . . . of Perupetro and Petroperu directed the process. They were tolerant with Graña y Montero and demanding with its competition in a bid where Petroperu was finally removed. Once [Graña y Montero was] declared as sole bidder, the authorities completed the process in* ***record time****.*"[264]

169. In sum, Peru cannot deny that there was corruption when it arbitrarily decided to abort the Direct Negotiation Process initiated by Amorrortu for the operation of Blocks III and IV, and opened a rigged International Public Bidding Process with the sole purpose of benefitting one company, Graña y Montero.

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[263] *Id*. at ¶ 16.

[264] *Id*. at ¶ 156 (emphasis added).

## IV. THE TRIBUNAL HAS JURISDICTION TO DECIDE THIS DISPUTE

170. This Tribunal has jurisdiction over the present dispute as the requirements of the USPTPA are satisfied.

171. Article 10 of the USPTPA delineates the terms and conditions under which Peru provides its general consent for the submission of a claim by an investor of the United States to arbitration. All these terms and conditions have been satisfied here. Amorrortu is a protected investor (Section IV A) with a protected investment (Section IV B) who has suffered damages caused by Peru's flagrant breach of the Treaty. Further, Amorrortu provided more than the required six months of notice prior to commencing this arbitration and commenced this action within three years of the discovery of the corruption that breached Peru's obligations under the USPTPA (Section IV C).[265]

### A. AMORRORTU IS AN INVESTOR OF THE UNITED STATES OF AMERICA

172. Amorrortu has commenced this arbitration against Peru as an investor of the United States of America. Amorrortu is a national of the United States that made and "*attempted through concrete action to make*" an investment in the territory of Peru.[266] Amorrortu accepted Peru's offer to arbitrate in writing in his notice of arbitration (***Notice of Arbitration*** or ***NOA***) and provided a written waiver of any right to initiate or continue before any administrative tribunal or court under the law of any Party, any proceeding with respect to the measures alleged in this action to

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[265] *See* USPTPA Investment Chapter (**CLA-1**), Arts. 10.16, 10.18.

[266] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

constitute a breach of the USPTPA. Amorrortu is therefore a protected "*investor of a Party*" as defined in Article 10.28 of the USPTPA.[267]

173. Article 10.28 of the USPTPA defines "*investor of a Party*" as follows:

> *[A] Party or state Enterprise thereof, or a national or an Enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.*[268]

174. The USPTPA further defines a "*national*" as a "*natural person who has the nationality of a Party according to Annex 1.3 or a permanent resident of a Party*."[269] Under the laws of the United States, a natural person has the nationality of the United States of America if he has obtained the citizenship of the United States either by birth or by naturalization.[270]

175. Amorrortu is a citizen of the United States. As explained by Amorrortu in his Witness Statement, Amorrortu was born in Peru in the area of Talara and became a prominent engineer and executive in the oil industry of the region.[271] However, the repressive regime of President Alberto Fujimori[272] forced Amorrortu to flee Peru and obtain political asylum in the United States on April 26, 2000.[273] In 2010, Amorrortu became a naturalized citizen of the United States, and has held this nationality,

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[267] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

[268] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

[269] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

[270] *See* United States Immigration and Nationality Act, 8 U.S.C. § 1101, 27 June 1952 (**CLA-13**), Section 22 (A).

[271] *See* CWS – 1 [Amorrortu] at ¶¶ 5-11.

[272] Fujimori was later accused and convicted for crimes against humanity.

[273] *See* NOA at ¶ 62; *see also See* CWS – 1 [Amorrortu] at ¶ 27; Letter from the U.S. Department of Justice, Immigration and Naturalization Service, 29 January 2001 (**C-1**).

without interruption, since then.[274] As such, Amorrortu was a citizen of the United States when he made the investment at issue in this arbitration in 2012. He was a citizen of the United States at the time of the underlying breach of the USPTPA by Peru. And he was a citizen of the United States when he commenced these proceedings by filing the NOA.

176. Amorrortu ***is not*** a dual citizen. As allowed by the Peruvian constitution,[275] Amorrortu ***expressly*** renounced his Peruvian nationality prior to the commencement of these proceedings.[276] Therefore, this is not a case of a dual national where the Tribunal needs to determine as a threshold question the dominant nationality of the investor.[277] In any event, from the moment he had to seek asylum in the United States, Amorrortu no longer held any strong connections with Peru or his Peruvian nationality.[278] On the other hand, he has a long-standing and close connection to the United States, and has strong personal, economic, tax, commercial, and political ties to the country.[279]

177. In sum, Amorrortu is not only a citizen of the United States, but the United States is his dominant and indeed exclusive nationality.

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[274] *See* CWS – 1 [Amorrortu] at ¶ 33. *See, e.g.*, U.S. passport issued to Amorrortu on March 1, 2010 (**C-25**); U.S. passport issued to Amorrortu on March 21, 2016 (**C-26**).

[275] *See* Peru's Political Constitution, December 1993 (**CLA-14**), Art. 53.

[276] *See* NOA at ¶ 62.

[277] *See* USPTPA Investment Chapter (**CLA-1**), Art. 10.28 (requiring a dominant jurisdiction analysis for dual citizens).

[278] *See* CWS – 1 [Amorrortu] at ¶ 5.

[279] *See* CWS – 1 [Amorrortu] at ¶¶ 27-33.

## B. AMORRORTU HAS A PROTECTED INVESTMENT UNDER THE USPTPA

178. Amorrortu's investment in Peru is comprised of a bundle of rights that arise out of his investment in the Baspetrol enterprise and the rights that under Peruvian law this enterprise acquired almost two years after its incorporation to recover, through direct negotiation, the right to operate Block III (and IV). Amorrortu's rights in the Direct Negotiation Process are a covered investment under the USPTPA.[280]

### 1) "COVERED INVESTMENT" IS BROADLY DEFINED IN THE USPTPA

179. Article 1.3 of the USPTPA defines the term "*covered investment*" to mean, "*with respect to a Party, an investment, [. . .], in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.*"[281] "*Investment*" is defined as "*every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.*"[282]

180. The definition of "*investment*" includes an illustrative list of the "*[f]orms that an investment may take.*" Of relevance in this case, this list includes: "*(a) an enterprise; (b) shares, stocks, and other forms of equity participation in an enterprise; [. . .] and (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law.*"[283]

181. As the text of the USPTPA makes clear, the term "*investment*" is broadly defined. This broad definition was not accidental. On the contrary, this broad

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[280] *See*, *e.g*, USPTPA Chapter One (**CLA-6**), Art. 1.3.

[281] USPTPA Chapter One (**CLA-6**), Art. 1.3.

[282] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

[283] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

definition reflects the intent of the United States and Peru to expand the reach of the definition of "*investment*" in their Treaty and, as a fundamental corollary, to expand the protections afforded to their nationals.

182. The legislative history of the USPTPA confirms that the United States was fully aware of the broad definition of "*investment*" in the USPTPA. In fact, several of the advisory committees that are required to advise the President of the United States, the Trade Representative, and Congress after the intent to enter into a trade agreement is announced,[284] highlighted that the definition of investment in the USPTPA was "*far more expansive than NAFTA*" and objected to this wide definition of "*investment.*"[285] However, the United States ultimately rejected these objections and agreed with the view that the broad definition of investment afforded more protections to the U.S. investors. As explained by the Report of the U.S. Congress' Advisory Committee for Trade Policy and Negotiations, the comprehensive nature of the definition of investment was one of the accomplishments of the treaty:

> *Investment - The committee believes the agreement fully meets the investment requirement laid out in the Trade Act of 2002, and applauds the comprehensive nature of the investment provisions. The committee notes that there have been investment disputes with Peru in the past, and believes that the strong investment protections in the bilateral agreement are very important. These provisions should ensure that U.S. investors have the right to establish investments in Peru, and provide U.S. investors with the protections that Peruvian investors currently enjoy in the U.S. legal system.*[286]

[284] *See* H.R. 3009, 107th Cong., Div. B, Title XXI, § 2104(e) (2002) (**CLA-52**).

[285] *See e.g.*, Report of Intergovernmental Policy Advisory Committee, 1 February 2006 (**CLA-53**), p. 3.

[286] The Report of Advisory Committee for Trade Policy and Negotiations, February 1, 2006 (**CLA-54**), p. 5.

183. Similarly, the Energy Committee reported that "*against a background of serious concern by the [Industry Trade Advisory Committee on Energy and Energy Services (ITAC 6)] regarding erosion of investor protections in other free trade agreements, the US-Peru FTA and overall investment agreement approach appear to be a significant improvement.*"[287]

184. The legislative history of the enactment of the USPTPA in Peru similarly reflects that Peru was primarily concerned with protecting its investors and, more relevant to this dispute, ensuring U.S. investors that their investment, in the broadest sense possible, were protected by the Treaty. This broad protection was fundamental to Peru's efforts to attract more U.S. investment.[288]

185. The broad definition of investment is intended to broadly protect investors from the United States that invest in an enterprise in Peru and that through that investment obtained economic rights under Peruvian law. That is precisely what Amorrortu did when he invested in Baspetrol and successfully obtained the rights to directly negotiate the contracts for Blocks III and IV.

2) AMORRORTU INVESTED IN AN "*ENTERPRISE*" THAT TWO YEARS LATER ACQUIRED THE RIGHTS TO DIRECTLY NEGOTIATE A CONTRACT TO OPERATE BLOCKS III & IV

186. Amorrortu's investment in Peru consists of his initial investment to form the Baspetrol enterprise, which commenced a process of direct negotiation for the contract to operate Blocks III and IV and the rights arising out of this process. In other words, Amorrortu's investment begins with the Baspetrol enterprise and

[287] Report of the Industry Trade Advisory Committee on Energy and Energy Services (ITAC 6) on the US-Peru Free Trade Agreement dated January, 2006 (**CLA-56**) at Section V.

[288] *See* Comisión de Comercio Exterior y Turismo, Período Anual de Sesiones 2005-2006, Dictamen sobre el Proyecto de Resolución Legislativa Nº14751/2005-PE, propone aprobar el "Acuerdo de Promoción Comercial Perú-Estados Unidos", 21 June 2006, (**CLA-57**).

extends to the bundle of rights and interest derived from the successful performance of this enterprise. This investment falls squarely within the non-exclusive list of categories of covered investments and bears the three fundamental characteristics of an investment.[289]

a) Amorrortu's Investment: Baspetrol

187. Amorrortu's investment in Baspetrol constitutes an "*investment*". He committed "*capital and other resources to this enterprise with the expectation of profits and the assumption of risk.*"

188. After more than 12 years of exile, Amorrortu had become a U.S. citizen and created Baspetrol with the expectation to operate oil fields in Peru and with the main objective of recovering the right to operate Block III. Amorrortu was aware that his initial contract to operate Block III, which his company was forced to assign as part of the political persecution of the Fujimori regime, was to expire on April 4, 2013.[290] Amorrortu was also aware that Peru had signed the USPTPA and had committed to fighting corruption and protecting U.S. nationals. Therefore, he decided to form Baspetrol in Talara and to assemble a team of experts with unmatched expertise in the operation and optimization of oil wells in the Talara Basin.

189. Amorrortu initially invested approximately US $500,000 in hard costs in rent, studies, personnel, and travel.[291]

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[289] USPTPA Investment Chapter (CLA-1), Art. 10.28. "*[I]nvestment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the* ***commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk****.*" (emphasis added).

[290] *See* Hydrocarbons Exploitation Services Contract signed between PetroPeru and PROVISA, 4 March 1993 (**C-4**), p. 21.

[291] *See* CWS – 1 [Amorrortu] at ¶¶ 61-74.

190. He also contributed to Baspetrol his monetary claim against Peru for violations of his human rights, including the persecution, assaults, ambushes, and kidnap attempts to which Amorrortu and his family were subjected. Further, since 1992, Peru had recognized a debt in favor of Amorrortu's previous company.[292] Amorrortu is a creditor of Peru. This credit against the government stemmed from services rendered by Amorrortu to PetroPeru from 1988 to 1989, and PetroPeru's failure to pay Amorrortu for the currency exchange deficiencies as agreed by the parties.

191. Amorrortu also contributed his experience and unique know-how. Amorrortu has extensive knowledge and experience in the oil and gas industry, not just as a petroleum engineer native from the Talara region, but specifically as somebody who had been optimizing the marginal wells in the Basin for more than twenty years. Amorrortu contributed this know-how and experience to Baspetrol. He became a key developer of Block III since this Block's operation was first awarded to a private company, following the 1991 Peruvian oil sector reorganization.[293]

b) Amorrortu's Investment Right: Acquired Substantive Rights In Direct Negotiation

192. As part of his business plan, on May 28, 2014, Amorrortu was able to commence an exclusive direct negotiation process with PeruPetro to operate Blocks III and IV and acquired the appurtenant rights under Peruvian law.

193. PeruPetro is the government entity responsible for the negotiation and execution of the contracts to operate and maintain the oil fields and their subdivisions

[292] *See* Special Examination on PetroPeru's debt in Propetsa's favor, 18 June 1992 (**C-2**).

[293] *See* CWS – 1 [Amorrortu] at ¶¶ 20-21.

in Peru. Under Article 11 of the Laws of Hydrocarbons of Peru, PeruPetro has the authority to negotiate such contracts through direct negotiation or public bidding.[294]

194. PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (***PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts***) establish a predictable legal framework that guarantees oil companies that commence a direct negotiation process the exclusive technical evaluation and the community analysis of their proposals before any competing company is invited to participate in the process. This substantive right is not insignificant. The Direct Negotiation Process gives oil companies that are duly qualified a competitive advantage that is practically insurmountable and that, in practically all cases, concludes with the execution of the contract, particularly in the case of a company that has the experience and success of Amorrortu in the Talara Basin. Indeed, PeruPetro's public records do not reveal any direct negotiation process that has not culminated in the execution of a contract. A company that commences a direct negotiation process is entitled to a process in compliance with the principles of good faith, equal treatment, impartiality, due process, procedural conduct, and predictability under Peruvian law.[295] This is the bundle of rights that Amorrortu had acquired before PeruPetro kowtowed to the corrupt demands of Graña y Montero and opened an arbitrary and illegal bidding process.

195. The PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts that were in place in 2014 establish three distinct decisional phases in the Direct Negotiation Process: (i) an initial phase in which the commission appointed by

[294] *See* CER – 1 [Quiroga] at ¶ 89.

[295] *Id*. at ¶¶ 116-192.

PeruPetro to negotiate direct contracts with oil companies (the ***Direct Negotiation Commission***) determines the availability of the subject project; (ii) a second phase in which the oil company is qualified, its proposal is evaluated, and the community reach process is commenced; and (iii) a third phase in which PeruPetro gives notice of the Direct Negotiation Process to the public at large and invites the submission of competing proposals from any oil company interested in the project. Once these three phases are satisfied, then the PeruPetro team proceeds to draft the concession contract with the oil company.

196. Critically, PeruPetro has 10 days to complete the first phase and determine whether the company is qualified. Under Peruvian law, PeruPetro's silence constitutes an implicit determination that the underlying project is available and that the company is qualified, giving the oil company further rights to continue with the direct negotiation process.[296]

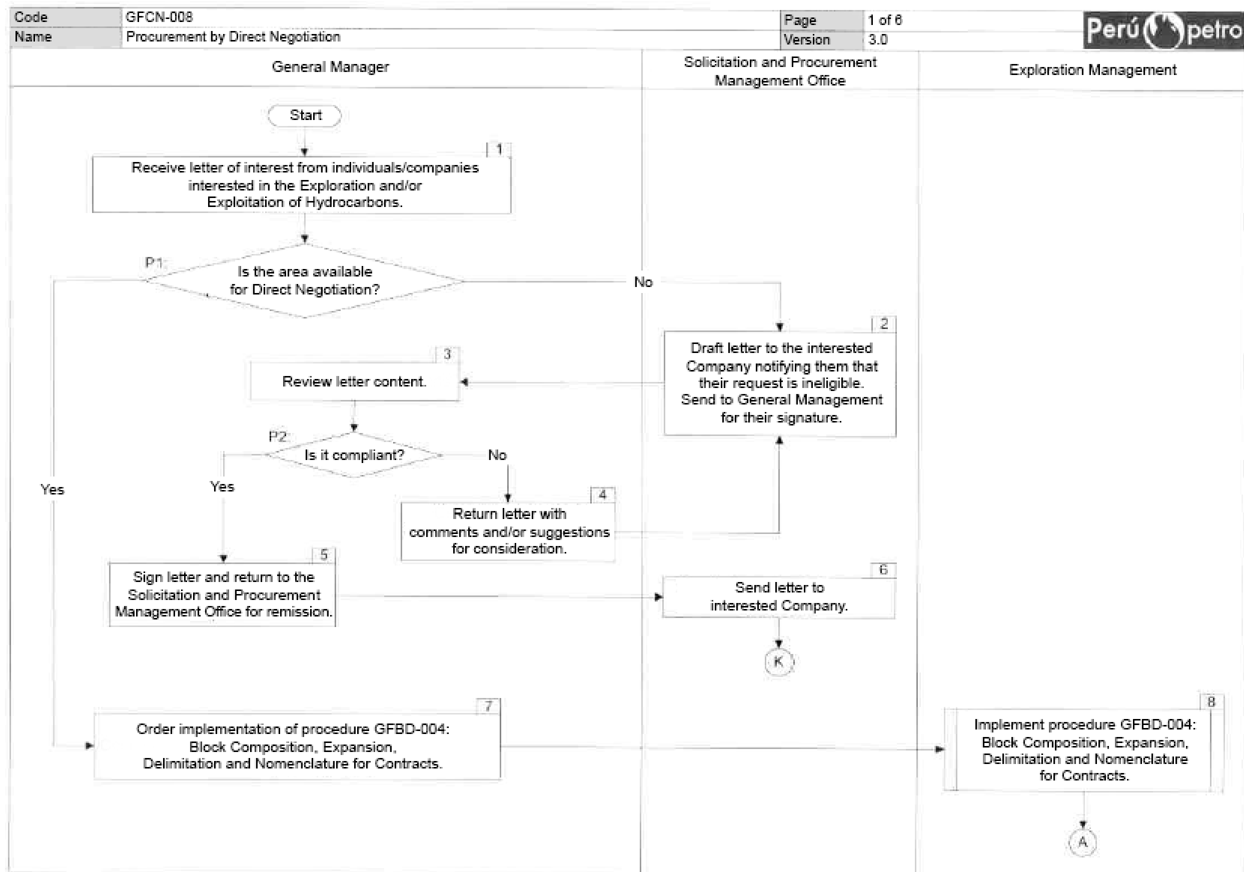
i. ***The First Phase****: Determination Of Availability Of Subject Block For Direct Negotiation*

197. The Direct Negotiation Process is commenced with the submission of a proposal for direct negotiation by an interested oil company. The first phase in the process is the determination of whether the oil block is available for direct negotiation and the completion of the survey or identification of the block to be negotiated. A block is available for direct negotiation when the block is not under contract and is not the subject of a public bidding process that has been open to the public. Upon confirmation that the block is available, the Division of Exploration of PeruPetro must

[296] *Id*. at ¶ 108.

comply with the procedures established for the identification and survey of the subject blocks.

