

PCA Case No. 2020-11

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

— and —

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

— between —

**BACILIO AMORRORTU**

*Claimant,*

v.

**THE REPUBLIC OF PERU,**

*Respondent.*

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**RESPONDENT’S SUBMISSION ON PRELIMINARY OBJECTIONS**

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15 March 2021

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## I. INTRODUCTION

1. In accordance with the Tribunal’s Procedural Order No. 3 dated January 21, 2021,<sup>1</sup> and the procedural calendar set forth on February 9, 2021, the Republic of Peru (“Peru”, “the Republic”, or “Respondent”) hereby presents its Submission on (i) its objection for failure to state a claim for which an award can be made in favor of Claimant, as a matter of law (“Objection 1”) pursuant to Article 10.20.4 of the Trade Promotion Agreement between the United States of America and the Republic (“USPTA” or the “Treaty”), and (ii) its jurisdictional objection under Article 23(1) of the UNCITRAL Arbitration Rules due to defective waiver (“Objection 4” and together with Objection 1, the “Objections”).

2. As the Tribunal will recall, on December 9, 2020, the Republic of Peru submitted a Notice of Intent to Submit Preliminary Objections (“Notice of Preliminary Objections”), whereby it requested that the Tribunal suspend the proceedings on the merits and consider the Objections, along with four other jurisdictional objections, as preliminary questions.<sup>2</sup> In a communication dated December 10, 2020, “the Tribunal [ordered] the suspension of the deadline for the filing of the Respondent’s Statement of Defense due December 21, 2020, as well as all subsequent deadlines set out in the Procedural Calendar” and invited Claimant to reply to Peru’s Notice of Preliminary Objections.<sup>3</sup> On December 22, 2020, Claimant submitted a “Motion for Leave to Amend his [Notice of Arbitration]” seeking to rectify his defective waiver, and for the Tribunal to adjudicate said motion before any of the objections raised by Peru.<sup>4</sup> The Tribunal granted Peru leave to respond to Claimant’s motion, which it did on January 15, 2021. In that response, Peru objected to Claimant’s motion and requested that the tribunal reject said motion or, in the alternative, reserve its decision until the Tribunal ruled on Peru’s Objection 4 (which Peru

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<sup>1</sup> Procedural Order No. 3 (21 January 2021), ¶¶ 8-9, 11.

<sup>2</sup> Procedural Order No. 3 (21 January 2021), ¶ 2. Two of the jurisdictional objections were also presented in the alternative as objections under Article 10.20.4 of the Treaty. Peru’s Notice of Intent to Submit Preliminary Questions (9 December 2020), notes 49, 59.

<sup>3</sup> Letter from the Tribunal to the Parties (10 December 2020).

<sup>4</sup> Procedural Order No. 3 (21 January 2021), ¶ 4; Claimant’s Motion for Leave to Amend his Notice of Arbitration (22 December 2020).

further insisted should be decided concurrently with its other preliminary objections including its Article 10.20.4 objection).<sup>5</sup>

3. In its Procedural Order No. 3, dated February 9, 2021, the Tribunal determined that “Objection 1 [Peru’s objection under Article 10.20.4 of the Treaty] shall be addressed and decided as a preliminary question”.<sup>6</sup> Further, the Tribunal “decide[d] that Objection 4 [Peru’s jurisdictional objection on the defective waiver] shall also be decided as a preliminary question”.<sup>7</sup> Therefore, it “request[ed] the Parties to confer and attempt to agree on a schedule for submissions on” the Objections, “no later than Monday, February 1, 2021”.<sup>8</sup> That day, Counsel for Respondent notified and transmitted to the Tribunal the agreed-upon briefing schedule for submission of the Objections.<sup>9</sup> On 9 February 2021, this schedule was formalized.<sup>10</sup>

4. As discussed in detail below, Claimant’s claim must be dismissed on two independent and concurrent grounds. **Section II** of the brief sets forth Peru’s **Objection 1**. After outlining the relevant standards for objections under Article 10.20.4 of the Treaty, and the facts accepted as true for purposes of Objection 1, Peru demonstrates that Mr. Amorrortu’s claim relies exclusively on his alleged right to a direct negotiation with PeruPetro for a possible contract over Blocks III and IV of the Talara Basin. Yet, under no scenario did Mr. Amorrortu ever obtain any such right. Accordingly, Mr. Amorrortu does not have an interest protected under the Treaty and his claim fails as a matter of law.

5. **Section III** sets forth Peru’s defective waiver jurisdictional objection (**Objection 4**). As explained therein, Mr. Amorrortu has effectively admitted that his waiver does not comply with the requirements of the Treaty. The presentation of a valid waiver is very clearly a

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<sup>5</sup> Letter from Peru to the Tribunal (15 January 2021), p. 12 (“the Tribunal could address all objection concurrently. This is particularly appropriate here, since a decision in favor of any one objection would result in the termination of the arbitration”).

<sup>6</sup> Procedural Order No. 3 (21 January 2021), ¶ 9.

<sup>7</sup> Procedural Order No. 3 (21 January 2021), ¶ 11.

<sup>8</sup> Procedural Order No. 3 (21 January 2021), ¶ 13.

<sup>9</sup> Email from Peru to the Tribunal (1 February 2021), on the agreed-upon briefing schedule for the objections.

<sup>10</sup> Procedural Calendar (as of February 9, 2021).

jurisdictional precondition to Peru's consent to arbitration under the Treaty and thus, absent Peru's consent (which it has not given), Mr. Amorrortu may not cure his defective waiver, and this Tribunal lacks jurisdiction.

6. Finally, in **Section IV**, Peru explains that regardless of the fate of Objection 4 and the Tribunal's decision on its jurisdiction over Mr. Amorrortu's claim, it is required by the express terms of the Treaty to decide Objection 1. Thus, even if the Tribunal concludes that it lacks jurisdiction because Mr. Amorrortu submitted a defective waiver, pursuant to Article 10.20.4 of the Treaty, the Tribunal must determine in this proceeding whether Mr. Amorrortu's claim lacks legal merit. Because that is indeed the case, the Tribunal must so find and reject Mr. Amorrortu's claim in its entirety and with prejudice.

## **II. MR. AMORRORTU'S CLAIM IS NOT A CLAIM FOR WHICH AN AWARD IN FAVOR OF CLAIMANT MAY BE MADE UNDER THE TREATY**

7. Mr. Amorrortu claims that Peru has breached Article 10.5 of the USPTPA<sup>11</sup> by "failing to accord Amorrortu's investment in Peru fair and equitable treatment" ("FET").<sup>12</sup> Specifically, Mr. Amorrortu asserts that "Peru failed to comply with [the FET standard] 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.**"<sup>13</sup> The claim is also articulated in Mr. Amorrortu's Notice of Arbitration where he alleges that "Peru breached the minimum standard of treatment set forth in Article 10.5 **in the sense that it aborted the direct negotiation process with Baspetrol** to give the contract to Graña y Montero based on corrupt motives."<sup>14</sup> Elsewhere in his Statement of Claim, Mr. Amorrortu repeats this claim by asserting "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."<sup>15</sup>

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<sup>11</sup> Notice of Dispute (19 September 2019), § VI.a; Notice of Arbitration (13 February 2020), § V.A; Claimants' Memorial (11 September 2020), § V.C.

<sup>12</sup> Claimants' Memorial (11 September 2020), ¶ 409 (emphasis added).

<sup>13</sup> Claimants' Memorial (11 September 2020), ¶ 304 (emphasis added).

<sup>14</sup> Notice of Arbitration (13 February 2020), ¶ 75 (emphasis added).

<sup>15</sup> Claimants' Memorial (11 September 2020), ¶ 150.

8. Mr. Amorrortu’s claim, therefore, rests entirely on what he asserts to be a right to a direct negotiation that would have inevitably led to a contract to operate Blocks III and IV. However, the fundamental basis for Mr. Amorrortu’s claim lacks any merit under applicable law.