198. The PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts not only lay out the procedures of this phase, but includes the following flow decision chart that illustrates this process:




199. At the end of this phase, the deliverables are clear: if the block is available for direct negotiation, PeruPetro continues the process internally and defines the boundaries of the blocks. If the property is not available for direct negotiation, PeruPetro must send a letter to the oil company which has to be pre-approved by the general management and the contract division. Indeed, the format of the communication denying the request for direct negotiation at this stage is attached as

**Annex 01** to the PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts.[297]

ii. ***Second Phase**: Qualification Of Oil Company, Evaluation Of Proposal, And Commencement Of Community Participation Process*

200. As soon as the proposal for direct negotiation is received, a working commission is supposed to be formed to evaluate the company pursuant to the certification of qualification law. This commission has 10 days from the date in which the proposal is received to either identify any deficiency that needs to be cured by the oil company or declare the company as qualified.

201. By law, PeruPetro is only authorized to commence a Direct Negotiation Process with oil companies that have complied with the procedure for certification of qualification established in Article 11 of the Law of Hydrocarbons.[298] As explained in the Report of Expert Anibal Quiroga (***Expert Quiroga***), this certification process is deemed to be satisfied when a proposal for direct negotiation is submitted to PeruPetro, and PeruPetro does not issue any response identifying any of the limited statutory basis for denial of certification.[299] Article 2 of the Rules of Qualification for Oil Companies establishes that "*every oil company shall be duly qualified by PeruPetro, S.A., to commence the negotiation of a contract.*"[300] Article 2 further states that a certification of qualification "*does not create any right over the area of the Contract.*"[301] In other words, a certification of qualification does not give the

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[297] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**), Annex 01.

[298] *See* CER – 1 [Quiroga] at ¶ 134.

[299] *Id*. at ¶ 99.

[300] *Id*. at ¶ 91.

[301] *Ibid*.

qualified company the right to establish a contract with PeruPetro, which has to be negotiated by the parties. But the certification of qualification gives the certified oil company the right to proceed to the contract negotiation phase of the Direct Negotiation Process with PeruPetro.[302]

202. The qualification process is very well defined in the Rules of Qualification. The process begins with the submission by the oil company expressing its interest in negotiating a contract for the operation or exploitation of oil fields in Peru. A recently incorporated company like Baspetrol is required to include in its presentation: (i) documents establishing that the company has the financial capacity to complete the underlying project; (ii) the commitment of an operator with the technical capacity to conduct the oil operations or a contract with an experienced oil services company; and (iii) a sworn declaration confirming that the company has a team with the experience and expertise necessary to complete the project.[303] These requirements were easily satisfied by Baspetrol, which through various presentations and written proposals had established that Amorrortu had successfully operated and/or serviced Block III and work in the Talara Basin for more than twenty years. Amorrortu had also put together a team of unquestionable technical capacity and had a business plan to fund the operations of Baspetrol.

203. Within 10 days from receiving the request from the oil company, PeruPetro has to give notice to the oil company of any missing document, which must be presented in 30 days after receipt of the notice.[304] If PeruPetro does not make any

[302] *Id*. at ¶¶ 99, 107.

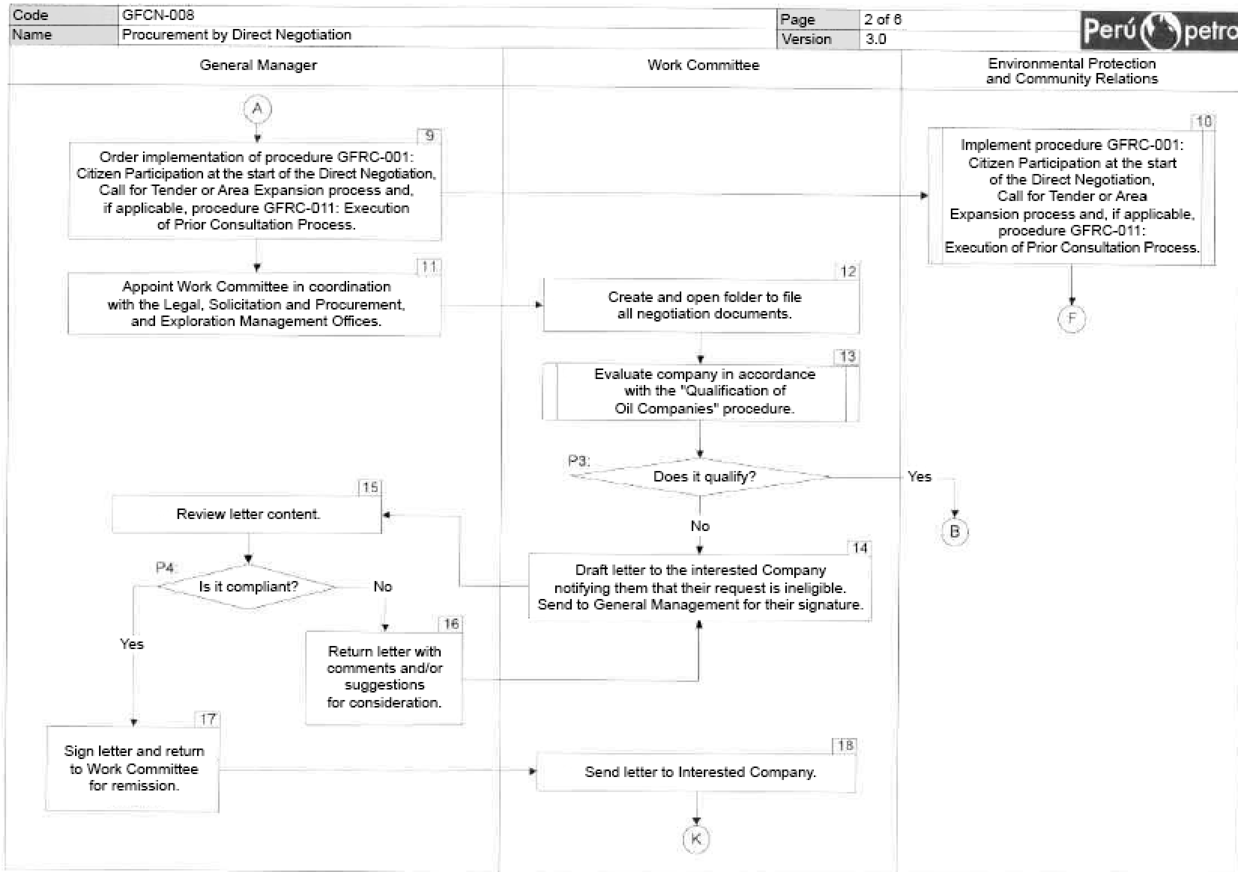
[303] *Id*. at ¶ 95.

[304] *Id*. at ¶¶ 96, 97.

observation to the request within the 10-day period, PeruPetro is obligated to issue the certification of qualification and the oil company is deemed to have satisfied the qualification requirements for all legal purposes. Specifically, Article 14 of the Rules of Qualification states that "*PeruPetro is obligated to grant the certification of qualification of the oil company, within the ten days from receipt of the request*" provided that the oil company presents the required documents and if no additional document is requested to cure any deficiency in the request after the completion of the evaluation process.[305]

204. At the same time, a separate commission is responsible for evaluating the proposal and communicating with the oil company with respect to any issue in the proposal. And a third commission commences the community participation process if applicable. The following flow chart illustrates the various steps of this second phase.

[305] *Id*. at ¶ 105.




205. At the end of this phase, the expected deliverables are: (i) the qualification or rejection of the oil company within 10 days of receipt of the direct negotiation proposal; (ii) the evaluation of the proposal; and (iii) the commencement of the community participation process.[306]

iii. ***Third Phase**: Invitation To Interested Companies*

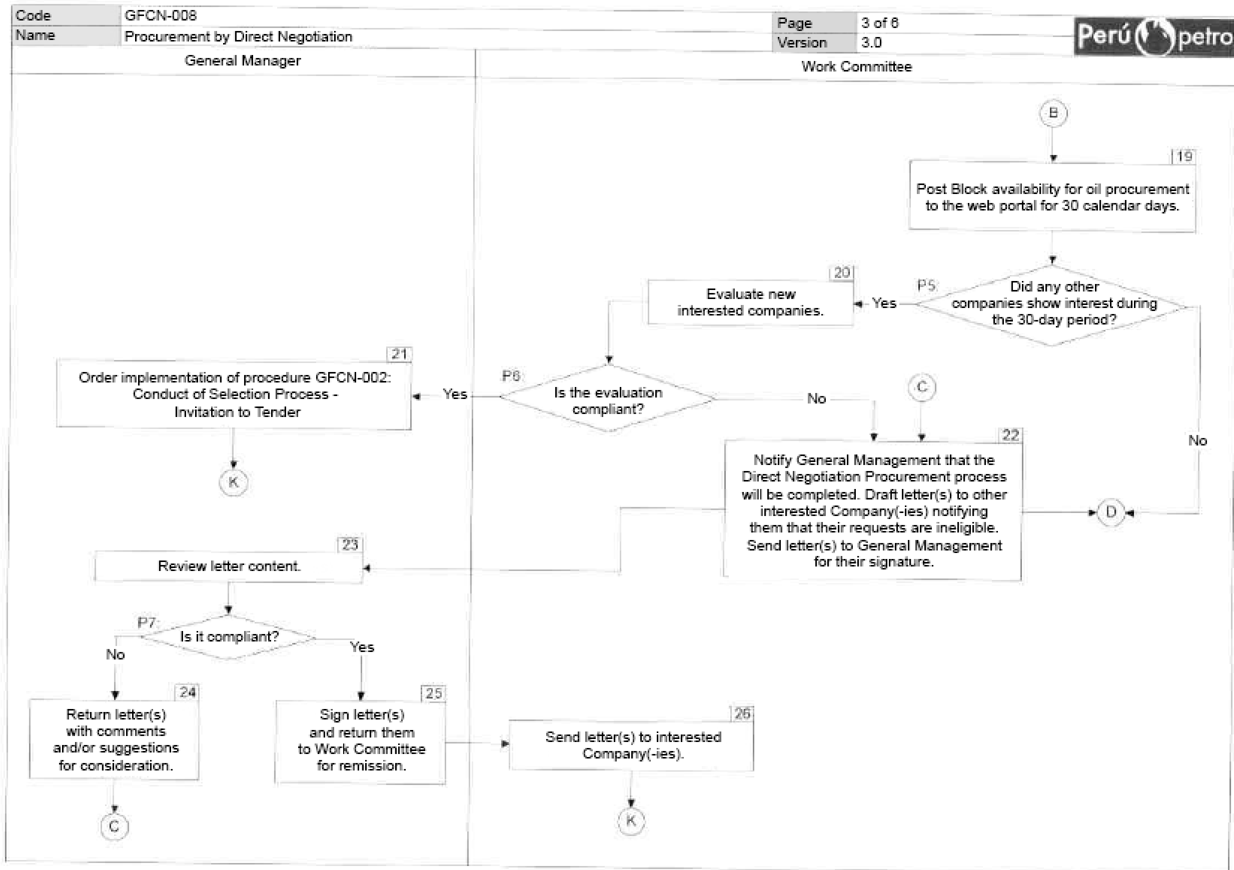
206. After PeruPetro has confirmed and surveyed the subject oil blocks, the oil company has satisfied the qualification process, the proposal has been evaluated, and the community participation process has commenced, if applicable, PeruPetro must give public notice of the Direct Negotiation Process and invite any interested oil company to submit their proposal.

[306] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**).

207. The invitation that PeruPetro publishes must comply with the form communication attached as **Annex 04** to the PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts.[307]

208. If no competing proposal is submitted, then PeruPetro must proceed to work with the direct negotiation oil company and prepare the contract. In the case that competing proposals are submitted, PeruPetro must complete the qualification process for any interested entity, and then evaluate these alternative proposals. If the competing company is not qualified or if the proposals are not satisfactory, then PeruPetro may continue with the drafting of the contract with the oil company that commenced the Direct Negotiation Process. The following flowchart in PeruPetro's own Rules and Procedure illustrates this process:

[307] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**), Annex 04.




209. As can be easily appreciated, the oil company that commences a Direct Negotiation Process has the advantage of having its proposal fully evaluated and approved by the local community before any competing proposals are even considered. The competitive advantage of this procedure is significant.

210. This process is ***not discretionary***. An oil company that submits a proposal for direct negotiation has a bundle of protected rights under Peruvian law.

211. As Expert Quiroga explains, hydrocarbon exploitation contracts, as legal contracts governed by the rules of private law, must be negotiated, and executed according to the rules imposed by the principle of good faith understood as loyalty in

the negotiation of the contract and as correction in the behavior on the concluded contract, in accordance with Article 1362 of the Civil Code.[308]

212. Further, PeruPetro must perform this Direct Negotiation Process in compliance of the requirements that govern a negotiation process with the government. Specifically, the principle of impartiality, provided for in Article IV, subsection 1, numeral 1.5, of the General Administrative Procedure Law, imposes on the government entities the duty to perform their duties dispensing equal treatment and without discrimination or favoritism.[309]

213. The principle of procedural conduct, regulated by Article IV, subsection 1, numeral 1.8, of the Law of General Administrative Procedure, requires the government to carry out its actions and adopt its decisions strictly respecting the rights and legitimate interests of the administered and of third parties, within a framework of strict compliance with the principle of good faith.[310]

214. The principle of predictability, enshrined in Article IV, subsection 1, numeral 1.15, of the Law of General Administrative Procedure, grants certainty to the administered with respect to the knowledge of the administrative legal norms, to the performance of certain administrative powers and regulatory changes.[311]

215. These are the rights that Amorrortu acquired under Peruvian law and that are protected as investment under the USPTPA.

216. PeruPetro turned its well-defined process to evaluate a direct negotiation proposal on its head to favor Graña y Montero.

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[308] *See* CER – 1 [Quiroga] at ¶¶ 17, 22, 133, 148, 149, 152-153, 156, 193(b).

[309] *Id*. at ¶¶ 178, 209.

[310] *Id*. at ¶¶ 20, 184, 193(d).

[311] *Id*. at ¶¶ 21, 190, 212.

217. It is undisputed that Amorrortu, through Baspetrol, expressed an interest in commencing the Direct Negotiation Process on August 8, 2013,[312] reiterated its interest in the Direct Negotiation Process on January 16, 2014,[313] March 20, 2014,[314] and in a meeting with Ortigas on May 22, 2014.[315] At that meeting, Ortigas invited Amorrortu to submit a direct negotiation proposal, which Amorrortu did on May 28, 2014. In the Baspetrol Proposal, as well as in his subsequent communications, Amorrortu made clear that he had received an invitation to present the Baspetrol Proposal to PeruPetro; a fact that Ortigas never denied or contested.

218. The Baspetrol Proposal was very attractive not only because it had been presented by Amorrortu, with his history of success in the Talara Basin, but also because it had the support of the local community in Talara, which would receive 5% of the revenues under the Baspetrol Proposal. In addition, the Proposal included (i) a legal section which emphasized that the Proposal satisfied the requirements for direct negotiation and was therefore submitted for that purpose;[316] (ii) an economic section which described the economic terms proposed to Perupetro;[317] and (iii) an exhaustive section which detailed relevant technical expertise, explaining

[312] *See* Letter from Bacilio Amorrortu to Luis Ortigas, 31 July 2013 (**C-31**).

[313] *See* Email from Bacilio Amorrortu to Maria Angelica Cobena, 16 January 2014 (**C-7**).

[314] *See* Email from Bacilio Amorrortu to Maria Angelica Cobena, 20 March 2014 (**C-28**).

[315] *See* CWS – 1 [Amorrortu] at ¶¶ 79-85.

[316] *See* Proposal from Baspetrol SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, 27 May 2014 (**C-11**), pp. 10-12.

[317] *See* Proposal from Baspetrol SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, 27 May 2014 (**C-11**), pp. 13-14.

Amorrortu's expertise in oil exploitation as well as his proven ability to coordinate with international experts in order to maximize production from the Blocks.[318]

219. At the time the Baspetrol Proposal was presented, on May 28, 2014, Amorrortu formally commenced the Direct Negotiation Process. Critically, PeruPetro never informed Amorrortu that the Blocks were not available, as it was required to do under PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts. Of course, PeruPetro could not have told Amorrortu that the Blocks were not available because the Blocks were in fact available and not subject to any legitimate contractual interest.

220. PeruPetro suggests that as early as April of 2014, its Directory had decided[319] that Blocks III and IV were to be submitted to public bidding. This argument misses the mark. First of all, irrespective of what internal decision PeruPetro had made, the fact is that the Blocks were available for direct negotiation when Amorrortu submitted the Baspetrol Proposal, as the corrupt International Public Bidding Process was not opened until July 14, 2014. Second, the Direct Negotiation Process was in the best interest of PeruPetro, as it would allow PeruPetro to evaluate the Baspetrol Proposal before the project was open for competing proposals. At the end of the day, if PeruPetro received better proposals, it would simply open a public bidding process as provided in PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts. In other words, the decision to ignore the Baspetrol Proposal and open the International Public Bidding Process did not benefit PeruPetro. Third, after the International Public Bidding Process was opened, Amorrortu was never told that when

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[318] *See* Proposal from Baspetrol SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, 27 May 2014 (**C-11**), pp. 9-10.

[319] *Ibid*.

he submitted the Baspetrol Proposal the Blocks were not available for direct negotiation. On the contrary, and as previously discussed, PeruPetro's Directory informed Amorrortu that it had rejected the Baspetrol Proposal, even though PeruPetro's Administration was not even aware of the Proposal. Simply put, even if PeruPetro had already launched the corrupt process to crown Graña y Montero — which it had not — that process was illegitimate *ab initio* and with very little relevance in these proceedings, if any.

221. Even more, PeruPetro in an untimely communication informed Amorrortu that Baspetrol did not qualify to negotiate a contract with PeruPetro even though Baspetrol had complied with all the qualification requirements, as Expert Quiroga explains.[320] Not surprisingly the only qualified bidder was Graña y Montero, who instead of having to present a proposal that would be compared to the pre-qualified, pre-approved Baspetrol Proposal, obtained the contracts after all interested companies were disqualified. Of course, this action is consistent with Graña y Montero's modus operandi in the multiple projects in which resulted as having them as the only qualified company.

222. As Expert Quiroga confirms, PeruPetro could not open a public bidding process without adjudicating the Baspetrol Proposal and affording Amorrortu the right to have the Baspetrol Proposal evaluated before competing entities were allowed to submit competing proposals.[321] It is clear that when the Baspetrol Proposal was submitted, the Blocks were available, and PeruPetro should have proceeded to evaluate the Baspetrol Proposal, to start the community process, and to qualify Baspetrol. This

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[320] *See* CER – 1 [Quiroga] at ¶¶ 22-25.