9. After discussing the relevant standards applicable to Article 10.20.4 objections (**Section A**), and the relevant facts assumed as true for purposes of this objection (**Section B**), Peru will demonstrate that, as matter of law, no direct negotiation was ever commenced, and that, moreover, Mr. Amorrortu never obtained any right to a direct negotiation (**Section C**). Even if assuming *arguendo* any such right accrued, Mr. Amorrortu never acquired a right to a contract with PeruPetro (**Section D**). Instead, Mr. Amorrortu only had a desire, or an unfounded expectation, to negotiate and conclude a contract with PeruPetro. International law does not protect such a desire or expectation (**Section E**). For all of these reasons, Mr. Amorrortu’s claim is not a claim for which an award in favor of Claimant may be made under the USPTPA.<sup>16</sup>

**A. The Applicable Standards under Article 10.20.4 of the USPTA**

10. Article 10.20.4 of the USPTA provides in its relevant part:

[A] tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26

11. The purpose of Article 10.20.4 is *inter alia* for the Tribunal to decide on the “legal sustainability of a claim.”<sup>17</sup> The analysis of the Tribunal under Article 10.20.4 is on Claimant’s “substantive Treaty rights or the legal merit of [his] claim.”<sup>18</sup> Thus, if Claimant has not shown a legal basis for his claim, the Tribunal is obligated under Article 10.20.4 to dismiss it at a preliminary phase. This is the case here.

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<sup>16</sup> USPTPA Investment Chapter (12 April 2006), Art. 10.20(4) (**CLA-01**).

<sup>17</sup> *The Renco Group, Inc. v. Republic of Peru*, UNCT/13/1, Decision as to the Scope of the Respondent’s Preliminary Objections Under Article 10.20.4 (18 December 2014) (Moser, Fortier, Landau), ¶ 207 (**RLA-28**).

<sup>18</sup> *The Renco Group, Inc. v. Republic of Peru*, UNCT/13/1, Decision as to the Scope of the Respondent’s Preliminary Objections Under Article 10.20.4 (18 December 2014) (Moser, Fortier, Landau), ¶ 206 (**RLA-28**).

12. For purposes of Article 10.20.4, subparagraph (c) of the Treaty states that, “the [T]ribunal shall assume to be true claimant’s factual allegations in support of any claim in the [...] statement of claim,” and that “[t]he tribunal may also consider any relevant facts not in dispute.”<sup>19</sup> However, mere conclusions unsupported by relevant factual allegations need not to be accepted as true.<sup>20</sup> Moreover, legal allegations must not be accepted as true.<sup>21</sup> Accordingly, issues concerning applicable international or Peruvian law can be disputed and Respondent “maintains the right to object to unfounded conclusions or suggestions of fact and law”.<sup>22</sup>

13. Based on these standards, Peru sets forth below the facts relevant to Objection 1. These facts are taken from Mr. Amorrortu’s factual allegations in his Memorial, as amended as of February 14, 2020, as well as exhibits presented by Claimant. These facts are taken as true for purposes of Peru’s objection only, and should not be construed as an acceptance of any factual allegation made by Mr. Amorrortu thus far. Respondent reserves all rights in that respect.

#### **B. Facts Assumed to be true for purposes of Peru’s Article 10.20.4 Objection**

14. Mr. Amorrortu asserts that he has been involved in “drilling and extraction operations in the Talara Basin” of Peru since 1976.<sup>23</sup> Mr. Amorrortu further claims that he “was awarded with the operation of [B]lock III in the 1990s”.<sup>24</sup> In support of these assertions, he refers to a 20-year Service Contract for the Exploitation of Hydrocarbons of Block III, dated March 4, 1993.<sup>25</sup> This Contract was signed between Petróleos del Peru—PetroPeru S.A.—and Promociones

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<sup>19</sup> USPTPA Investment Chapter (12 April 2006), Art. 10.20(4) (**CLA-01**).

<sup>20</sup> See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB /09/12, Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 (2 August 2010) (Tawil, Stern, Veeder), ¶¶ 87-91 (**RLA-13**) (“factual allegations” do not include “a mere conclusion unsupported by any relevant factual allegation.”).

<sup>21</sup> See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB /09/12, Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 (2 August 2010) (Tawil, Stern, Veeder), ¶¶ 87-91 (**RLA-13**) (“factual allegations” do not include “a legal allegation clothed as a factual allegation.”).

<sup>22</sup> Peru’s Notice of Intent to Submit Preliminary Questions (9 December 2020), p. 4.

<sup>23</sup> Claimants’ Memorial (11 September 2020), ¶ 5.

<sup>24</sup> Claimants’ Memorial (11 September 2020), § II.B.2.

<sup>25</sup> Hydrocarbons Exploitation Services Contract signed between PetroPeru and PROVISA (4 March 1993), [PDF] p. 1, 21 (**C-4**).



Petroleras Talara, S.A.<sup>26</sup> (“Propetsa”), a company created by Mr. Amorrortu. On August 13, 1997, Propetsa transferred its participation in Block III to another company, and thus its activities in Block III “came to an end”.<sup>27</sup>

15. In 2012, Mr. Amorrortu constituted Baspetro S.A.C. (“Baspetro”) “with the expectation”<sup>28</sup> to obtain rights to operate Block III.

16. On July 31, 2013, Mr. Amorrortu sent an email to Luis Enrique Ortigas, then President of PeruPetro, S.A. (“PeruPetro”), expressing “BASPETROL’s [interest] to operate Block III”.<sup>29</sup> In response, on August 12, 2013, Mr. Ortigas informed Mr. Amorrortu that Block III was not available for direct negotiation.<sup>30</sup> Mr. Ortigas also indicated that should PeruPetro decide to issue a public tender that included Block III, the respective notices would be posted in PeruPetro’s website and in other sources.<sup>31</sup> Notably, Mr. Ortigas did not say that Block III would ever be adjudicated by direct negotiation.<sup>32</sup>

17. On March 20, 2014, a temporary contract in favor of InterOil for the operation of both Block III and Block IV of the Talara Basin (“the Blocks”) was approved.<sup>33</sup> As the contract

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<sup>26</sup> Hydrocarbons Exploitation Services Contract signed between PetroPeru and PROVISA (4 March 1993), [PDF] pp. 2-3 (C-4).

<sup>27</sup> Claimants’ Memorial (11 September 2020), ¶ 46.

<sup>28</sup> Claimants’ Memorial (11 September 2020), ¶¶ 8, 53 (emphasis added).

<sup>29</sup> Letter from Bacilio Amorrortu to Luis Ortigas (31 July 2013) (C-31) (Free Translation by the Republic of Peru: Spanish original text reads: “Por la presente, formalmente le comunico a Ud., y a PeruPetro S.A., el interés de mi Empresa Petrolera BASPETROL S.A. C, establecida en la ciudad de Talara, de operar el Lote III ubicado en el área de Talara, Noroeste del Peru [...]”); Claimants’ Memorial (11 September 2020), ¶ 67.

<sup>30</sup> Claimants’ Memorial (11 September 2020), ¶ 68; Letter from Luis Ortigas to Bacilio Amorrortu (12 August 2013) (C-6).

<sup>31</sup> Letter from Luis Ortigas to Bacilio Amorrortu (12 August 2013) (C-6) (Free Translation by the Republic of Peru: “in the event that PERUPETRO S.A. decides to carry out a public bidding process that includes the current Lot III, the respective publications will be made, in due time, in our institutional portal [www.perupetro.com.pe](http://www.perupetro.com.pe), as well as in other media.”) (Spanish original text reads: “[...] en caso de que PERUPETRO S.A. decida la realización de una licitación pública que incluya al actual Lote III, se efectuarán, en su oportunidad, las publicaciones respectivas en nuestro portal institucional [www.perupetro.com.pe](http://www.perupetro.com.pe), así como en otros medios.”).

<sup>32</sup> Letter from Luis Ortigas to Bacilio Amorrortu (12 August 2013) (C-6).

<sup>33</sup> Claimants’ Memorial (11 September 2020), ¶ 71; See Directory Agreement No. 034-2014 (20 March 2014), p. 2 (C-3).

indicates, its temporary nature was intended to give PeruPetro time to organize and carry out the “selection process” for a new License Contract for the Blocks.<sup>34</sup>

18. Approximately two months later, on May 22, 2014, Mr. Amorrortu met personally with Mr. Ortigas.<sup>35</sup> According to Amorrortu, in that meeting, Mr. Ortigas “instructed [him] to prepare a proposal for direct negotiation [...] for the operation of Block III and IV”.<sup>36</sup> Notably, as Claimant concedes, and consistent with Mr. Ortigas’ statement in his August 12, 2013 communication, PeruPetro had already decided that the Blocks would be put up for public tender.<sup>37</sup>