[321] *See* CER – 1 [Quiroga] at ¶¶ 22-25.

process should have been conducted without any interference of any competing interest. After the conclusion of this process, PeruPetro should have notified the public of the Direct Negotiation Process and offer any oil company interested in the project the opportunity to submit a proposal. Notably, the rigged International Public Bidding Process confirms that there was little interest in these Blocks from other competitors. For Block III, the only bidder were Baspetrol and Graña y Montero, and for Block IV, there was only an additional bidder, Omega Energy International S.A.C.[322] Based on this evidence, it is very unlikely that additional bidders would have participated in a properly held direct negotiation invitation process, after the Baspetrol Proposal would have been duly evaluated and approved.

223. Amorrortu's reasonable expectations matured when he formally commenced the Direct Negotiation Process. At that point, Amorrortu was set apart from other investors and Baspetrol became an oil company vested with all the rights of an oil company qualified to negotiate with PeruPetro pursuant to the certification of qualification rules that has commenced a Direct Negotiation Process.

224. Instead of following with this process, PeruPetro decided to open the International Public Bidding Process in which Baspetrol had to be qualified with all other competing companies, even though Baspetrol had already been qualified.

3) THE DEFINITION OF COVERED INVESTMENT IN THE USPTPA INCLUDES THE RIGHT TO DIRECT NEGOTIATION FOR BLOCKS III & IV ACQUIRED BY AMORRORTU THROUGH BASPETROL

225. Peru suggests that the USPTPA does not protect the interests of Amorrortu, through Baspetrol, in the Direct Negotiation Process with PeruPetro for the contract to operate Blocks III and IV because this contract was never executed. This

[322] *See* CER – 1 [Yaya] at ¶¶ 160-161, 171.

argument is wrong and is belied by the explicit language of the USPTPA, which broadly defines investment to include, not only the rights of an investor in an enterprise, but also any rights or claims the investor may have under Peruvian law in this case, particularly with respect to the expansion of the assets and rights of its initial investment.[323] Indeed, the USPTPA goes as far as protecting, " *an investor that attempts through concrete action to make, is making, or has made an investment*."[324]

226. When Amorrortu commenced the Direct Negotiation Process, Amorrortu, through Baspetrol, acquired a number of substantive acquired rights, including the right to a direct negotiation conducted in compliance with the norms of good faith, impartiality, observance of principles of due process, and predictability.[325] These rights are not simply procedural inchoate rights. These are substantive rights with monetary value particularly in light of the fact that Amorrortu had operated Block III for more than twenty years and had the know-how and capability to optimize the wells in Block III and Block IV.

227. As it has been long recognized, "*an investment is not a single right but is, like property, correctly conceived as a bundle of rights, some of which are inseparable from others and some of which are comparatively free standing.*"[326] The bundle of rights acquired by Amorrortu are an integral part of Amorrortu's business plan when he formed Baspetrol.

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[323] *See* USPTPA Investment Chapter (**CLA-1**), Art. 10.28; *see also* USPTPA Chapter One (**CLA-6**), Art. 1.3.

[324] USPTPA Investment Chapter (**CLA-1**), Art. 10.28

[325] *See* CER – 1 [Quiroga] at ¶¶ 116-192.

[326] *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (**CLA-102**) at ¶ 96.

228. Peru's argument is not only disproved by the text of the USPTPA, but by recent arbitral awards that have undoubtedly held that a substantive right to negotiate in good faith a contract to expand an initial investment is an investment under definitions of investment almost identical to the definition of investment in the USPTPA. The decisions in *Lemire*, *Bosca*, and *EDF* make clear that an investor that has acquired rights under the applicable law of the host state to negotiate an agreement in good faith has an investment interest that is protected by most bilateral treaties.

a) Lemire v. Ukraine

229. *Lemire* was an ICSID case, and the jurisdictional analysis was based on the definition of investment in Article 25(1) of the ICSID Convention in addition to the definition in the applicable Bilateral Investment Treaty between the United States of America and the Ukraine. However, the legal analysis of the tribunal is highly persuasive as the investment rights at issue in *Lemire* are very similar to the rights that Amorrortu seeks to enforce in this arbitration.

230. In *Lemire*, the claimant had invested in a music radio station under the laws of Ukraine with the expectation to increase its size and audience of Gala and to establish a network of several radio stations in the country. To this end, the claimant submitted more than 300 hundred applications for radio frequencies, all of which were denied. The claimant commenced an arbitration proceeding alleging that the denial of its frequency applications was arbitrary and capricious and that the frequency applications of other competing radio stations had been illegally granted.[327] The claimant alleged a violation of the fair and equitable treatment obligation, among

[327] *See Lemire v. Ukraine*, Decision on Jurisdiction and Liability (**CLA-026**) at ¶ 409.

other treaty violations.[328] The claimant alleged that he had a protected investment right in that when he made his initial investment in the radio station he had a legitimate expectation that he would be authorized to enlarge the activities of his radio company.[329]

231. On the issue of the existence of an investment, the tribunal began by noting that it had no doubt that the claimant had established a protected investment interest:

> *Summing up the evidence, the Tribunal has no doubt that Mr. Lemire actually made an investment in Ukraine, although the undisputed total amount is only 236,000 USD. Respondent has not challenged that Mr. Lemire is — at least since 2006 — indirect owner of 100 % of the share of capital of Gala [the initial radio station].*[330]

232. Ukraine argued that the tribunal did not have jurisdiction with respect to claims arising out of claimant's "*failure in tenders for additional frequencies on the ground that such tenders precede investments and that pre-investment activities fall outside*" the definition of investment under the ICSID Convention.[331]

233. The tribunal determined that the claims related to the tenders for new frequencies and broadcasting licenses could not be considered pre-investment activities because the claimant had made an initial investment — irrespective of the amount of this investment — in acquiring the first radio station.[332] The allocation of frequencies, according to the *Lemire* tribunal was a condition for claimant's ability to expand his investment in the initial radio station:

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[328] *See*, *e.g.*, *Lemire v. Ukraine*, Decision on Jurisdiction and Liability (**CLA-026**) at ¶ 229.

[329] *Id*. at ¶¶ 212 et. seq.

[330] *Id*. at ¶ 54.

[331] *Id*. at ¶ 86.

[332] *Id*. at ¶ 89.

> *This conclusion is confirmed by the text of the BIT. The BIT expressly extends protection to "associated activities" which include "access to . . . licences, permits and other approvals . . .." [see Article II.3.(b)] moreover provides that "Neither Party shall in any way impair by arbitrary or discriminatory measures the . . . expansion . . . of investments*".[333]

234. With respect to the Article 25(1) analysis, the tribunal noted that at the time of the tender, claimant had already invested in the initial radio station. The application of additional frequencies and licenses formed an integral part of the initial radio station's business operations. The tribunal noted that it is irrelevant whether the tender was part of the claimant's initial business plan:

> *For this conclusion it is immaterial whether the receipt of additional frequencies had already been envisaged in Claimant's initial business plan and whether Respondent had made any commitment to support such a business plan. It suffices that the additional frequencies were sought by [the initial radio] as part of its strategy to defend and/or expand its market share. It is furthermore immaterial whether additional frequencies were sought to extend the reach of Gala's existing program or to access new audiences with newly designed programs. In either case, the applications were part of Gala's business strategy to maintain and enhance its position in the Ukrainian market*.[334]

235. Simply put, the frequency applications formed an integral part of Gala's overall business operation.

236. This reasoning applies in this case. Amorrortu formed the enterprise Baspetrol in 2012, two years before he formally presented the Proposal for Direct Negotiation to PeruPetro and acquired the appurtenant rights under Peruvian law. By the time

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[333] *Id*. at ¶ 91.

[334] *Id*. at ¶¶ 97-98.

Amorrortu presented the Baspetrol Proposal, it was a going concern and was in negotiation with other entities. Amorrortu's presentation of the Baspetrol Proposal to initiate the Direct Negotiation Process is an expansion of his initial investment, which is protected under the USPTPA. Critically, like the US-Ukraine Bilateral Investment Treaty at issue in *Lemire*, the USPTPA protects investments and the expansion of these investments. In fact, the USPTPA protects attempts through "*concrete actions*" to make an investment.[335] Therefore, under the reasoning of *Lemire*, Amorrortu has a protected investment in his efforts to expand Baspetrol's business plan through the Direct Negotiation Process to operate Blocks III and IV.

b) Bosca v. Lithuania

237. The decision of the tribunal in *Bosca* is another award that confirms that an investor that seeks to expand its initial investment through a negotiation process protected by local law, has a protected investment interest in that negotiation process. Bosca was a popular brand of sparkling wines in Europe with a service agreement to help a local company in Lithuania to produce Bosca sparkling wines for the local market. The government of Lithuania opened a bidding process to privatize its brand of sparkling wine, and Bosca participated in the public bid to acquire the national brand. Ultimately, Bosca was declared the winner of the public tender and commenced the negotiation process to draft the acquisition agreement. However, the parties were not able to reach an agreement because the government insisted on a clause imposing a number of fines that was unacceptable to Bosca. After the government terminated the negotiations, Bosca filed a judicial action against the privatization agency alleging that the government had failed to negotiate in good

[335] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

faith. Ultimately, the supreme court of Lithuania found that Bosca had been the victim of unfair and arbitrary conduct in the tender process and awarded Bosca its fees and costs.[336]

238. Bosca then commenced an arbitration under the Italy-Lithuania Bilateral Investment Treaty. Bosca alleged that Lithuania had failed to accord Bosca just and fair treatment, national treatment, most-favored nation treatment and guarantees of legal expropriation.[337] The investor claimed that "*but for*" the state's conduct, Bosca would have earned around EUR 207 million from operating the national company.[338]

239. Lithuania sought to dismiss the arbitration, arguing *inter alia*, that Bosca did not have a protected investment interest. The arbitral tribunal disagreed and held that Bosca had a protected investment right in the negotiation of the agreement.[339] Like the tribunal in *Lemire*, the tribunal in *Bosca* first focused on Bosca's initial investment in Lithuania and held that Bosca had contributed its know-how to the company producing its wines in Lithuania.[340] Then, the arbitral tribunal held that Bosca's interest in expanding to acquire the national brand was an expansion of its initial investment that was protected as an associated activity to its initial investment.

240. The arbitral tribunal reasoned that while Lithuania had not interfered with Bosca's initial investment, its agreement to provide its know-how to the company producing its wines, Lithuania had interfered with an associated activity to that

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[336] *See*, *e.g.*, *Bosca v. Lithuania*, Award (**CLA-46**) at ¶¶ 187-200.

[337] *Id*. at ¶¶ 183-190, 245-249, 256-259, 265-268.

[338] *Id*. at ¶¶ ¶¶ 275-278.

[339] *Id*. at ¶¶ ¶¶ 164-178.

[340] *Id*. at ¶¶ ¶ 168.

investment. That is, Bosca's efforts to expand this investment with the acquisition of the national brand.[341]

241. Lithuania argued that the tender to acquire the national company did not have anything to do with the service contract that Bosca had to produce wines in Lithuania and which the tribunal had considered to be a protected investment.[342] However, the tribunal rejected this argument holding that whether the expansion was directly contemplated by the initial investment is irrelevant.[343] The tribunal determined that the activities were sufficiently related through "*their common purpose, aims, and operation.*"[344]

242. Here, Baspetrol's business plan was to service the oil industry in the Talara Basin. Amorrortu's Direct Negotiation Process with PetroPeru is an integral part of that business plan, and therefore, it is protected.[345] Certainly, in *Bosca*, the claimant had won the bid, but Amorrortu's Direct Negotiation rights are similar particularly given the fact that the vast majority of direct negotiation processes — if not at all — concluded in a successful contract.

c) EDF v. Romania

243. The principle that an investor who seeks to expand its initial investment through a negotiation process has a protected investment interest in a fair negotiation was also implicitly followed by the tribunal in *EDF*.

[341] *Id*. at ¶¶ ¶ 166.
[342] *Id*. at ¶¶ ¶ 138.
[343] *Id*. at ¶¶ ¶ 173.
[344] *Ibid*.
[345] *See Duke Energy International Peru Investments No. 1, LTD. v. The Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006, (**CLA-61**) at ¶¶ 119 et. seq.

244. In *EDF*, the claimant had invested in a joint venture to operate duty free stores at several airports in Romania. The initial operational license expired, and Romania failed to grant the claimant's renewal request. The claimant alleged that the denial of its renewal application was arbitrary and unreasonable. According to the claimant, the denial of the renewal application was a retaliatory measure for its refusal to pay bribes to several government officials.[346]

245. The issue of whether the claimant had a protected investment was not highly disputed by Romania. However, the tribunal stated that it shared the view "*expressed by other tribunals that one of the major components of the [Fair and Equitable Treatment] standard is the parties' legitimate and reasonable expectations with respect to the investment they have made.*"[347] In the view of the tribunal, this reasonable expectation included the right of the claimant to negotiate a renewal of its license in good faith and free of corruption.[348]

246. In *EDF*, Romania did not take issue with the principle that the claimant's rights in negotiating the renewal of a license after the initial license in which it invested had expired was a protected investment right. The *EDF* tribunal went on to hold that a host country breaches its fair and equitable standard obligations when it exercises its discretion to negotiate a contract with an investor with corruption, which is the principle at the core of Amorrortu's claim in this arbitration.[349]

247. Therefore, under the reasoning of *Lemire, Bosca, and EDF,* Amorrortu has a covered investment right in the Direct Negotiation Process for Blocks III and IV in

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[346] *See EDF v. Romania*, Award (**CLA-4**) at ¶ 216.

[347] *Ibid*.

[348] *Id*. at ¶ 221.

[349] *Id*. at ¶ 221.

that he made his initial investment in the enterprise Baspetrol with the reasonable expectation that this enterprise could work in the oil fields in the Talara Basin and participate in a Direct Negotiation Process once the contract between PeruPetro and Interoil expired.

### C. AMORRORTU TIMELY COMMENCED THIS ARBITRATION WITHIN THE STATUTE OF LIMITATIONS PERIOD AND COMPLIED WITH ALL THE USPTPA REQUIREMENTS

248. The USPTPA sets out specific requirements that a claimant must satisfy before submitting its claim to arbitration — all of which have been satisfied by Amorrortu.

249. First, Amorrortu delivered its requisite Notice of Intent (***NOI***) to Peru — and Peru received the Notice — on September 24, 2019.[350] Therefore, Amorrortu complied with Article 10.16.2, which requires the claim to be submitted to arbitration "*at least 90 days*" after the filing of the written NOI.[351] Second, "*six months have elapsed since the events giving rise the claim*" and Amorrortu's submission of his NOA, as required under Article 10.16.3 of the USPTPA.[352]

250. Under Article 10.18 of the USPTPA, "*[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) . . . has incurred loss or damage.*"[353]

251. Critically, on July 14, 2014, on the basis of the Corrupt Scheme, Peru decided to ignore the Baspetrol Proposal to operate the Blocks and instead it initiated the

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[350] *See* NOA at ¶ 87.

[351] *See* USPTPA Investment Chapter (**CLA-1**), Art. 10.16(2).

[352] *See* USPTPA Investment Chapter (**CLA-1**), Art. 10.16(3).

[353] USPTPA Investment Chapter (**CLA-1**), Art. 10.18.

rigged International Public Bidding Process to favor Graña y Montero. At the same time, although some of Peru's unlawful conduct *commenced* more than three years before the September 19, 2019 NOI was sent, the fact that such conduct was in breach of the USPTPA was *unknown* and *unknowable* to Amorrortu until June 2019 when Graña y Montero finally acknowledged its involvement in the Corruption Scheme undertaken together with Odebrecht in various megaprojects in Peru.[354]

252. Only at that point, in 2019, could Amorrortu begin to *suspect* for the first time that corruption was at the heart of Peru's failure to consider the Baspetrol Proposal, of Peru's purported rejection of the Baspetrol Proposal, of the rigged International Public Bidding Process, and ultimately of the granting of the buena pro to Graña y Montero. Indeed, in 2017, Graña y Montero vehemently denied any wrongdoing. Critically, the evidence implicating Graña y Montero did not surface until 2018 when Odebrecht identified the company in its confession. In fact, Graña y Montero did not admit any wrongdoing until 2019. As a result, Amorrortu did not become aware of the fact that Peru's prior conduct was unlawful under the USPTPA until June 2019 and could not have learned such information earlier with any amount of due diligence.

253. Furthermore, Amorrortu cannot be blamed for any purported failure to complain about Peru's breaches of the USPTPA in 2017 because Peru — and its co-conspirator in its Treaty breaches, Graña y Montero — affirmatively concealed the fact that the International Public Bidding Process of Blocks III and IV was plagued with corruption.

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[354] *See* Agencia EFE, *Constructora admite un soborno por 3,7 millones de dolares en el Gobierno de Humala*, 7 June 2019, https://www.efe.com/efe/america/politica/constructora-admite-un-soborno-por-3-7-millones-de-dolares-en-el-gobierno-humala/20000035-3995567 (last accessed 4 September 2020).

254. Accordingly, Amorrortu could not have known that Peru was in breach of the USPTPA until June 2019, when Amorrortu understood that corruption had plagued the International Public Bidding Process and that the process had been designed to benefit Graña y Montero, following instructions from the Peruvian Presidency. Therefore, Amorrortu gave Peru notice of its intent to arbitrate this dispute well within the statute of limitations and has timely submitted his claims under the USPTPA.

## V. PERU HAS BREACHED ITS OBLIGATION UNDER THE USPTPA

255. By exercising its discretion to contract on the basis of corruption, Peru has breached its Treaty obligations.

256. The applicable standard of proof to establish corruption is more than satisfied here (Section V(A)(1)), by the overwhelming evidence of corruption (Section V(A)(2)). Peru is responsible for this corruption (Section V(B)), which clearly constitutes a violation of the Fair and Equitable Treatment obligations under the USPTPA (Section V(C)).

### A. PERUPETRO AWARDED BLOCKS III & IV AS PART OF GRAÑA Y MONTERO'S CORRUPT SCHEME

257. Peru cannot longer dispute that Graña y Montero paid millions of dollars in bribes to Peru's president and government officers. The tale of corruption between the Humala administration and Graña y Montero is undisputed.[355] Nor can Peru dispute any more that these bribes were paid in exchange for government contracts to Graña y Montero which were awarded under the guise of public biddings designed to make Graña y Montero the sole qualified bidder.

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[355] *See* CER-1 [Yaya] at ¶ 73; *see also* CER-1 [Durand] at ¶¶ 14-15.

258. The Corruption Scheme has now been fully exposed to the public. Indeed, Graña y Montero's executives have admitted that they paid bribes to the Humala administration to obtain government contracts in the same period in which Graña y Montero somehow became the only qualified bidder for the contract to operate Blocks III and IV in an illegal public process. The admission that Graña y Montero executives met with the Nadine Heredia to discuss Blocks III and IV is just the latest — but doubtfully the last — chapter in this tragic saga of corruption and abuse of power.[356]

259. The license contracts to operate Blocks III and IV were awarded as part of the Corruption Scheme. Amorrortu commenced the Direct Negotiation Process for Blocks III and IV. But his statement of interest and proposals were shelved to give way to the phony International Public Bidding Process in which the rules and regulations were bent or ignored to benefit Graña y Montero.[357]

1) APPLICABLE STANDARD TO PROVE CORRUPTION

260. Allegations of corruption are very serious, and it is by now well-established that allegations not supported by evidence and based on suppositions are not sufficient to prove corruption.[358] Some tribunals have taken this principle to the extreme and required "*clear and convincing evidence*" to prove corruption.[359] However, most tribunals have agreed that direct evidence of corruption is only

[356] *See* G. Castañeda Palomino, *Gasoducto del Sur case: the prosecutor's office has an agenda with the meetings of José Graña, Jorge Barata and Nadine Heredia*, 31 August 2020 **(C-34)**.