19. A few days later, on May 28, 2014, Mr. Amorrortu submitted a proposal to operate Blocks III and IV. In this proposal, “BASPETROL SAC requested PERUPETRO *to start* direct negotiations”<sup>38</sup> (“Baspetro Proposal”). The Proposal consists of a 16-page document, which outlines in general terms Mr. Amorrortu’s experience in the Peruvian oil industry, the need for significant investment in Blocks III and IV in light of their characteristics as “marginal oil fields”, the “first-rate” international technical team that would support Baspetro, and the types of perforation techniques Baspetro proposed.<sup>39</sup> Notably, the Baspetro Proposal does not cite to any supporting document or studies, nor are any such documents attached. There is also no elaboration of Baspetro’s credentials and experience.

20. The Baspetro Proposal also outlined a general economic proposal that included a US\$130 million investment, royalties of 50%, and a fund to benefit the local community.<sup>40</sup>

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<sup>34</sup> See Directory Agreement No. 034-2014 (20 March 2014), p. 1 (C-3).

<sup>35</sup> Claimants’ Memorial (11 September 2020), ¶ 72.

<sup>36</sup> Claimants’ Memorial (11 September 2020), ¶ 73.

<sup>37</sup> Claimants’ Memorial (11 September 2020), note 102.

<sup>38</sup> Proposal from Baspetro SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West (27 May 2014), p. 1 (C-11) (Free Translation by the Republic of Peru: Spanish original reads: “[...] BASPETROL SAC solicita a PERUPETRO *iniciar* negociaciones directas [...]”) (emphasis added).

<sup>39</sup> Proposal from Baspetro SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West (27 May 2014), pp. 4-7, 9-10 (C-11).

<sup>40</sup> Proposal from Baspetro SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West (27 May 2014), pp. 13-14 (C-11).

However, no documentary support is provided to demonstrate Baspetro's financial capacity or resources. The Baspetro proposal also suggested a schedule for the proposed direct negotiation that would begin in June 2014 and lead to a signed contract by December 2014.<sup>41</sup>

21. On July 14, 2014, consistent with Mr. Ortega's August 12, 2013 communication, PeruPetro opened a public tender to award a contract for the exploration and exploitation of the Blocks.<sup>42</sup> On July 16, 2014, Mr. Amorrortu met with Mr. Ortigas in Peru.<sup>43</sup> In that meeting, Mr. Ortigas informed Mr. Amorrortu that PeruPetro's Board of Directors had rejected the Baspetro Proposal.<sup>44</sup> Immediately after his meeting with Mr. Ortigas, Mr. Amorrortu met with Ms. Isabel Tafur, then PeruPetro's Chief Administrator ("Ms. Tafur"), who informed Mr. Amorrortu that her office had no knowledge of the Baspetro Proposal and requested a copy. Mr. Amorrortu sent the proposal to Ms. Tafur, a few hours later.<sup>45</sup>

22. On August 20, 2014, PeruPetro informed Mr. Amorrortu of the then ongoing public tender for the Blocks, opened on July 14, 2014, and invited Baspetro to participate in the tender.<sup>46</sup>

23. Baspetro accepted this invitation. On October 31, 2014, on behalf of Baspetro, Mr. Amorrortu "presented a bid [to participate in] the public tender".<sup>47</sup> The only evidence provided by Mr. Amorrortu with respect to Baspetro's bid for the public tender is a cover letter indicating that this bid included (i) a letter of interest to participate in public tender, (ii) a letter of

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<sup>41</sup> Proposal from Baspetro SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West (27 May 2014), p. 8 (C-11).

<sup>42</sup> See PeruPetro S.A., Press Release (14 July 2014) (C-12); Claimants' Memorial (11 September 2020), ¶ 82; see also Letter from PeruPetro, S.A. to Bacilio Amorrortu (20 August 2014) (C-13).

<sup>43</sup> Claimants' Memorial (11 September 2020), ¶ 83.

<sup>44</sup> Claimants' Memorial (11 September 2020), ¶ 83.

<sup>45</sup> Claimants' Memorial (11 September 2020), ¶ 84; see also Letter from Bacilio Amorrortu to Isabel Tafur (16 July 2014) (C-32).

<sup>46</sup> Letter from PeruPetro, S.A. to Bacilio Amorrortu (20 August 2014) (C-13); Claimants' Memorial (11 September 2020), ¶ 85; see also First Witness Statement of Bacilio Amorrortu (10 September 2020), ¶ 91 (CWS-1).

<sup>47</sup> See Letter from Bacilio Amorrortu to "Comisión de la Licitación Pública Internacional No. PERUPETRO-001-2014" (31 October 2014) (C-14); Claimants' Memorial (11 September 2020), ¶ 86.

confidentiality and license of use, and (iii) a sworn declaration of a commitment to integrity.<sup>48</sup> No reservation was made with respect to any alleged direct negotiation or the “Baspetro Proposal”.

24. On November 3, 2014, PeruPetro informed Mr. Amorrortu that Baspetro’s bid for the public tender of the Blocks did not comply with any of the applicable Technical Indicators, and that Baspetro had not provided any information on its financial situation.<sup>49</sup>

25. Almost 5 years later, Mr. Amorrortu notified Respondent of a dispute under the Treaty.<sup>50</sup> Mr. Amorrortu’s claim is based on Peru’s alleged abandonment of the direct negotiation process with PeruPetro to obtain a contract to operate Blocks III and IV.<sup>51</sup> However, as will be shown, no direct negotiations ever commenced, and Mr. Amorrortu never obtained a right to such direct negotiations, let alone a contract.

### **C. Mr. Amorrortu Had No Right to a Direct Negotiation**

26. Mr. Amorrortu alleges that when he “commenced the Direct Negotiation Process [...] [he] acquired a number of substantive acquired rights, including the right to a direct negotiation” covered by the USPTPA.<sup>52</sup> However, according to Mr. Amorrortu’s own factual

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<sup>48</sup> See Letter from Bacilio Amorrortu to “Comisión de la Licitación Pública Internacional No. PERUPETRO-001-2014” (31 October 2014) (C-14).

<sup>49</sup> See Letter from Roberto Guzman to Bacilio Amorrortu (3 November 2014) (C-15) (Free Translation by the Republic of Peru: “[...] according to the information stated in the Letter of Interest to participate in the International Public Bidding No. PERUPETRO-001-2014, to grant the License Contract for the Exploitation of Hydrocarbons in Block III (Form No. 1), received on October 31, 2014, your company does not comply with any of the Technical Indicators for this Bidding as established in the Board of Directors Agreement No. 048-2010 and numeral 7.2 of the Bidding Terms and Conditions; and, on the other hand, the information of the Net Worth, Current Assets and Operating Cash Flow of your company is not indicated.”) (Spanish original text reads: “[...] conforme a la información declarada en la Carta de Interés para participar en la Licitación Pública Intemacional No. PERUPETRO-001- 2014, para otorgar el Contrato de Licencia para la Explotación de Hidrocarburos en el Lote III (Formato N° 1), recibida con fecha 31 de octubre de 2014 su representada no cumple con ninguno de los Indicadores Técnicos para la presente Licitación según lo establecido en el Acuerdo de Directorio N° 048-2010 y el numeral 7.2 de las Bases de la Licitación; y, de otra parte, no se indica la información del Patrimonio Neto, Activo Corriente y Flujo de Caja operativo de su representada.”) (emphasis omitted). See also Claimants’ Memorial (11 September 2020), ¶ 87.

<sup>50</sup> Notice of Dispute (19 September 2019).

<sup>51</sup> Notice of Arbitration (13 February 2020), p. 5, ¶ a) (“Peru breached its obligations under the USPTPA by aborting the direct negotiation process with Amorrortu with the corrupt intent to benefit Graña y Montero.”); *Id.* ¶ 75 (“Peru breached the minimum standard of treatment set forth in Article 10.5 in the sense that it aborted the direct negotiation process with Baspetro to give the contract to Graña y Montero based on corrupt motives.”).

<sup>52</sup> Claimants’ Memorial (11 September 2020), ¶ 226; see also *Id.*, ¶ 215.

allegations no direct negotiation was ever commenced. The only fact that is alleged to have occurred is Mr. Amorrortu's presentation of a proposal for direct negotiation.<sup>53</sup> The presentation of this proposal, however, did not "commence" a direct negotiation as a matter of law. Nor did it confer Mr. Amorrortu any legal right to direct negotiations with PeruPetro.