[357] *See* CER-1 [Yaya] at ¶ 189, 229.

[358] *See EDF v. Romania*, Award (**CLA-4**) at ¶¶ 221-237.

[359] *Id*. at ¶ 232.

available in a few unique cases and that corruption may be proved by circumstantial evidence that establishes with "*reasonable certainty*" the alleged corruption.[360]

261. In *Metal Tech v. Uzbekistan*,[361] the various forms of evidence which led the tribunal to find corruption were circumstantial in nature. To prove corruption in the *Metal Tech* proceedings, the parties disagreed on the burden and standard of proof applicable to allegations of corruption. While the claimant contended that the corruption alleged by Uzbekistan must be proved by "*clear and convincing evidence,*" Uzbekistan posited that the corruption may be proved through "*prima facie or circumstantial evidence.*"[362] The tribunal disagreed holding that circumstantial evidence was sufficient:

> *[T]he Tribunal will determine on the basis of the evidence before it whether corruption has been established with* ***reasonable certainty****. In this context, [the Tribunal] notes that corruption is by essence difficult to establish and that it is thus generally admitted that* ***it can be shown through circumstantial evidence****.*[363]

262. Therefore, the Tribunal demonstrated how various forms of circumstantial evidence, such as the amount of payments awarded, the qualifications of the alleged consultants, the (lack of) documentary evidence of services rendered and the

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[360] *Metal-Tech LTD. v. The Republic of* Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013 (**CLA-62**) at ¶ 243 (hereinafter, ***Metal-Tech v. Uzbekistan***); *see* C. Lamm et. al, *Fraud and Corruption in International Arbitration* (2010) (**CLA-103**), pp. 702-703. Indeed, "*in a survey of twenty-five arbitral awards regarding bribery, only five tribunals ruled that 'clear and convincing' evidence was needed. . . to declare the agreement invalid because of corruption […] Professor Crivellaro surveyed twenty-five arbitral awards involving bribery and corruption charges and concluded that arbitrators frequently rely on indirect evidence of corruption when credible allegations of corruption have been made.*"

[361] *Ibid*.

[362] *Id*. at ¶ 228.

[363] *Id*. at ¶ 243 (emphasis added).

consultants' relationships with those in power, can and should be contemplated as a whole. The tribunal unequivocally acknowledged that corruption can be shown through circumstantial evidence subject to a "*reasonable certainty*" standard.[364] This standard is consistent with the applicable burden of proof under Peruvian law and in practically all of the states in the United States.[365]

263. Irrespective of the applicable burden, it is beyond dispute that PeruPetro awarded the contract to operate Blocks III and IV as part of the Corruption Scheme designed to grant all the government contracts that Graña y Montero requested in exchange for the bribes and corrupt influence in the cult of the construction with Odebrecht.[366] Indeed, as shown below, there are numerous red flags of corruption present in this case.

2) THE EVIDENCE OVERWHELMINGLY PROVES CORRUPTION

264. The evidence of corruption is simply overwhelming.

265. Graña y Montero have admitted that the President of Peru together with his advisers concocted a plan to award government contracts to Graña y Montero through rigged public bidding processes in which Graña y Montero was the only qualified bidder.[367] As Expert Yaya explains, "*[i]t should be noted that, during the government*

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[364] *See* U. Cosar, *Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences, and Sanctions* (2015) (**CLA-63**). The Tribunal in *Metal-Tech v. Uzbekistan*, an ICSID arbitration that arose under the Israel-Uzbekistan BIT, concluded that "[*r]ules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing the inferences from a lack of proof are generally deemed to be part of the lex causae*", which in those cases were "*essentially the BIT*" and the laws incorporated by reference therein.

[365] *See* CER – 1 [Quiroga] at ¶¶ 215-227; *see also Rutas de Lima S.A.C. vs. Municipalidad de Lima*, UNCITRAL, Arbitration Award, 11 May 2020 (**CLA-64**) at ¶¶ 394-402.

[366] *See* CER-1 [Durand] at ¶ 15.

[367] *See* CER-1 [Yaya] at ¶¶ 160-161, 171.

*of the President of the Republic Ollanta Humala Tasso, the companies belonging to the Graña y Montero Group, [repeatedly] obtain[ed] the buena pro as the sole bidder. [Indeed] . . . the companies . . . won as the **sole bidder** in 60% of the selection process in which they participated [. . . ] which brings our first conclusion: during the government of Ollanta Humala Tasso, **the companies of the Graña y Montero Group had the privilege that the Bidding Rules were designed in a fraudulent manner . . . avoiding all kind of competition. [When] other bidders were present, they were discriminated against, with no response or with responses with no support or with apparent support**."*[368]

266. Graña y Montero paid millions of dollars in bribes to obtain any government contract it requested pursuant to this plan.[369] As Dr. Durand explains, "*[d]uring the Humala government, who 'co-governs' with his wife, Nadine Heredia, forming the officially called 'presidential couple,' Odebrecht, through its manager, Jorge Barata, made a covert electoral 'donation' of USD $ 3 million, which is given in cash to Ollanta Humala and Nadine Heredia. From this moment on, access to the highest levels of the State is facilitated, where Heredia plays a key role in influencing decisions, especially in the Ministries of Economy, Energy and Mines and Construction. This 'donation' is considered by Barata as a 'consideration,' that is, as a quid pro quo. An indicative event of privileged access to seek influence is the meetings at the Government Palace between Nadine Heredia, Jorge Barata and José Graña. The first meeting is held in June 2011 (shortly before the inauguration of the government on July 28), and they continue until 2015 to discuss cases such as the South Peruvian*

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[368] *Id*. at ¶ 83 (emphasis in the original).

[369] *See* CER-1 [Durand] at ¶ 14.

*Gas Pipeline and oil blocks III and IV of Talara. This triangular relationship is collusive and corrupt, giving rise to privileges and favors for these two private partners that are contrary to the public interest. From this triangle, Nadine Heredia manages the decisions of the power to favor Odebrecht and Graña y Montero, with the collaboration of Luis Miguel Castilla (Minister of Economy and Finance) and Eleodoro Mayorga (Minister of Energy and Mines), in addition to other ministers*."[370]

267. These bribes gave Graña y Montero total control of the negotiation process for government contracts. As already explained, Marcelo Odebrecht admitted that Graña y Montero helped Jorge Barata to establish contact with Peruvian politicians; and that the role of Graña y Montero was decisive in choosing the projects in which bribes could be paid, and in suggesting the name of presidential candidates that should receive financing.[371] Not surprisingly, Graña y Montero received an exorbitant number of government contracts during the Humala administration.[372]

268. Worse yet, 60% of these contracts were awarded with Graña y Montero as the sole qualified bidder.[373]

269. Simply put, the vast majority of contracts awarded during the Humala administration to Graña y Montero were awarded consistent with the Corruption Scheme: (1) a facially legitimate public bidding process where (2) all competitors of Graña y Montero fail to qualify and (3) Graña y Montero is the only qualified bidder.

270. To pretend that during this period of corrupt bonanza, the contracts to operate Blocks III and IV were legitimate is simply not credible.

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[370] *Id*. at ¶ 15.

[371] *See* A. Zambrano, *Odebrecht falls on GyM*, November 2017 **(C-42)**

[372] *See* CER-1 [Yaya] at ¶ 148; *See* Graña y Montero Contracts during the Humala Presidency (Yaya-9).

[373] *See* CER-1 [Yaya] at ¶ 148.

271. This argument is not credible because there was no justification to abort the process of direct negotiation with Amorrortu when Baspetrol was led by Amorrortu with his history of success in the Talara Basin. The argument is not credible because Blocks III and IV had a significant importance for Graña y Montero, as it would increase its presence in the Talara Basin. This argument is not credible because PeruPetro amended the Bidding Rules to allow Graña y Montero to qualify. And, this argument is not credible because PeruPetro ceded its 25% interest in the Blocks in favor of Graña y Montero. In other words, the process under which Graña y Montero obtained the contracts for Blocks III and IV was plagued with irregularities, all of which confirm that these contracts were part of the Corruption Scheme.

272. As expert YAYA concluded, the process under which Graña y Montero obtained the contracts to operate Blocks III and IV is highly suspect:

> *That it is important to take into account the meeting revealed by José Graña Miró Quesada with Nadine Heredia, 'NdH', prior to the publication of the Terms and Conditions.*
>
> *That there is no evidence that the bidders received the details of the Technical Indicators that would determine their qualification, specifically, the material called average production.*
>
> *That the Rules of the International Public Bid No. PERUPETRO-001-2014 to Grant the License Contract for the Exploitation of Hydrocarbons in Block III were illegally modified, when an official, identified as Oscar Miró Quesada Rivera, intervened in them, with no competence to receive comments and propose changes.*
>
> *That the modifications to the Rules of the International Public Tender No. PERUPETRO-001-2014 to Grant the License Contract for the Exploitation of Hydrocarbons in Block III, favored the bidder Graña y Montero S.A.A.*
>
> *That the bidder Graña y Montero S.A.A. was illegally favored. by the broad interpretation of the provisions of Article 3 of Supreme Decree No. 030-2004-EM, which*

> *allows to support the economic indicators of foreign companies with the equity of their parent, but does not establish the possibility of qualifying the Peruvian company with the economic indicators of another Peruvian company.*[374]

273. In any event, the recent revelations of the agenda of some of the executives of Graña y Montero have all but confirmed that Blocks III and IV were part of the Corruption Scheme and indeed were the subject of discussions between Nadine Heredia and the executives of Graña y Montero. As Expert Yaya explains, "*the meeting agendas of one of the main directors of Graña y Montero S.A.A. and Graña y Montero Petrolera. . . [i]t can be observed . . . that on April 28, 2014,. . . José Graña and Nadine Heredia, 'Ndh', reportedly met about Blocks III and IV before the publication of the Bidding Rules*."[375]

274. Therefore, Peru cannot seriously deny that the contracts for Blocks III and IV were obtained by Graña y Montero as part of the Corruption Scheme.

## B. PERU IS RESPONSIBLE FOR THE CORRUPTION SCHEME

275. As set forth below, Peru is responsible for the corrupt acts that harmed Amorrortu, including the acts and omissions of Nadine Heredia — and indeed, President Ollanta Humala, PeruPetro, Ortigas, and MEM as agents and/or organs of Peru established under the laws of the state.

276. PeruPetro was established to "*reformulate the State's business role and the consequent restructuring of the Energy and Mining Sector.*"[376] Nadine Heredia had

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[374] *Id*. at ¶¶ 199-203.

[375] *Id*. at ¶ 167.

[376] *See* PeruPetro, History, https://www.perupetro.com.pe/wps/portal/corporativo/PerupetroSite/perupetro%20s.a./historia/!ut/p/z1/pZLLDoIwEEW_xS9ooQ_dYkAq4VWsgt0YVoZE0YXx-23RuGPGxOmmTc7tvZ0OsaQjduyfw7l_DLexv7jz0cpTGSZcKR5kaV2sqOYmzozbFDkl7QTQmYoosfP6ppQf_QxgagbpDeOI3gHz-

official and semi-official duties, including the responsibility of assigning special government contracts.[377] Ortigas was the President of PeruPetro during the relevant period, and MEM is the governmental ministry that regulates activities of PeruPetro, among others.[378] Therefore, under international law, the acts or omissions of Nadine Heredia, President Ollanta Humala, PeruPetro, Ortigas, and MEM in exercise of their official functions are attributable to Peru.[379]

277. Under chapter 10 of the USPTPA:

> *A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any **regulatory, administrative, or other governmental authority delegated to it by that Party**, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.*[380]

278. An "*enterprise*" is defined as "*any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole*

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[377] *See* CER-1 [Yaya] at ¶ 17.

[378] *See* Peruvian Ministry of Energy and Mines, Sectors, Ascribed Organs, https://www.minem.gob.pe/_detalle.php?idSector=21&idTitular=9314&idMenu=sub9239&idCateg=1748 (last accessed 11 September 2020).

[379] Intl. Law Commission's Arts. on the Responsibility of States for Internationally Wrongful Acts (**CLA-33**), Arts. 4, 5, 8; *see also* Commentaries on Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (hereinafter the ***Draft Articles Commentary*** or ***Commentary***) (**CLA-67**).

[380] USPTPA Investment Chapter (**CLA-1**), Art. 10.1(2) (emphasis added).

*proprietorship, joint venture, or other association.*"[381] An "*enterprise of a Party*" is defined as "*an enterprise constituted or organized under the law of a Party.*"[382]

279. The conducts identified by Amorrortu as giving rise to this dispute were carried out in the exercise of PeruPetro's governmental authority. First, PeruPetro through Ortigas instructed Amorrortu to present the Baspetrol Proposal to initiate the Direct Negotiation Process. Blocks III and IV.[383] Second, Ortigas lied to Amorrortu when he made representations to Amorrortu to the effect that the Baspetrol Proposal would be subject to a legal-technical-economic analysis by PeruPetro, and that it would be discussed by PeruPetro's Board.[384] Third, as provided under Peruvian law, the Direct Negotiation Process was binding on PeruPetro when, after 10 days, PeruPetro had not responded to the Baspetrol Proposal.[385] Fourth, PeruPetro flouted Peruvian law and infringed on Amorrortu's right to due process when it rejected the Baspetrol Proposal without any explanation even after the Direct Negotiation Process had already become binding on PeruPetro.[386] Fifth, PeruPetro engaged in an irregular bidding process when it declared Graña y Montero, a sole bidder, as the winner of the International Public Bidding Process.[387] Sixth, MEM failed to ensure that due process was accorded to Amorrortu in the Direct Negotiation Process.[388] These

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[381] USPTPA Preamble (**CLA-2**).

[382] USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

[383] *See* CWS – 1 [Amorrortu] at ¶ 85.

[384] *Id*. at ¶ 83.

[385] *See* CWS – 1 [Quiroga] at ¶ 105.

[386] *Id*. at ¶¶ 116-192.

[387] *See* CER – 1 [Yaya] at ¶¶ 160-161, 171.

[388] *See* Peruvian Ministry of Energy and Mines, Sectors, Ascribed Organs, https://www.minem.gob.pe/_detalle.php?idSector=21&idTitular=9314&idMenu=sub9239&idCateg=1748 (last accessed 11 September 2020). PeruPetro is an Ascribed Organ to the Peruvian MEM.

actions were taken as part of PeruPetro's governmental mandate to negotiate and monitor contracts on behalf of Peru. Therefore, it is squarely within the authority delegated to PeruPetro by Peru vis-à-vis the petroleum sector of Peru's economy.

280. PeruPetro is an enterprise of Peru because it is constituted under Peruvian law.[389] Additionally, Peru's obligations under Chapter 10 of the USPTPA applies to the above-referenced conducts of PeruPetro because those actions, as explained, were taken in exercise of governmental authority delegated to PeruPetro by Peru.

281. In a similar manner, under the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts (the ***ILC Articles***), a state can be held responsible for, among others: (i) conducts of its organs; and/or (ii) conducts of persons or entities exercising elements of governmental authority.[390] Article 4 provides as follows:

> *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial **<u>or any other functions</u>**, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
> *An organ includes any person or entity which has that status **<u>in accordance with the internal law of the State</u>**.*[391]

282. Therefore, "*State organs*" do not only include the quintessential branches of government, namely the legislature, judiciary or executive branches. This reference "*covers all the individual or collective entities which make up the organization of the State and **<u>act on its behalf</u>**.*"[392] Additionally, "*the reference to a State organ in*

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[389] *See* Organic Hydrocarbons Law No. 26221, 13 August 1993 (**CLA-45**).

[390] ILC Arts. on State Responsibility, Art. 5.

[391] *Id*., Art. 4 (emphasis added).

[392] Draft Articles Commentary, p. 40 at ¶ 1 (emphasis added).

*article 4 is intended in the most general sense. It is not limited to the organs of the central government.*"[393] Moreover, "*the term is one of extension, not limitation, as is made clear by the words 'or any other functions.'*"[394] Further, "*it is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as acta iure gestionis.*"[395]

283. Under Article 4 of the ILC Articles, it is also irrelevant that a person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under color of authority, the actions in question will be attributable to the state.[396]

284. Furthermore, according to the Commentary on the Draft Articles:

> *In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or* ***corporations*** *may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision.* ***The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under internal law****.*[397]

285. The Draft Articles Commentary also explains the extent to which internal law is relevant in determining the status of a state organ. The Draft Articles Commentary

[393] *Id*. at ¶ 6.

[394] *Ibid*.

[395] *Ibid*.

[396] *Id*. at p. 41, ¶ 13.

[397] *Id*. at p. 39, ¶ 7 (emphasis added).

states that "*it is not sufficient to refer to internal law for the status of State organs*"[398] because:

> *In some systems the status and functions of various entities are determined **not only by law but also by practice**, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, **and not the very broad meaning it has under article 4**.*[399]

286. Therefore, in determining whether an entity is a state organ, both internal law and practice are relevant, and the tribunal should consider its "*very broad meaning.*"[400]

287. On the other hand, Article 5 of the ILC Articles provides as follows:

> *The conduct of a person or entity which is not an organ of the State under article 4 but **which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law**, provided the person or entity is acting in that capacity in the particular instance.*[401]

288. Article 5 provides an alternative means in which a state may be held responsible for conducts of other persons or entities not considered "organs" of the state in the sense of Article 4. This situation arises where such person or entity

[398] *Id*. at. p. 42, ¶ 11.

[399] *Ibid*. (emphasis added).

[400] *Ibid*.

[401] ILC Arts. on State Responsibility, Art. 5 (emphasis added).

exercises some elements of governmental authority. In this regard, the Draft Articles Commentary explains that:

> *The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, **as well as situations where former State corporations have been privatized but retain certain public or regulatory functions**.*[402]

289. The Commentary further explains that the generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority, such as "*public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies.*"[403] It also notes that for purposes of Article 5, an entity is covered "*even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the state.*"[404]

290. As noted by the tribunal in *EDF*,[405] in order for an act to be attributed to the state under ILC Article 5, two cumulative conditions must be fulfilled: (i) the act must be performed by an entity empowered by the internal law of the state to exercise elements of governmental authority; and (ii) the act in question must be performed by the entity in the exercise of the delegated governmental authority.

291. Here, PeruPetro's conduct is attributable to Peru because PeruPetro is an organ or agent of Peru established under Peruvian law, and at every material time was

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402 Draft Articles Commentary at p. 40, ¶ 1 (emphasis added).

403 *Id*. at ¶ 2.

404 *Id*. at ¶ 7

405 *See EDF v. Romania*, Award (CLA-4) at ¶ 191.

exercising governmental authority. First, there is abundant information on PeruPetro's website establishing that it is an organ or agent of Peru, or that it was empowered to exercise certain governmental authority. Second, the various actions of PeruPetro in question were within the scope of its delegated powers.

292. PeruPetro was established under the internal laws of Peru. Specifically, Law No. 26221 states that PeruPetro was created to "*reformulate the State's business role*" and "*restructuring of the Energy and Mining Sector.*"[406] By way of background information on PeruPetro's website, it is stated that PeruPetro is the "*new state company*" that assumes the rights and obligations of PetroPeru (the predecessor state company).[407]

293. Under the "*about us*" tab on the website, PeruPetro is described as:

> *[T]he **State company, on behalf of the Peruvian State** and it is responsible for **promoting, negotiating, underwriting and monitoring contracts for exploration and exploitation of hydrocarbons in Peru**.*[408]

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[406] *See* PeruPetro, History, https://www.perupetro.com.pe/wps/portal/corporativo/PerupetroSite/perupetro%20s.a./historia/!ut/p/z1/pZLLDoIwEEW_xS9ooQ_dYkAq4VWsgt0YVoZE0YXx-23RuGPGxOmmTc7tvZ0OsaQjduy fw7l_DLexv7jz0cpTGSZcKR5kaV2sqOYmzozbFDkl7QTQmYoosfP6ppQf_QxgagbpDeOI3gHz-lSEsP8EQP5cIP4OAPyNhvUTAOVfI3oPAPmDHYPzewDS50j_PfDP_3vA_jJ_AGDh8WyJxRALZdD5EgH8DEF AEgsQSA8ZRywYcoNS2CsaJKTeIBmCCgEkRRolK0Hu1_23Ojps3ytavAAnjdR6/dz/d5/L2dBISEvZ0FBIS9n QSEh/ (last accessed 22 August 2020).

[407] PeruPetro, History, https://www.perupetro.com.pe/wps/portal/corporativo/PerupetroSite/perupetro%20s.a./historia/!ut/p/z1/pZLLDoIwEEW_xS9ooQ_dYkAq4VWsgt0YVoZE0YXx-23RuGPGxOmmTc7tvZ0OsaQjduy fw7l_DLexv7jz0cpTGSZcKR5kaV2sqOYmzozbFDkl7QTQmYoosfP6ppQf_QxgagbpDeOI3gHz-lSEsP8EQP5cIP4OAPyNhvUTAOVfI3oPAPmDHYPzewDS50j_PfDP_3vA_jJ_AGDh8WyJxRALZdD5EgH8DEF AEgsQSA8ZRywYcoNS2CsaJKTeIBmCCgEkRRolK0Hu1_23Ojps3ytavAAnjdR6/dz/d5/L2dBISEvZ0FBIS9n QSEh/ (last accessed 22 August 2020).

[408] *Ibid*. (emphasis added).

294. The webpage ends with the following statement:

> *In virtue of this rule, which aims to promote investment in hydrocarbon exploration and exploitation,* ***the Peruvian government created PERUPETRO S.A. as a State Enterprise*** *Sector Private Law Energy and Mines, which began operations on November 18, 1993.*[409]

295. PeruPetro's own website makes clear that it is a "*state company,*" and also that it acts "*on behalf of the Peruvian State.*" As noted previously under Article 4(1) of the ILC Articles and explained in the Commentary, reference to "*State organs*" covers entities which act on the state's behalf. Because PeruPetro is such an entity, as expressly stated on its website, there can be no doubt that it is an organ of Peru.

296. Therefore, as long as PeruPetro is a state organ acting on behalf of Peru, it is inconsequential that under Peruvian law PeruPetro possesses a separate legal identity, or is considered a private enterprise.

297. Alternatively, even if PeruPetro is not considered an organ of Peru, its conduct is still attributable to Peru under Article 5 of the ILC Articles because: (i) it is empowered by Peruvian law to exercise elements of the Peruvian government authority; and (ii) the conduct in question was performed by PeruPetro in the exercise of the delegated Peruvian governmental authority.[410]

298. There is no doubt that PeruPetro performs "*certain public or regulatory functions.*"[411] The mission statement on its website states as follows:

> *We are the organization that manages the reserves and resources of hydrocarbons with quality,* ***to contribute to the sustainable development of Peru, harmonizing***

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[409] *Ibid*. (emphasis added).

[410] *See EDF v. Romania*, Award (**CLA-4**) at ¶ 191.

[411] *See* Draft Articles Commentary, p. 42 at ¶ 1.

> ***<u>the interest of the State, the community and investors</u>***.[412]

299. An entity saddled with the responsibility of ensuring the sustainable development of a state is necessarily empowered to exercise governmental authority in ensuring that such governmental objective is achieved. Similarly, any action taken by an entity to establish a balance between the state's interest on the one hand, and the interests of the communities within the state as well as investors in the state on the other hand, must also necessarily utilize governmental powers to achieve those goals. It is this governmental stamp of approval that gives legitimacy to the entity's actions. Without such legitimacy, the actions would be ineffective. Therefore, by declaring its mission to include these responsibilities, PeruPetro has expressly certified that it performs public functions based on the delegated governmental authority.

300. Under the "*About us*" section of PeruPetro's website, the purpose of the company includes, among others: (i) to promote hydrocarbons investment in exploration and exploitation activities; (ii) to negotiate, execute and monitor contracts and technical evaluation agreements; (iii) to assume the appropriate payment of fee, overfee and income participation; (iv) to propose to the Ministry of Energy and Mines other policy options related to hydrocarbon exploration and

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[412] *See* PeruPetro, Mission and Vision, http://www.perupetro.com.pe/wps/portal/corporativo/PerupetroSite/perupetro%20s.a./misi%C3%B3n%20y%20visi%C3%B3n/!ut/p/z1/pZNBT8MgFIB_i1cvD2kL81i1K9Z2jq2LKxeDyrRxds3azGS_3tJsB7PwumRwAfJ9jwc8QMESVKV35aduy02l1928UOx1QiNfCP8miafZiEg_f0jybhARCi89QBwtJKDcfpaSg-8AxIhivvD8Ab8D3H4c3AWo3wPI_jzH_R5AfG864FsA8W8Jx30L_PeJjIhk45BJJmm8OL2_E-CS97OAOqd-EEDh5VV0Pne9X_jIYA4KVL01u_sv8_4NxUqvG2PXmlZv28nmw0AR0COUlk0LBbkObGYKK54w4ShAJGUHAPsdWAT2HOBAJtlADmMfPwWnHh7Be6J4BCEGTiFnQ0mmHOamgvpncWzLfW7e9qs6mtkufq_-AIPfqOo!/dz/d5/L2dBISEvZ0FBIS9nQSEh/ (last accessed 9 September 2002) (emphasis added).

exploitation; (v) to participate in development of sector plans; (vi) to coordinate with the corresponding entities, compliance with the provisions related to environmental preservation.[413]

301. The aforementioned functions cannot be performed without having some sort of governmental backing. For instance, an entity without any affiliation to the government cannot promote investments in the form of exploration and exploitation in a country's hydrocarbons sector. Neither would such an entity be able to negotiate, execute or monitor contracts with investors on behalf of the government. Similarly, it cannot prescribe fees to be paid by industry players, nor can it propose policies to the government through governmental ministries. Therefore, these functions are clearly a reflection of governmental authority exercised by PeruPetro.

302. Further, under the "*negotiation & contracts*" section of PeruPetro's website, PeruPetro *"[represents Peru]"* and *"negotiates, signs and monitors contracts about hydrocarbons."*[414] Again, an entity cannot represent a state in negotiations,

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[413] *See* PeruPetro, About Us, http://www.perupetro.com.pe/wps/portal/corporativo/PerupetroSite/perupetro%20s.a./quienes%20somos/!ut/p/z1/pZNRT4MwEID_jy93ltLOR1RGRZjrxuLoi0HtlDgZGWQm-_XSZTMxC4eJ7Qttvu-u1x5gYAmmKnblW9GWm6pYd-vciKcJC7lS_DKOpukINc9u46z7SJHD4wHAnhEgmH4_RHb0ewA1YpSvPD7gd0C_H_nXPukfACK_zGj_ABC-Nx3wHUD4Vyhp3wG_fdQhajEOhBaaRYvz-zsDiPxpgnR-B_zn_R1g_tJ_BGDo9sw7X_a9f3AnYA4GTL21u5t3-_IB-apYN9btNW2xbSebVwu5z05QUjYt5Hjhu8oM1XxBLEkANRNHgPq7qAjiwaeBVIuBM4w5XYVkHh3Bu2d0BKUGqtCzoUMmEua2gvpz8TOW-8w-71d1OHNTfX0Dp4YHJw!!/dz/d5/L2dBISEvZ0FBIS9nQSEh/ (last accessed 9 September 2020).

[414] *See* PeruPetro, Negotiation & Contracts, http://www.perupetro.com.pe/wps/portal/corporativo/PerupetroSite/negociacion%20y%20contratacion/%C3%A1reas%20disponibles%20para%20contrataci%C3%B3n/!ut/p/z1/pZNRT4MwEID_jy93ltLqIyqjIky6sTj6YlA7JU5GBpnJfr10mSZm4TCxfWmb77u21ysYWIKpy131WnbVpi7X_bww4nHKQq4UP4-jLL1AzfObOO8HeebBwwHAgRYgmGE_RX70BwDlccKP_Cuf9A8Asb_Maf8AEL6XjfgOIPxLlLTvgN8-

execution and monitoring of contracts if the state has not expressly bestowed on such entity legitimate governmental authority. There is therefore no doubt that PeruPetro is empowered by Peru to exercise governmental authority in carrying out its functions.

303. In sum, actions taken by PeruPetro with regard to Amorrortu and Baspetrol are attributable to Peru because PeruPetro is an organ of Peru, or because PeruPetro was exercising elements of governmental authority at all relevant times. Therefore, the international obligations set forth in the USPTPA applies to PeruPetro's conducts culminating in this dispute. The same is true with respect to the actions of Nadine Heredia, Ortigas, and all the other agencies that directly or indirectly participated in the corruption orchestrated to benefit Graña y Montero.

### C. PeruPetro's Corruption Violated Peru's Fair And Equitable Standard Obligations

304. This reprehensible and unlawful course of conduct violates the fair and equitable treatment obligations guaranteed by the USPTPA. Article 10.5 of the USPTPA requires Peru to accord covered investments "*treatment in accordance with customary international law, including fair and equitable treatment.*"[415] The standard "*fair and equitable treatment*" is not defined in the Treaty. But it is by now well established that fair and equitable treatment requires a host country (i) to abide by customary principles of international law; (ii) to honor the reasonable expectations of investors; (iii) to refrain from conduct that is arbitrary, grossly unfair, unjust or

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[415] USPTPA Investment Chapter (**CLA-1**), Art. 10.5.

idiosyncratic or discriminatory; and (iv) to act in good faith. Peru failed to comply with each of these requirements when it implemented a corrupt scheme to deprive Amorrortu of his substantive right to resume his operation of Block III (and IV) through direct negotiation.

1) FAIR AND EQUITABLE TREATMENT: VIOLATION OF CUSTOMARY PRINCIPLES OF INTERNATIONAL LAW

305. The phrase "*fair and equitable treatment*" is not defined in the Treaty. But the USPTPA makes clear that the fair and equitable treatment requirement guarantees the customary principle of international law of minimum standard of treatment of aliens, including "*all customary international law principles that protect the economic rights and interests of aliens*."[416] Peru's Corruption Scheme is a flagrant violation of the customary principles of international law. Indeed, there is no dispute that "*corruption is universally condemned.*"[417] Unfortunately, corruption "*remains widely practiced and infects may aspects of life; foreign investment is no exception.*"[418] But the fact that this infectious flagellum has creeped into the world of foreign investment does not negate its unlawfulness. A government that exercises its discretion to contract based on corruption violates customary principles of international law, and a violation of customary principles of international law, by definition, is a violation of the fair and equitable treatment obligations of Peru under the USPTPA.

306. International arbitration tribunals have not hesitated to hold that corruption is a clear violation of customary principles of international law. The first international

[416] USPTPA Investment Chapter (**CLA-1**), Annex 10-A.

[417] I. Devendra, *State Responsibility for Corruption in International Investment Arbitration* (2019) (**CLA-68**), p. 248.

[418] *Ibid*.

arbitral tribunal of record to denounce corruption was the tribunal that issued the ICC Award No. 1110 in 1963. That arbitration arose out of a commission agreement between a foreign investor and a company in Argentina that agreed to procure a series of supply contracts with the government of Argentina for the foreign investor. After determining that the commission contract contemplated the payment of bribes to officers of the government of Argentina "*for the purpose of obtaining the hoped-for business,*" the sole arbitrator dismissed the arbitration for lack of jurisdiction. The sole arbitrator reasoned that "*it cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.*"[419] The sole arbitrator explained that *"[a]lthough these commissions were not to be exclusively for bribes, a very substantial part of them must have been intended for such use. Whether one is taking the point of view of good government or that of commercial this it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress.*"[420]

307. Critically, the sole arbitrator admonished the parties that:

> *Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.*[421]

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[419] ICC Award 1110, 1996 (**CLA-60**) at ¶ 16.

[420] *Id*. at ¶ 20.

[421] *Ibid*.

308. In a prescient final statement, the sole arbitrator emphasized the deterring impact of his award and its importance in international public policy, "*[p]arties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.*"[422] And the sole arbitrator made clear that the application of this principle should not inure to the benefit of any party participating in the corruption:

> *[C]are must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other*.[423]

309. This ruling was the genesis in international arbitration of the principle that corruption is anathema to the regime of international commerce and investment. The principles and admonishments of ICC Award 1110 have echoed through a range of arbitral tribunals all of which explicitly rejected claims arising out of corrupt investments.[424]

310. In the field of investment arbitration, the application of this anti-corruption principle was more controversial given the concern that host states may rip the benefits of their own misconduct. Notwithstanding, numerous investment arbitration tribunals have expressed their rejection of corruption, as a matter of established international law.

311. The seminal case of *World Duty Free v. Kenya*,[425] is illustrative of how corruption has been rejected as contrary to international law. The *World Duty Free*

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[422] *Id*. at (**CLA-60**) at ¶ 23.

[423] *Id*. at ¶ 21.

[424] *World Duty Free v. Kenya*, Award (**CLA-65**) at ¶¶ 149-150.

[425] *See World Duty Free v. Kenya*, Award (**CLA-65**).

dispute arose out of the expropriation by the Government of Kenya of duty free concessions at two international airports. The claimant admitted that its chief executive officer had made a personal donation of US $2,000,000 to the president of Kenya before obtaining the concessions. The US $2,000,000 payment was undisputed. However, the parties differed on the nature of the payment. The claimant argued the payment was a donation consistent with the applicable protocol while the state argued that the donation was a bribe in disguise that voided the investment.

312. The *World Duty Free* tribunal first concluded that the claimant had made the payment as a bribe for the concessions. "*Those payments were made not only in order to obtain an audience with President Moi (as submitted by the Claimant), but above all to obtain during that audience the agreement for the President on the contemplated investment. The Tribunal considers that those payments must be regarded as a bribe in order to obtain the conclusion of the 1989 Agreement.*"[426]

313. Then, the tribunal went on to discuss the consequences of the bribe. The tribunal began by noting that "*bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries.*"[427] Then the tribunal noted that a number of international conventions also condemned corruption, including the Declaration against Corruption and Bribery in International Commercial Transactions adopted on December 16, 1996 by the General Assembly of the United Nations.[428] In these conventions, states "*have shown*

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[426] *Id*. at ¶ 136.

[427] *Id*. at ¶ 142.

[428] *Id*. at ¶ 143.

*their common will to fight corruption, not only through national legislation, as they did before, but also through international cooperation. In doing so, States not only reached a new stage in the fight against corruption but also solidly confirmed their prior condemnation of it.*"[429] The tribunal went on to conclude that "*[i]t would be an affront to public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct.*"[430] The tribunal recognized that a "*highly disturbing*" consequence of the holding was the possibility that Kenya would benefit from the corrupt acts of its highest officers.[431] However, the tribunal rejected that concern reasoning that Kenya would receive the same fate if it were on the side of the claimant. The analysis of this point is so important to this case that is worth restating verbatim:

> *. . . the objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, but accidentally, if I may say so. The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, potior est condition defendentis*.[432]

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[429] *Id*. at ¶ 146.

[430] *Id*. at ¶ 161 (discussing the English common law principles regarding public policy).

[431] *Id*. at ¶ 180 (citations omitted).

[432] *Id*. at ¶ 180 (citations omitted).

314. Similarly, the tribunal in *Metal-Tech* held that a contract procured by bribes was not a legal investment under the underlying investment treaty.[433] And in *Inceysa Vallisoletana v. El Salvador*, the tribunal concluded that treaty protections apply only to lawful investments.[434] The same principle was followed by the tribunal in *Plama Consortium v. Bulgaria*.[435]

315. While most of these cases have focused on addressing corruption as a defense on the basis that arbitral tribunals should close their doors and reject corrupt investments, a number of tribunals have also held that corruption is a claim that can be asserted by a foreign investor. The case of *EDF* is illustrative. The claimant contended that the government engaged in actions that resulted in the claimant's loss of holdings in Romania due to their refusal to pay bribes to an official. The arbitral tribunal recognized "*that a request for a bribe by a state agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy.*"[436]

316. The emphasis on international public policy in the *EDF* decision makes clear that corruption is the antithesis of customary principles of international law; and therefore, a host state that implements a corruption scheme that harms a foreign

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[433] *Metal-Tech v. Uzbekistan*, Award (**CLA-62**) at ¶ 422.

[434] *See Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 (**CLA-69**) at ¶¶ 256-257.

[435] *See Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (**CLA-70**) at ¶¶ 139-146.

[436] *See EDF v. Romania*, Award (**CLA-4**) at ¶ 221.

investor is in violation of customary principles of international law, and hence in violation of the fair and equitable standard obligations.[437]

317. This conclusion is not at all controversial and is also based on the notion that customary international law also encompasses the principle of good faith. As the *Teco* tribunal explained "*the Arbitral Tribunal also considers that the minimum standard is part and parcel of the international principle of good faith. There is no doubt in the eyes of the Arbitral Tribunal that the principle of good faith is part of customary international law established by Article 38.1(b) of the Statute of the International Court of Justice, and that the lack of good faith on the part of the State or one of its organs should be taken into account in order to assess whether the minimum standard was breached.*"[438]

318. Furthermore, good faith is a necessary element of fair and equitable treatment. Indeed, the tribunal in *Tecmed v. Mexico* observed that fair and equitable treatment "*is an expression and part of the bona fide principle recognized in international law.*"[439] The expectation that a host state will act in good faith is fundamental to a foreign investor's decision to invest. Indeed, no investor would invest in a foreign nation with the expectation that the host state would act in bad faith. The tribunal in *Saluka v. Czech Republic* remarked that *"[t]he expectations of foreign investors*

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[437] *See Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Award, 18 July 2014 (**CLA-72**) (In *Yukos*, the Tribunal was presented with a claim that Russia had violated the fair and equitable treatment standard obligation by launching a corruption scheme that caused damages to the foreign investor. The tribunal did not have to rule on this claim, as the tribunal found that the actions of the government constituted expropriation in violation of the Treaty).

[438] *Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (**CLA-73**) at ¶ 456 (hereinafter, ***Tecmed v. Mexico***).

[439] *Tecmed v. Mexico*, Award (**CLA-73**) at ¶ 153.

*certainly included the observation by the host State of such well-established fundamental standards as good faith, due process, and nondiscrimination.*"[440]

319. An examination of the circumstances of this case as described above reveals that Peru's conduct not only was motivated by corruption but lacked good faith and evidenced bad faith that shocks the conscience. Indeed, it was not enough for Peru to not consider the Baspetrol Proposal, but it also orchestrated an International Public Bidding Process plagued with corruption in violation of Amorrortu's rights as protected under the USPTPA.

320. Corruption in and of itself is sufficient to establish a violation of customary principles of international law. But corruption is further a violation of customary principles of international law in that by definition corruption constitutes and embodies bad faith.

2) FAIR AND EQUITABLE TREATMENT: VIOLATION OF LEGITIMATE EXPECTATIONS

321. In interpreting the fair and equitable treatment standard under customary principles of international law, the neuralgic objective is the protection of the legitimate expectations of a protected investor, especially when specific representations have been made by the state and relied upon by the investor — to induce the foreign investment. As explained by the tribunal in *Thunderbird Gaming Corp v. Mexico*:

> *Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a*

[440] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**CLA-23**) at ¶ 303 (hereinafter, ***Saluka v. Czech Republic***).

> *failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.*[441]

322. The protection of legitimate expectations is well established in investment arbitration. A state that generates legitimate expectations in an investor and then directly or indirectly destroys those expectations is in breach of its fair and equitable treatment obligations and must compensate the investor for any damages suffered.[442] "*The standard of 'fair and equitable treatment' is . . . closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the 'fair and equitable treatment' standard . . . must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations.*"[443] Simply put, "*fair and equitable treatment meant to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.*"[444]

323. To establish a breach of the fair and equitable treatment obligations based on the allegation that Peru breached Amorrortu's legitimate and reasonable expectations, Amorrortu has to establish that (a) Peru made a promise or assurance; (b) Amorrortu relied on that promise or assurance as a matter of fact; and (c) such reliance was reasonable.[445] As the tribunal in *Micula v. Romania*: "*[t]here must be*

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[441] *International Thunderbird Gaming Corporation v. The United Mexican States*, Award, 26 January 2006 (**CLA-74**) at ¶ 147.

[442] *See Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (**CLA-75**) at ¶ 667 (hereinafter, ***Micula v. Romania***).

[443] *Saluka v. Czech Republic*, Partial Award at ¶ 302.

[444] *Tecmed v. Mexico*, Award (**CLA-73**) at ¶ 154.

[445] *See Micula v. Romania*, Award (**CLA-75**) at ¶ 668.

*a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability. It is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance. The element of reasonableness cannot be separated from the promise, assurance or representation, in particular if the promise is not contained in a contract or is otherwise stated explicitly. Whether a state has created a legitimate expectation in an investor is thus a factual assessment which must be undertaken in consideration of all the surrounding circumstances.*"[446] "*The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.*"[447]

324. This principle is particularly applicable in investment disputes arising out of bilateral treaties that explicitly condemn corruption like the Agreement between Peru and the United States that is at issue in this arbitration. The USPTPA explicitly confirms the promise of the subscribing state to fight the plague of corruption.

325. That promise rings hallow in light of the fact that Graña y Montero obtained practically all its government contracts in Peru through corruption. Peru’s flagrant

[446] *Micula v. Romania*, Award (**CLA-75**) at ¶ 668.

[447] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (**CLA-22**) at ¶ 340 (hereinafter, ***Duke Energy v. Ecuador***).

breach of its Treaty obligations prejudiced Amorrortu, who had the legitimate right to formalize an agreement to exploit and maintain Blocks III and IV.

326. The USPTPA reflects the commitment of Peru and the United States to fight corruption in all its forms to enhance and protect foreign investors and their investments. The objectives of the USPTPA are set forth in the Preamble, as the Legislative History of the USPTPA confirms.

> *The Preamble to the Agreement provides the Parties' underlying objectives in entering into the Agreement and provides context for the provisions that follow.*[448]

327. In the Preamble, Peru and the United States agree to "*prevent and combat corruption, including bribery, in international trade and investment.*"[449]

328. As its Legislative History confirms, this anti-corruption promise in the Preamble permeates the entire Treaty. Section B of Chapter 19 is titled Anti-Corruption. In this anti-corruption section, "*[t]he Parties affirm their commitment to prevent and combat corruption, including bribery, in international trade and investment.*"[450] The Parties further commit to "*promoting, facilitating, and supporting international cooperation in the prevention and fight against corruption.*"[451] To this end, the Parties reaffirm their existing rights and obligations under the 1996 Inter-American Convention Against Corruption and agreed to implement measures to prevent and combat corruption consistent with the 2003 United Nations Convention against Corruption.[452]

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[448] The United States-Peru Trade Promotion Agreement, Summary of the Agreement, 14 December 2017 (**CLA-76**), p. 1.

[449] USPTPA Preamble (**CLA-2**).

[450] USPTPA Chapter Nineteen (**CLA-42**), Art. 19.7.

[451] *Ibid*.

[452] *Id*., Art. 19.8.

329. To this end, Article 19.9, which is titled "*Anti-Corruption Measures*" states that each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment, for:

> (a) A public official of that Party or a person who performs public functions for that Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as favor or promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
>
> (b) Any person subject to the jurisdiction of that Party intentionally to offer or grant, directly, or indirectly, to a public official of that Party or a person who performs public functions for that Party any article of monetary value or other benefit, such as a favor, promise, or advantage for himself or for another person in exchange for any act or omission in the performance of his public functions;
>
> (c) Any person subject to the jurisdiction of that Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly to a foreign official for that official or for another person, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and
>
> (d) Any person subject to the jurisdiction of that Party to aid or abet, or to conspire in, the commission, of any of the offenses described in subparagraphs (a) through (c).

330. Each Party further agreed to "*ensure that enterprises shall be subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions*"[453] for any of the above offenses.

331. But Chapter 19 is not the only anti-corruption Chapter in the USPTPA. As the Legislative History confirms, "*Chapter Nine builds on the anticorruption provisions of*

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[453] *Id*., Art. 19.9(3).

*Chapter Nineteen, including by requiring each Party to maintain procedures to declare suppliers that have engaged in fraudulent or other illegal actions in relation to procurement ineligible for participation in the Party's procurement.*"[454]

332. Not surprisingly, in the US. Senate, the USPTPA was approved in part precisely because of the "*strong anti-corruption procedures*"[455] that were included in the Agreement, which was supposed to establish "*a secure, predictable legal framework for U.S. investors in Peru.*"[456] Throughout the years, U.S. investors have been undermined by the rampant corruption and arbitrariness in Peru, and a number of United States Senators were concerned about corruption in Peru. As the exchange between Senator Bunning and the Assistant Trade Representative Eissenstat demonstrate, Senators voted for the USPTPA only after receiving assurance that Peru had in fact agreed to fight corruptions and give U.S. investors in Peru the same protection that Peruvians investors would receive in the United States:

*Mr. Eissenstat: Thank you, Senator Bunning. We have had significant investment disputes with Peru over a very, very long period of time, and we have raised those with them in many different forums. I think that one of the things that the trade agreements enable us to do is engage on a more in-depth and deeper level in these discussions. I think, as part of that, we have made——.*

Senator Bunning: Well, are they in the agreement? That is my question.

*Mr. Eissenstat: Yes. That is a great question, and I was going to get to that. Let me get to that, first. What the agreement attempts to do on investment is make our investors in Peru get the same type of protections that a Peruvian investor would get in the United States, and in that sense get a level playing field so there will not be arbitrary decisions against our investors in Peru. It does that through a number of mechanisms, both procedural and substantive, including transparency provisions,*

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[454] The United States-Peru Trade Promotion Agreement, Summary of the Agreement, 14 December 2017 (**CLA-76**), p. 11.

[455] United States-Peru Trade Promotion Agreement, S. Hrg 109-995 Before the Committee on Finance, 109 Cong. (2006) (**CLA-77**), p. 11.

[456] United States-Peru Trade Promotion Agreement, S. Hrg 109-995 Before the Committee on Finance, 109 Cong. (2006) (**CLA-77**), p. 7.

*anti-corruption provisions, the ability to go to investor state arbitration in the event there is a dispute, so it does provide significant new guarantees that are not present, should this agreement not be followed.*

*Senator Bunning: In other words, you are telling me that if this agreement is approved, American companies will have recourse if taxation is inappropriately applied by the Peru government? We will have the same level field that we would have as though they were in the United States?*

*Mr. Eissenstat: Yes, Senator. It is in the agreement. There is a very extensive investment chapter. It does include procedural and substantive guarantees for investors in Peru across the board, and this will enable companies that have had disputes, similar to those in the past, to go to investor state arbitration. Should they be treated in an unfair manner, in a discriminatory manner by the government, should they have their property expropriated without compensation, they will have remedies. That is one of the major benefits of this agreement.*

*Senator Bunning. At the same subcommittee hearing, there was a discussion about transparency and the rule of law in the court system in Peru. Again, there have been numerous complaints about the treatment of international investors by the Peruvian court system. Without due process and fair treatment by the court system, it is difficult for any businessman to feel comfortable investing in Peru. Obviously, this affects not only American investors, but all investors, including the Peruvian investors themselves. Assistant USTR Vargo, one of your predecessors, told the House subcommittee back in October of 2004 that the administration and members of Congress need to have confidence that the rule of law is respected by our respective FTA partners. Is that factual in this agreement?*

*Mr. Eissenstat: Yes. The rule of law is very important and should be respected by our FTA partners. In selecting partners, we look to those governments that are embracing the transparency/openness/democratic principles.*

333. Indeed, Amorrortu testified in front of the Senate Committee and denounced the atrocities that Peru had committed against him. His concerns were assuaged by the Treaty's corruption protections.[457]

334. Therefore, when he formed Baspetrol, Amorrortu had the reasonable expectation that Peru was going to live up to its promise and comply with its anti-corruption obligations. Instead of complying with its obligations, Peru launched a plan to hide its corruption practices behind a facade of legitimacy.

[457] *See* CWS – 1 [Amorrortu] at ¶ 31.

335. Peru understood that when the majority of the profitable government contracts are awarded directly to the same company, corruption becomes too obvious. Instead, Peru adopted the practice of commencing international public biddings in which all competitors were disqualified for a myriad of arbitrary reasons, except the company that had prepaid the required bribes.[458] That is what happened in this case. Amorrortu presented the Baspetrol Proposal to initiate the Direct Negotiation Process with PeruPetro with the legitimate expectation that the Proposal was going to be evaluated on its merits without any corrupt bias. But that was not the case. Graña y Montero had a corrupt arrangement with Peru to obtain all the public contracts it desired, and that meant that the contracts for the operation of Blocks III and IV had to go to a public bidding process in which Graña y Montero was the only qualified company. That is a clear violation of Amorrortu's legitimate expectations.

#### 3) FAIR AND EQUITABLE TREATMENT: VIOLATION BASED ON ARBITRARY AND DISCRIMINATORY CONDUCT

336. A host state violates the fair and equitable treatment standard if its treatment of an investor or investment is arbitrary, grossly unfair, unjust, or idiosyncratic or discriminatory, or if it involves lack of due process leading to an outcome which offends judicial propriety, or a complete lack of transparency and candor in an administrative process.[459]

337. In international law, the most widely recognized definition of arbitrary conduct comes from the International Court of Justice in the *ELSI* case. In that case, the

[458] *See* CER – 1 [Yaya] at ¶ 16; *see also* CER – 1 [Durand] at ¶¶ 58-65.

[459] *See Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**CLA-28**) at ¶ 98 (hereinafter, ***Waste Management, Inc. v. The United Mexican States***); *see also Teco v. Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013 (**CLA-78**) at ¶ 454.

Court held that *"[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law . . . It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."*[460] The essence of arbitrary conduct is that it is not based on reason, or that is taken for reasons ***other than those put forward***.[461]

338. In the *Lemire* case, the tribunal went on to quote with approval Professor Christoph Schreuer's definition of "*arbitrary,*" which he had put forth as an expert in the *EDF* dispute and which that tribunal had accepted. Under this definition, arbitrary conduct is:

> a) a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
> b) a measure that is not based on legal standards but ***on discretion, prejudice or personal preference***;
> c) a measure taken for reasons that are different from those put forward by the decision maker;
> d) a measure taken ***in willful disregards of due process and proper procedure***.[462]

339. The tribunal in *Crystallex v. Venezuela* embraced a similar definition: "*In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards **but on excess of discretion, prejudice or personal preference**, and taken for reasons that are different from those put forward by the decision maker.*"[463] In

[460] *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, Judgment, 20 July 1989, ICJ Reporter 15 (**CLA-79**) at ¶ 128.

[461] *See Lemire v. Ukraine*, Decision on Jurisdiction and Liability at ¶ 262 (describing arbitrariness as including conduct "*founded on prejudice or preference rather than on reason or fact,*" and measures "*taken for reasons that are different from those put forward by the decision maker*").

[462] *EDF v. Romania*, Award at ¶ 303.

[463] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**CLA-24**) at ¶ 578 (emphasis added) (hereinafter, ***Crystallex v. Venezuela***).

*Eureko v. Poland*, the tribunal found a breach of fair and equitable treatment where the respondent "*acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.*"[464]

340. At a minimum, as the tribunal in the *Frontier Petroleum v. Czech Republic* concluded, a state violates the fair and equitable treatment obligations when It uses the law for purposes other than those for which it was created. "*Such unjust purpose include the state conspiring to use the law to inflict damage on an investment.*"[465]

341. Peru's failure to consider and evaluate the Baspetrol Proposal, Peru's purported rejection of the Proposal without any technical, legal basis or justification, and Peru's fabrication of a public bidding plagued with irregularities and corruption to ultimately benefit a hand-picked company (Graña y Montero) by the highest public servants of the government, were decisions taken for purely arbitrary and capricious reasons; and therefore, violate the fair and equitable treatment standard.

4) FAIR AND EQUITABLE TREATMENT: VIOLATION OF TRANSPARENCY

342. A host state violates the fair and equitable treatment standard if it fails to act in a transparent manner.[466] The conduct of Peru falls far short of the norms of transparency required by the fair and equitable treatment obligations.

343. The USPTPA seeks "*to promote transparency and prevent and combat corruption, including bribery, in international trade and investment*."[467] However,

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[464] *Eureko B.V. v. Republic of Poland*, Ad Hoc, Partial Award, 19 August 2005 (**CLA-80**) at ¶ 233.

[465] *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (**CLA-81**) at ¶ 300.

[466] A host state's failure to abide by its own legal system can also result in a breach of fair and equitable treatment. *See Total v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (**CLA-21**) at ¶ 333 (hereinafter, ***Total v. Argentina***).

[467] USPTPA Preamble (**CLA-2**).

Amorrortu's investments and legitimate expectations were frustrated precisely by a corrupt scheme designed to benefit a local company that bribed Peru to obtain a government contract that Amorrortu was negotiating through a process of direct negotiation.

344. In addition to the representations made by Ortigas (on behalf of PeruPetro) to Amorrortu, Peru expressly made representations regarding its intent to provide foreign investors with a stable and transparent framework for international investment in order to encourage such investments. This is clearly reflected in Peru's establishment of constitutional guarantees of nondiscriminatory treatment to foreign investors,[468] and the USPTPA.[469]

345. The international community is in agreement that transparency constitutes part of fair and equitable treatment standard. For instance, after analyzing several arbitral decisions, the OECD has taken the position that "*transparency*" is one of the requirements of the fair and equitable standard.[470]

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[468] *See* Peru's Political Constitution, December 1993 (**CLA-14**), Art. 63.

[469] USPTPA Preamble (**CLA-2**).

[470] *See* OECD (2004), Fair and Equitable Standard in International Investment Law, http://dx.doi.org/10.1787/675702255435 (last accessed 9 September 2020), p. 26; *see also* World Trade Organization, Working Group on the Relationship between Trade and Investment, 29 March 2002, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=36533&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 9 September 2020) (expressing the view that the principle of "*fair and equitable treatment*" has been in certain cases interpreted as "*requiring parties to adhere to basic norms of transparency*").

346. The tribunal in *Waste Management v. Mexico* noted that "*a complete lack of transparency and candour in an administrative process*" is a violation of the fair and equitable treatment standard.[471]

347. Peru has systematically acted without giving Amorrortu "*clear, specific, and binding representation[s]*"[472] and, furthermore, has made inaccurate and untrue representations to Amorrortu while simultaneously violating Peruvian law. Specifically, Peru failed to follow PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts, thereby avoiding mandatory procedural steps concerning information to be made available to the public in general.[473] Peru not only failed multiple times to give Amorrortu a well-reasoned response to the Baspetrol Proposal, it also induced Amorrortu to attempt to expand his investment by directly making manifestly false representations to which Amorrortu relied to his detriment, all in an attempt to hide the Corruption Scheme.

348. In fact, Amorrortu did not only expect the commencement of a direct negotiation following Ortigas' specific representation, but also expected the Direct Negotiation Process to be consistent, in accordance with Amorrortu's experience and diligent research. In other words, Amorrortu did not expect the arbitrariness with which Peru acted when Peru deliberately decided not to follow the direct negotiation procedure. Peru's "*contradictory and ambiguous*"[474] conduct can only be "*characterized by . . . [an] uncertainty which [was] prejudicial to [Amorrortu]*"[475] who

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[471] *Waste Management, Inc. v. The United Mexican States*, Award at ¶ 98.

[472] *9REN HOLDING S.A.R.L. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, 31 May 2019 (**CLA-82**), ¶ 320.

[473] *See* CER – 1 [Quiroga] at ¶ 175.

[474] *Tecmed v. Mexico*, Award at ¶ 172.

[475] *Ibid*.

systematically received inconsistent commands from Peru's officials. This lack of forthrightness in communications, questionable statements, and misrepresentations advanced by Peru constitute a breach of the fair and equitable treatment standard.[476]

349. Peru's conduct which resulted in significant detriment to Amorrortu is similar to that of the Czech Republic in *Saluka Investments v. Czech Republic.* In *Saluka*, the government was found to have breached the fair and equitable treatment standard by failing to disclose information to the investor.[477] The government had refused to discuss with the claimant its reasons for treating the investor in a discriminatory manner.[478] Here, Peru failed to give Amorrortu any explanation regarding the decision to proceed with a public bidding process as opposed to a direct negotiation. In addition, the Baspetrol Proposal was never formally rejected, not even after Amorrortu sought clarifications.

## VI. PERU'S CONDUCT CAUSED SIGNIFICANT LOSSES TO AMORRORTU'S INVESTMENT

350. Peru’s corruption harmed Amorrortu. Corruption hurts honest investors and affected citizens alike: the former through competitive disadvantages, *e.g.* in tendering procedures, and the latter through the frustration of good-governance efforts and higher prices.[479] There is a causal link between Peru’s breach of its fair and equitable standard obligations (Section VI A). Peru’s corrupt behavior is the

[476] *See Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, 10 April 2001 (**CLA-83**) at ¶¶ 177-179.

[477] *Saluka v. Czech Republic*, Award (**CLA-23**) at ¶ 407.

[478] *Ibid*.

[479] S Mbiyavanga, *Combating Corruption Through International Investment Treaty Law* (2017) (**CLA-43**).

proximate cause of Amorrortu's harm (Section VI B), and indeed Peru cannot allege any uncertainty as to the amount of damages caused by its breach (Section VI C).

## A. THERE IS A CAUSAL LINK BETWEEN PERU'S BREACHES AND AMORRORTU'S LOSS

351. But for Peru's breach of the USPTPA Articles, the Baspetrol Proposal for operation of Blocks III and IV would have been approved and the Blocks would have produced significant oil and gas.

352. Proof of causation requires (A) cause, (B) effect, and (C) a logical link between the two to be established.[480] Cause and effect are straight forward — Cause being the wrongful acts attributable to the host state, and effect being the resulting consequence of the wrongdoing experienced by the investor.[481] In this case, the cause is Peru's refusal to follow the correct and lawful procedure for direct negotiation.

353. As noted above, Peru's refusal to follow this established Direct Negotiation Process was based on its corrupt manipulation of the process to benefit Graña y Montero. Therefore, the cause in this case is two-fold. First, Peru's decision to discontinue the Direct Negotiation Process in violation of established procedures under the Peruvian legal framework.[482] This resulted in an irregular process. Second, the corruption which induced such a decision is a violation of customary principles of international law, and is direct evidence of lack of good faith.[483]

354. The third element of causation in the causal link, the chain which leads from cause to effect. According to the *Lemire* tribunal, the causal link can be viewed from

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[480] *Id*. at ¶ 157.

[481] *Id*. ¶¶ 157-162.

[482] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**).

[483] *See* CER – 1 [Quiroga] at ¶¶ 131-156.

two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause (in our case the wrongful acts of Peru) to the final effect (the loss in value of Baspetrol); while the negative aspect permits the offender to break the chain by showing that the effect was caused — either partially or totally — not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible (like *force majeure*).[484]

355. The *Lemire* tribunal noted certain challenges with the claimant's contention that there was a causal link between the actions of Ukraine and the claimant's loss mainly because Ukraine's irregular process took place in public tenders convened for the awarding of radio frequencies in accordance with pre-established legal criteria.[485] The tribunal identified two reasons why the presence of tenders would be a problem for causation. First, there were *bona fide* third parties — and not only claimant and the media groups irregularly privileged by the authorities — who participated in the tenders. Therefore, the possibility that these third parties could have been awarded frequencies in preference over claimant must be factored into the analysis. Second, although Ukrainian law established a number of criteria for awarding frequencies by tender, the National Council was not required to explain the reasons underlying its decisions.[486]

356. Those set of facts in *Lemire* could not be more different from the situation in the present dispute. First, unlike *Lemire,* the situation in this dispute does not involve

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[484] *See Lemire v. Ukraine*, Award ¶ 163.

[485] *Id*. at ¶ 168.

[486] *Ibid*.

a *public tender* process. Rather, it was a unique Peruvian contract award process through direct negotiation. As explained earlier, this unique Direct Negotiation Process establishes a predictable legal framework that guarantees oil companies that commence a Direct Negotiation Process the exclusive technical evaluation and analysis of their proposals before any competing company is invited to participate in the process.[487] Amorrortu's enterprise, Baspetrol, was not accorded that guaranteed right. Second, and a corollary to the first point, unlike *Lemire*, there were no other *bona fide* third parties who participated in the process because this was not a typical tender process. Only Amorrortu was invited to submit the Baspetrol Proposal for direct negotiation. Baspetrol was not only technically qualified as established in the Baspetrol Proposal,[488] it was also the only company invited for direct negotiation. Peru corruptly commenced an irregular process culminating in the award of Blocks III and IV to Graña y Montero. Third, unlike the Ukrainian process in *Lemire*, where the National Council was not required to explain the reasons underlying its decisions, under Peruvian law, Perupetro was required to communicate its decision to Amorrortu. In fact, PeruPetro's silence constituted an implicit determination that the underlying project (Blocks III and IV) is available and that Baspetrol is qualified, thereby giving Amorrortu further rights to continue with the Direct Negotiation Process.[489] Therefore, the factual scenario in this present dispute undoubtedly provides a more solid basis for this Tribunal to find a causal link between Peru's

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[487] *See* CER – 1 [Quiroga] at ¶ 110.

[488] Proposal from Baspetrol SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, 27 May 2014 (**C-11**).

[489] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**).

conduct and Amorrortu's loss than the link that the tribunal in *Lemire* found to be sufficient.

## B. PERU'S ACTIONS ARE THE PROXIMATE AND FORESEEABLE CAUSE OF AMORRORTU'S LOSS

357. In this case, there is no question that in the absence of corruption, Baspetrol would have completed the Direct Negotiation Process and would have executed the contracts to operate Blocks III and IV.

358. The *Lemire* tribunal explained that *"[g]iven the characteristics of the Ukrainian process for the awarding of licenses, it is impossible to establish, with total certainty, how specific tenders would have been awarded if the National Council had not violated the FET standard."*[490] The tribunal further noted that *"[i]f it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other."*[491]

359. Additionally, one must be deemed to have foreseen the natural consequences of their wrongful acts, and to stand responsible for the damage caused.[492] Therefore, the *Lemire* tribunal determined that:

> *Proximity and foreseeability are related concepts: a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage.*[493]

360. In sum, the tribunal concluded that the specific circumstances of the case require that two links in the causal chain be analyzed and proven: (i) if the tenders

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[490] *Lemire v. Ukraine*, Award at ¶ 169.

[491] *Ibid*.

[492] *Id*. at ¶ 170.

[493] *Ibid*.

had hypothetically been decided in a fair and equitable manner, and claimant had participated in them, he (and not some of the other participants) would have won the disputed frequencies; and (ii) with these frequencies, Lemire would have been able to grow Gala Radio into the broadcasting company he had planned — a FM national broadcaster, for music format, plus a second AM channel, for talk radio.[494]

361. Interestingly, despite the situation in *Lemire* which involved a public tender with other participants, the tribunal concluded that "*Claimant has been able to prove that the initial cause (Ukraine's wrongful acts) and the final effect (Claimant's frustration to fulfil his plans and operate a nationwide FM channel plus AM informational channel) are linked through a chain of causation. And this chain of causation is proximate and foreseeable.*"[495]

362. As demonstrated above, the present dispute provides an even stronger case for this Tribunal to find causation. Peru was aware of Amorrortu's business plans; Peru could foresee that irregularities in the Direct Negotiation Process would result in the rejection of the Baspetrol Proposal thwarting Baspetrol's operation of Blocks III and IV, eventually leading to a reduction in value of the company and a loss for Amorrortu.

363. The certainty of the Direct Negotiation Process also distinguishes this case from the situation in *Bosca* where the tribunal could not determine with any certainty the outcome of the negotiation process.[496] Unlike *Bosca*, there is certainty in the Peruvian Direct Negotiation Process. As explained earlier, Amorrortu was ready, able

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[494] *Id*. at ¶ 171.

[495] *Id*. at ¶ 208.

[496] *See Bosca v. Lithuania*, Award (**CLA-46**) at ¶¶ 291-296.

and willing to commence operation of Blocks III and IV. He had done the basic groundwork putting everything in place for a successful operation. Pursuant to Peruvian law, upon initiating the Direct Negotiation Process, PeruPetro would be unable to change its mind as the Lithuanian government could have done in *Bosca* (the applicable legal framework in each situation is different). The only option for PeruPetro was to continue the Direct Negotiation Process in compliance with the principles of good faith, impartiality, and non-discrimination.[497] Therefore, all of the factors that persuaded the tribunal in *Bosca* to hold that lost profits based on the assumption of an agreed contract were "*much too remote and speculative*"[498] are not present here. The rights and entitlements of Amorrortu for lost profits in this dispute are not speculative. Amorrortu possessed a tangible right. The certainty of the Direct Negotiation Process has been undoubtedly established. Baspetrol would have been awarded Blocks III and IV but for the irregular process adopted by PeruPetro.

364. Significantly, Peru cannot prove that the refusal to commence the Direct Negotiation Process was due to causes other than Peru's wrongful conduct, that if there was no corruption in the process, Amorrortu, through Baspetrol, would not have succeeded in receiving authorizations required to operate Blocks III and IV, and that once awarded, Amorrortu would not have been able to successfully operate the Blocks. Indeed, there is no record of a Direct Negotiation Process commenced by a qualified oil company that has not concluded in the execution of a contract.

365. With Amorrortu's wealth of experience and significant success operating the Blocks in the 1990s, coupled with the technical expertise detailed in the Baspetrol

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[497] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**).

[498] *See Bosca v. Lithuania*, Award (**CLA-46**) at ¶ 301.

Proposal, it would be near impossible for Peru to show that Baspetrol would not have been awarded the license to operate Blocks III and IV, or that Baspetrol's operation of Blocks III and IV would have been anything but successful.[499]

366. In sum, causation exists between Peru's wrongful acts and the losses suffered by Amorrortu because but for such wrongful conduct, Amorrortu would not have suffered the losses and would have had a profitable operation of Blocks III and IV.

## C. PERU CANNOT ARGUE THAT THE AMOUNT OF DAMAGES CAUSED BY ITS BREACH IS UNCERTAIN

367. Although there is no single formula in investment arbitration to guide tribunals in assessing causality with respect to damages. From the analysis, it is clear that Peru has a much higher burden to overcome. The tribunal in *Gemplus v. Mexico* explained that:

> [It is] a "*general legal principle [that] when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the Claimant's claim for compensation.*"[500]

368. The *Gemplus* Tribunal further noted:

> *[I]t would be wrong in principle to deprive or diminish the Claimants of the monetary value of that lost opportunity on lack of evidential grounds when that lack of evidence is directly attributable to the Respondent's own wrongs. This is not therefore a case where the burden of proof lay exclusively on the Claimants: and, in the Tribunal's view, it was also for the Respondent to prove the contrary.*[501]

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[499] *See* CWS – 1 [Amorrortu] at II (A), II (B); *see also* Proposal from Baspetrol SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, 27 May 2014 (**C-11**), pp. 9-14.

[500] *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010 (**CLA-84**) at ¶¶ 13-92, 13-99.

[501] *Ibid*.

369. In regard to quantum (discussed fully below), the tribunal in *Crystallex* also held that any uncertainty is to be resolved in favor of the investors, where the uncertainty is the fault of the state:

> *In the Tribunal's view, this approach may be particularly warranted if the uncertainty in determining what exactly would have happened is the result of the other party's wrongdoing.*[502]

370. In this case, Peru's breaches are not only responsible for Amorrortu's loss, they are also the direct cause of any potential evidentiary limitations regarding future lost profits. But for Peru's breaches, Amorrortu would have operated the Blocks profitably and would have had records of such profits. It would therefore not be enough for Peru to raise speculative, hypothetical possibilities that might have affected the operation and/or profitability of Blocks III and IV. Rather, it is Peru that must prove that Blocks III and IV would not have been profitable. Peru cannot satisfy this burden of proof as it is manifest in the results of the operation of the Blocks by Graña y Montero.

371. As detailed below, and in the expert report on quantum and damages, the Blocks had substantial reserves and would have been profitable had Amorrortu been allowed to commence operations. Furthermore, Amorrortu has established, beyond a mere balance of probabilities, that but for the wrongdoing of Peru which constituted breaches of the USPTPA, there would have been a profitable operation of Blocks III and IV.

[502] *Crystallex v. Venezuela*, Award at ¶ 871.

## VII. AMORRORTU IS ENTITLED TO FULL REPARATION

372. As a result of Peru's breaches of the USPTPA, Amorrortu suffered significant damages. Under the USPTPA, Amorrortu is entitled to full compensation for the damages he suffered as a result of Peru's breaches to the USPTPA (Section VII A). As such, the independent experts retained by Amorrortu, Santiago Dellepiane and Andres Chambouleyron of Berkeley Research Group (***BRG***), have calculated the damages from the date of the breach (Section VII B) based on an income market methodology (Section VII C) to be approximately USD $96,900,000 (Section VII D) plus interest (Section VII E), plus costs (Section VII F), and without taxes (Section VII G).

### A. AMORRORTU IS ENTITLED TO "FULL REPARATION" WIPING OUT THE CONSEQUENCE OF PERU'S BREACHES TO THE USPTPA

373. Article 10.26.1 empowers the Tribunal to "*make a final award against*" Peru, in which it may award "*monetary damages and any applicable interest*", including "*in lieu of restitution*."[503] As established above, Peru has violated its fair and equitable standard obligations under Article 10.5 (Minimum Standard of Treatment) of the USPTPA. As a result, Amorrortu is entitled to reparation in accordance with the applicable principles of international law.

374. The USPTPA does not specify the applicable measure of damages in the event of violation of the above-referenced provisions. Accordingly, the applicable principles

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[503] USPTPA Investment Chapter (**CLA-1**), Art. 10.26.1.(a) and (b) ("*1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.*").

of international law provide the appropriate measure of damages.[504] These principles are by now well established. In the Case Concerning the Factory at Chorzów, the Permanent Court of International Justice articulated the basic purpose and principle of reparation under international law as follows:

> *The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that* ***reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed****. Restitution in kind, or, if this is not possible,* ***payment of a sum corresponding to the value which a restitution in kind would bear****; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*[505]

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[504] *Id*., Art. 10.22(1) ("*[T]he tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*").

[505] *Case Concerning The Factory at Chorzów (Germany v. Poland),* Decision on the Merits, 13 September 1928, PCIJ Rep. Series A. – No. 17 (**CLA-30**), p. 47 (hereinafter, ***Chórzow Factory***) (emphasis added).

375. The authoritative standard set out in *Chorzów*[506] has since been codified in the ILC Articles.[507] Specifically, Article 31(1) of the ILC Articles provides that *"[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*"[508]

376. In other words, the "full reparation" standard under customary principles of international law requires that Amorrortu be placed in the same economic position he would have been, had Peru not committed the wrongful acts – i.e., the "*but-for*" scenario. The Tribunal's task in valuing the damages owed to Amorrortu's investment as a result of Peru's breaches is to consider the value of that investment in a but-for world, "*wip[ing] out all the consequences of the illegal act.*"[509] Where a host state unlawfully deprives an investor of its entire investment, tribunals will consistently grant an award of compensation equal to the "fair market value" (***FMV***) of the

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[506] *Crystallex v. Venezuela*, Award at ¶¶ 847-48 (describing *Chorzów* as "*[a]n authoritative description of the principle of full reparation*"); *see also Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014 (**CLA-85**) at ¶¶ 1587-88, 1593 (quoting *Chorzów* and recognizing it as amongst "*accepted principles of international law*"); *Foresight Luxembourg Solar 1 S.A.R.L., et al. v. The Kingdom of Spain*, SCC Arbitration V 2015/150, Final Award, 14 November 2018 (**CLA-86**) at ¶¶ 434-36 (noting that "*the principle of full reparation is generally accepted in international investment law*"); *CEF Energia B.V. v. The Italian Republic*, SCC Arbitration V 2015/158, Award, 16 January 2019 (**CLA-87**) at ¶ 275 (refusing to adopt a valuation approach that "*would be inconsistent with the even longer-established Chorzów Factory principle.*"); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, (2004) I.C.J. Reports 136, 198 (**CLA-88**) at ¶ 152.

[507] Draft Articles Commentary (**CLA-67**), Art. 31; *see also CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (**CLA-89**) at ¶¶ 617-18 (hereinafter, ***CME v. Czech Republic***); *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016 (**CLA-90**), at ¶¶ 424-25; *Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**CLA-91**) at ¶¶ 682-84.

[508] ILC Arts. on State Responsibility, Art. 31(1).

[509] *Chórzow Factory*, Decision on the Merits, p. 47.

investment and any damages incurred in connection with unlawful conduct leading up to the unlawful taking.[510] The concept of FMV is well established in international law and regularly adopted in investor-state disputes.[511] According to the World Bank, the FMV of an investment is:

> *[A]n amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future […] and other relevant factors pertinent to the specific circumstance of each case.*[512]

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[510] *See, e.g., Flughafen Zürich A.G. and Gestión e Inginería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014 (**CLA-92**) at ¶¶ 747-48 ("*In an expropriation, full restitution equals the market value of the expropriated asset, which is the value the owner could have obtained if it had been sold right before the date the State took possession. . . . Market value must be understood as the price in money that a hypothetical buyer would be willing to pay to a hypothetical seller, [i] both being interested in carrying out the transaction, but without obligation to do so, [ii] acting in good faith and according to market practice, [iii] in an open, unrestricted market, and [iv] both having a reasonable knowledge of the purpose of the contract and market conditions.*"); *see also* Draft Articles Commentary (**CLA-67**), Art. 36 at ¶¶ 21-22 ("*The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses. . . . Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost. . .*").

[511] *See, e.g.*, *CME v. Czech Republic*, UNCITRAL, Partial Award at ¶ 618; *Metalclad v. Mexico*, Award at ¶ 118; *Tecmed v. Mexico*, Award at ¶ 189; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (**CLA-93**) at ¶¶ 402-10; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (**CLA-16**) at ¶¶ 409-10 (hereinafter, ***CMS v. Argentina***); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (**CLA-94**) at ¶¶ 359-63.

[512] The World Bank Group, *Legal Framework for the Treatment of Foreign Investment* (Vol. II, 1992) (**CLA-55**) at ¶¶ 5-6; *see also* S. Ripinsky et. al, *Damages in International Investment Law* (2008) (**CLA-95**), pp. 183-84 ("*Starting with awards of the Iran-US Claims Tribunal, the willing-buyer/willing-seller analytical framework has been used to determine the FMV of investments. Tribunals have used different definitions of FMV, but the common denominator has been that FMV represents a reasonable price that would normally be paid by a willing buyer to a willing seller of the asset.*"); *CMS v.*

## B. THE APPROPRIATE DATE OF VALUATION IS THE DATE PERUPETRO ANNOUNCED THE INTERNATIONAL PUBLIC BIDDING PROCESS

377. The appropriate date of valuation for damages accruing to Amorrortu is July 14, 2014. This is the date that Peru's breaches to the USPTPA led to an irreversible and substantial deprivation of the value of Amorrortu's investment.

378. For treaty violations such as breaches of the obligation to accord FET, tribunals have looked to when the investment was "*irreversibl[y] depriv[ed]*"[513] of value, or "*the date when the loss crystallised with the divesture*"[514] of the investment to determine the appropriate date of valuation.

379. In this case, Amorrortu reached out to Ortigas through a letter, indicating his interest to take over the exploration of Block III.

380. Amorrortu further contacted PeruPetro via email, and further expressed his willingness, capacity, and expertise to operate Block III. On February 6, 2014,

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*Argentina*, Award at ¶ 402; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (**CLA-96**) at ¶ 702.

[513] *Masdar Solar & Wind Cooperatif U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (**CLA-97**) at ¶ 605 ("*The Tribunal considers Claimant's proposed application of an 'irreversible deprivation test' to cases of non-expropriatory breaches convincing. As a number of tribunals have concluded, and Claimant correctly argues, this date provides a reasonably ascertainable point in time, capable of consistent and objective application in FET cases, just as it does in expropriation cases.*") (***Masdar v. Spain***).

[514] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award, 27 November 2013 (**CLA-98**) at ¶ 150 (setting the valuation date as "*the date when the loss crystallised with the divesture [of the investment]*"); *see also Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 (**CLA-99**) at ¶ 272 (setting the date of valuation as the date that Pakistan denied the claimant's mining lease application and breached its obligations under the relevant BIT) (hereinafter, ***Tethyan v. Pakistan***); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (**CLA-100**) at ¶¶ 417-18 (setting the date of valuation as the date when "*breaches of the BIT had reached a watershed.*").

Amorrortu had a telephone conference with Ortigas, where he discussed, in more detail, his plan to modernize the oil industry in the Talara Basin. Amorrortu reiterated this position on March 20, 2014 correspondence to Perupetro. This time he copied MEM.

381. Ortigas eventually agreed to meet with Amorrortu on May 22, 2014. This meeting is critical to Amorrortu's claim because it was at that meeting that Ortigas instructed Amorrortu to prepare the Baspetrol Proposal to operate Blocks III and IV.[515]

382. With this understanding that he was presenting a proposal for direct negotiation, Amorrortu prepared a proposal based on Ortigas' instructions, and sent the proposal to operate Blocks III and IV, to Perupetro on May 28, 2014.[516] At this point, Peru became locked into a direct negotiation with Amorrortu, and could only back out of that process by giving Amorrortu formal rejection notice.[517] In other words, this was the moment Baspetrol was set apart from other potential investors and became an oil company vested with all the rights of an oil company qualified to negotiate with PeruPetro pursuant to the Rules and Procedures of PeruPetro that commence a Direct Negotiation Process.[518]

383. As discussed above, Amorrortu never received any formal notice. Rather, on July 14, 2014, PeruPetro invited oil companies to participate in the International Public Bidding Process. This was in sharp contrast to the representations made by

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[515] *See* CWS – [Amorrortu] at ¶¶ 79-85; *see also* Email exchange between Bacilio Amorrortu, Maria Angelica Cobena, and Magali Hernandez, May 2014 (**C-8**).

[516] *See* Email from Bacilio Amorrortu to Maria Angelica Cobena, 28 May 2014 (**C-9**).

[517] *See* CER – 1 [Quiroga] at ¶ 170.

[518] *Id.* at ¶¶ 111, 156.

Ortigas, and not in line with Peruvian law. In fact, as previously explained, Ortigas invited Amorrortu to submit the Baspetrol Proposal.[519]

384. By opening Blocks III and IV to public bidding without even considering the Baspetrol Proposal, PeruPetro eliminated revenues Baspetrol would have earned as an investor and operator of Blocks III and IV. Therefore, the losses associated with Amorrortu's investment crystallized in or around the same time that PeruPetro announced the decision to open Blocks III and IV for public bidding.

385. July 14, 2014 is therefore the appropriate date for the valuation of damages resulting from Peru's breach of Article 10.5 (FET) of the USPTPA and related relevant provisions.

### C. An Income and Market-Based Valuation Methodology Is Appropriate Here

386. The FMV of an investment may be assessed using an income[520], market[521], or asset-based[522] methodology and tribunals have discretion as to which method they adopt.[523]

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[519] *See* PeruPetro Board Agreement No. 071-2014, 30 June 2014 (**C-36**), p. 1; *see also* PeruPetro Board Agreement No. 072-2014, 30 June 2014 (**C-43**), p. 1.

[520] The income approach relies on the future stream of cash flows that the asset is expected to generate.

[521] The market approach relies on transaction prices in similar assets for which price and other information is available.

[522] The asset-based valuation typically estimates either the liquidation value, cost basis or the replacement cost value of asset.

[523] *See*, *e.g.*, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment Proceeding, 5 January 2002 (**CLA-101**) at ¶ 91; and *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the Ad Hoc Committee, 25 March 2010 (**CLA-58**) at ¶¶ 143-46, 179(5).

387. As detailed above, prior to the frustration of Amorrortu's direct negotiation with PeruPetro, Amorrortu had set up Baspetrol to undertake various projects, including the operation of Blocks III and IV. These activities for a highly successful operation of Blocks III and IV ranged from elaborate research regarding the technical and operational conditions of the Blocks, putting together technical, operational, administrative and executive staff, to opening offices in Talara, and obtaining a municipal license.

388. Based on his track record when he first operated Blocks III and IV, Amorrortu was expected to generate substantial value once the investment in Blocks III and IV became operational. A critical factor in this analysis is the fact that a corruption free Direct Negotiation Process guarantees the execution of the contract. Indeed, the public records of PeruPetro do not reflect or report any Direct Negotiation Process that had not culminated in the execution of an agreement after the company was duly qualified pursuant to PeruPetro's Rules and Procedures. In other words, there is more than a reasonable certainty that Baspetrol would have executed the contracts to operate Blocks III and IV in the absence of corruption. This is not a case where PeruPetro was likely to have suspended the negotiations. PeruPetro was under a mandate to assign the Blocks. This is not a case where there could be other companies interested in the Blocks that could compete at the same level with Baspetrol. Under the Direct Negotiation Process, competing alternatives were only to be considered after Baspetrol is qualified and the evaluation of its proposal is at an advanced stage.[524] Indeed, this is not a case where a new company is experimenting with a startup project. Amorrortu had successfully serviced and

[524] *See* PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts (**CLA-44**).

operated the wells in the Talara Basin for more than twenty years. Therefore, in assessing the damages suffered by Amorrortu, the fair market value of the contracts to operate Blocks III and IV at the time of the breach is the correct measure, as Amorrortu was deprived of his right to complete the direct negotiation of the contracts to operate Blocks III and IV and Baspetrol was reasonably certain to obtain the contract in the absence of corruption.[525]

389. This is not a case of a loss of chance. Amorrortu was not deprived of the opportunity to commence a Direct Negotiation Process, which was available to a number of oil companies. Amorrortu properly commenced the Direct Negotiation Process and was deprived of the opportunity to complete the direct negotiation and profit from the contracts to which he was entitled. Faced with a similar situation, the tribunal in *Lemire* aptly noted that "*the investor's loss does not consist in being deprived of some chance to win additional frequencies; what has been proven is that Ukraine's wrongful acts have resulted through a foreseeable and proximate chain of events in the damage suffered by the investor.*"[526] In a case assessing damages for the loss of the rights to a contract, "*the value of an income-producing asset . . .*

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[525] As the court explained in *Miller v. Allstate Insurance Co.*, 573 So.2d 24, 29 (Fla. Dist Ct App. 1990) (**CLA-104**) ("*[i]t is now an accepted principle of contract law … that recovery will be allowed where a plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain.*"); *see also Schonfeld v. Hilliard*, 218 F.3d 164 (2d Cir. 2000) (**CLA-105**) (in a case assessing damages for the loss of the rights to a contract, the court reasoned that "*the value of an income-producing asset … represents what a buyer is willing to pay for the chance to earn the speculative profits*").

[526] *Lemire v. Ukraine*, Award (**CLA-34**) at ¶ 252; *see Miller v. Allstate Insurance Co*., 573 So.2d 24, 29 (Fla. Dist Ct App. 1990) (**CLA-104**) ("[i]t is now an accepted principle of contract law … that recovery will be allowed where a plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain").

[526] *Schonfeld v. Hilliard*, 218 F.3d 164 (2d Cir. 2000).

*represents what a buyer is willing to pay for the chance to earn the speculative profit."*[527] Therefore, the fair market value of the contracts to operate Blocks III and Blocks IV is the appropriate measure of damages.

### D. PERU MUST COMPENSATE AMORRORTU USD 96.9 MILLION

390. To calculate the fair market value of the contracts to operate Blocks III and IV, BRG used market data sourced from peer group transactions as provided by IHS Markit's upstream transaction database.[528]

#### 1) EX-ANTE VALUATION

391. BRG calculated the damages to Amorrortu by assessing the FMV of Blocks III and IV as of July 14, 2014. BRG based the assessment on observed market based transactions compiled and provided by IHS Markit's upstream transaction database.[529] BRG then filtered the database in order to obtain a peer group of Latin American transactions that occurred at most three years prior to July 14, 2014,[530] and compute a median multiple on confirmed reserves (***1P Reserve Multiple***) and the total reserve equivalents (***Reserve Equivalent Multiple***).

392. BRG then used these multiples to assess the FMV value of Blocks III and IV by multiplying the relevant Multiple to the corresponding outstanding reserves of Blocks III and IV as of July 14, 2014 published annually by Perupetro.[531]

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[527] *Schonfeld v. Hilliard*, 218 F.3d 164 (2d Cir. 2000).

[528] CER -1 [BRG] at ¶ 34.

[529] CER -1 [BRG] at ¶ 99. Of the 11,464 upstream oil and gas transactions reported between January 1, 2011 and December 31, 2019 globally, BRG adjusted the database to achieve a peer group sample with similar characteristics to Amorrortu's investment.

[530] CER -1 [BRG] at ¶ 86. BRG notes that looking at 3 years back is due to the fact that during this period oil prices remained fairly stable with an average of USD/boe [110.0] for the ex-ante period, and USD/boe [63.1] for the ex-post period.

[531] *Id*. at ¶ 87.

393. For the application of both the 1P Reserve Multiple and the Reserve Equivalent Multiple, BRG relied on available information as of July 14, 2014 on the outstanding reserves of Blocks III and IV.[532] To fairly represent the outstanding reserves of Blocks III and IV as of July 14, 2014, BRG adjusted the reserve information published by PeruPetro as of December 31, 2013 by reported production of each Block between January and June 2014, taking into consideration the fact that the relevant date (July 14, 2014) represents mid fiscal year.[533]

394. BRG's calculations were also based on the assumption that Amorrortu would have financed the operations of Blocks III and IV through a mix of debt and equity.[534] In doing this, BRG assumed that Amorrortu financed 61% of its operations and investments through debt.[535]

395. Based on the foregoing, BRG calculated total damages to Amorrortu of USD $94.1 Million under the 1P Reserve Multiple, and USD $99.6 Million under the Reserve Equivalent Multiple for Blocks III and IV as of July 14, 2014. Based on the average of both, total damages to Amorrortu under the ex-ante calculation is USD 96.9 Million, as illustrated below:

**Table 7: *Ex-ante* Damages Summary**

[532] *Id*. at ¶ 89.

[533] *Id*. at ¶ 103.

[534] *Id*. at ¶¶ 105, 113.

[535] *Id*. at ¶ 113.

| | Units | FMV under 1P Reserve Multiple | | | FMV under Reserve Equivalent Multiple | | | Total Avg. |
|---|---|---|---|---|---|---|---|---|
| | | Block III | Block IV | Total | Block III | Block IV | Total | |
| | | [a] | [b] | [c]=[a]+[b] | [d] | [e] | [f]=[d]+[e] | [g]=([c]+[f])/2 |
| Reserves | Bbl MM | 18.0 | 5.8 | 23.8 | 19.8 | 6.9 | 26.8 | |
| Multiple | USD MM/Bbl MM | 13.5x | 13.5x | 13.5x | 12.7x | 12.7x | 12.7x | |
| **Enterprise Value** | USD MM | **243.3** | **78.3** | **321.5** | **251.8** | **88.3** | **340.2** | **330.8** |
| *Debt to Firm Value* | % | *61.0%* | *61.0%* | *61.0%* | *61.0%* | *61.0%* | *61.0%* | |
| Debt | USD MM | 148.3 | 47.7 | 196.0 | 153.5 | 53.9 | 207.4 | |
| **Equity Value** | USD MM | **95.0** | **30.5** | **125.5** | **98.3** | **34.5** | **132.8** | **129.2** |
| *Ownership Share* | % | *75.0%* | *75.0%* | *75.0%* | *75.0%* | *75.0%* | *75.0%* | *75.0%* |
| **Damages to Claimant** | USD MM | **71.2** | **22.9** | **94.1** | **73.7** | **25.9** | **99.6** | **96.9** |

Source: BRG Peer Group Transactions (BRG-002)

2) EX-POST VALUATION

396. To illustrate the full extent of the damages suffered by Amorrortu and his lost profits, BRG also computed the FMV of Blocks III and IV as of December 31, 2019. This calculation confirms the reliability of the ex-ante valuation. The ex-post valuation takes into account two sets of cash flows, namely, (i) lost historical cash flows to Amorrortu for the operation of Blocks III and IV between May 1, 2015 and December 31, 2019; and (ii) lost future cash flows to Amorrortu between January 1, 2020 and July 14, 2044.

397. BRG estimated the historical cash flows to Amorrortu as of the December 31, 2019 (the ex-post date of valuation) by computing the cash flows that Amorrortu would have obtained through the operation of Blocks III and IV but for the conduct of Peru. BRG then calculated future losses as of the ex-post date of valuation using the FMV of Blocks III and IV as of that date — December 31, 2019. Further, similar to the ex-ante valuation, BRG based the ex-post valuation using a peer group transaction sample using IHS Markit's upstream database, with relevant adjustments.[536]

[536] CER -1 [BRG] at ¶¶ 115-17.

398. For the historical cash flows, BRG used available information as of the ex-post valuation date (December 31, 2019) such as crude oil price, production, and royalty payments, as published by PeruPetro as well operation costs and capital expenses as published by Graña y Montero.[537]

399. After the historical cash flows calculation based on Graña y Montero's operations information, BRG made certain adjustments to accommodate the peculiarities in the Baspetrol Proposal, such as royalty payment of 50% for the operation of Blocks III and IV; payment of 5% of revenue for the Talara community fund.[538]

400. Regarding future cash flows, BRG calculated lost future cash flows and profits to Amorrortu by assessing the FMV of Blocks III and IV as of December 31, 2019. Like the ex-ante valuation, BRG adjusted the results based on IHS Markit's database in order to find a peer sample of similar transactions. These filters resulted in a peer sample of 344 transactions that occurred three years prior to the ex-post date of valuation.[539]

401. As in the ex-ante approach, BRG adjusted the value of Blocks III and IV by considering the mix of equity and debt financing observed in the market as of the ex-post date of valuation. By the calculations, BRG indicated that Amorrortu would have financed 36% of his operations through debt.[540]

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[537] CER -1 [BRG] at ¶¶ 119-20.

[538] CER -1 [BRG] at ¶122; *see also* Proposal from Baspetrol SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, 27 May 2014 (**C-11**), p. 13.

[539] *Id*. at ¶ 129.

[540] *Id*. at ¶ 133.

402. Applying the methodology described above, BRG calculated the total ex-post damages to Amorrortu as of December 31, 2019 to be USD 165.6 Million, as shown below:

**Table 4: *Ex-post* damages summary (USD MM as of December 31, 2019)**

| | 1P Reserves Multiple | Reserve Equivalent Multiple | Average |
|---|---|---|---|
| Lost Historical Cash Flows | 8.9 | 8.9 | **8.9** |
| Lost Future Cash Flows | 131.3 | 182.1 | **156.7** |
| **Total Damages to Claimant** | **140.2** | **191.1** | **165.6** |

Source: BRG Peer Group Transactions (BRG-002)

### E. PERU MUST PAY AMORRORTU'S INTEREST

403. Amorrortu is also entitled to interest. To calculate the interest, BRG applies a rate equal to the risk of financial investments in Peru (Peru's cost of borrowing).[541] As such, "*[i]n the ex-ante valuation, [BRG] use[s] the annual Peruvian [cost of borrowing] between 2015 and 2019, ranging between 3.6% and 4.6%[,]*"[542] and Peru's cost of borrowing of 3.8% for the *ex-post* valuation, as of December 31, 2020.[543]

### F. PERU MUST COMPENSATE FOR ALL COSTS INCURRED IN THIS ARBITRATION

404. In order to make Amorrortu whole, Peru must pay the entire costs and expenses of the Arbitration, including Amorrortu's legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and other administrative costs.

[541] *See* CER -1 [BRG] at ¶ 137.

[542] CER -1 [BRG] at ¶ 138.

[543] *See* CER -1 [BRG] at ¶¶ 137-138.

405. The Tribunal's authority to award costs is established in Article 10.26(1) of the USPTPA, providing that a tribunal "*may also award costs and attorney's fees*" in the final award.[544] Furthermore, Article 38 of the UNCITRAL Rules authorizes the Tribunal to award costs. If the Tribunal finds that Peru breached its obligations under the USPTPA, the award of costs is consistent, and in fact required, by the full reparation principles set out in *Chorzów*. Amorrortu would not have brought this Arbitration and incurred substantial costs and lost time as a result, if Peru had respected its obligations under the USPTPA. Accordingly, Amorrortu should be awarded his costs and will submit a formal quantification of costs at the appropriate phase of these proceedings.

## G. PERU MAY NOT DEDUCT ADDITIONAL TAXES FROM AWARD

406. BRG has calculated damages owed to Amorrortu accounting for corporate taxes that Amorrortu would have paid in Peru had his investments been allowed to develop. Therefore, to ensure full reparation and place Amorrortu in the same position he would have occupied but for Peru's breaches of the USPTPA, the Award should not be subjected to any further taxes by Peru.[545]

## H. TOTAL DAMAGES DUE TO AMORRORTU

407. BRG projects total damages for Amorrortu's investment of USD $96,900,000 plus pre-award interest at Peru's borrowing rate and costs.

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[544] USPTPA Investment Chapter (**CLA-1**), Art. 10.26(1).

[545] *See Tethyan v. Pakistan*, Award, *dispositif*; *see also Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016 (**CLA-51**), *dispositif*.

## I. PRAYER FOR RELIEF

408. On the basis of the foregoing, without limitation and reserving Amorrortu's rights to supplement these prayers for relief, including without limitation in the light of further action by Peru, Amorrortu respectfully requests that the Tribunal:

409. **DECLARE** that Peru has breached Article 10.5 of the USPTPA by failing to accord Amorrortu's investment in Peru fair and equitable treatment; and

410. **ORDER** Peru to pay damages to Amorrortu for its breaches of the USPTPA in the amount of USD $96,900,000, plus interest.

411. **AWARD** such other relief as the Tribunal deems appropriate; and

412. **ORDER** Peru to pay all of the costs, attorneys' fees, and expenses of this arbitration, including Claimant's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and the PCA's other costs, in accordance with Article 10.26(1) of the USPTPA and Article 38 of the UNCITRAL Rules.

DATE: September 11, 2020

By: */s/ Francisco A. Rodriguez*

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