**1. Mr. Amorrortu's own Allegations Establish that No Direct Negotiation Was Ever Commenced**

27. According to Mr. Amorrortu, a company that commences a direct negotiation acquires a bundle of rights<sup>54</sup> that are protected by the USPTPA, and "Baspetro Commence[d] Direct Negotiations With PeruPetro."<sup>55</sup> Both statements are incorrect. They are unsupported by Mr. Amorrortu's own allegations and evidence, and are unfounded as a matter of law.

28. Mr. Amorrortu admits that as early as August 12, 2013, Mr. Ortigas had already indicated to Mr. Amorrortu that Block III was not available for direct negotiation.<sup>56</sup> Indeed, in his communication of August 12, 2013, Mr. Ortigas also stated that if Block III would become available for acquisition generally, it would be subject to a public tender.<sup>57</sup> Specifically, Mr. Ortigas indicated "should Perupetro decide to realize a *public tender* that includes Lot III, the respective notices would be made."<sup>58</sup>

29. Mr. Amorrortu also admits that on March 20, 2014, PeruPetro approved a temporary operation contract over Blocks III and IV in favor of the current operator of Block III, Interoil, for a 12-month period.<sup>59</sup> The terms of the contract demonstrate that the temporary nature

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<sup>53</sup> Claimants' Memorial (11 September 2020), ¶ 74.

<sup>54</sup> See for instance Claimants' Memorial (11 September 2020), ¶ 194.

<sup>55</sup> Claimants' Memorial (11 September 2020), § II.E.3.

<sup>56</sup> Claimants' Memorial (11 September 2020), ¶ 68; Letter from Luis Ortigas to Bacilio Amorrortu (12 August 2013) (C-6).

<sup>57</sup> Claimants' Memorial (11 September 2020), ¶ 68; Letter from Luis Ortigas to Bacilio Amorrortu (12 August 2013) (C-6).

<sup>58</sup> Letter from Luis Ortigas to Bacilio Amorrortu (12 August 2013) (C-6) (Free Translation by the Republic of Peru: Spanish original text reads: "[...] en caso de que PERUPETRO S.A. decida la realización de una *licitación pública* que incluya al actual Lote III, se efectuarán, en su oportunidad, las publicaciones respectivas [...].") (emphasis added).

<sup>59</sup> Claimants' Memorial (11 September 2020), ¶ 71

of the contract was meant to give PeruPetro the time it needed to “carry out the selection process to celebrate a new License Contract for the Exploitation of Hydrocarbons in Lot III.”<sup>60</sup> This is fatal to Mr. Amorrortu’s case because, as he acknowledges in his Memorial, “[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.”<sup>61</sup> The reference in the temporary Interoil contract to a “selection process” (as opposed to a “negotiation process”) necessarily reflects the intention to organize a public tender. The Interoil contract thus reflected PeruPetro’s long-stated indication that Blocks III and IV would be subject to a public tender. Moreover, the contract’s public indication that the blocks would be subject to a public tender also effectively made those blocks unavailable, and, accordingly, any proposal for direct negotiation ineligible.

30. Mr. Amorrortu further alleges that in April 2014, one month before Mr. Amorrortu submitted his proposal for direct negotiation, PeruPetro had “already decided to open a public bidding process” for Blocks III and IV.<sup>62</sup> Finally, Mr. Amorrortu’s own allegations demonstrate that PeruPetro moved forward with its previously stated plans to submit the oil blocks to a public

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<sup>60</sup> Directory Agreement No. 034-2014 (20 March 2014), p. 1 (**C-3**) (Free Translation by the Republic of Peru: Spanish original text reads: “[...] se lleve a cabo el proceso de selección para la celebración del nuevo Contrato de Licencia para la Explotación de Hidrocarburos en el Lote III [...].”). The Interoil temporary contract was made public in Peru’s Diario Oficial, *see* Decreto Supremo No. 012-2014-EM y No. 013-2014-EM (5 April 2014), p. 1 (**CLA-59**).

<sup>61</sup> Claimants’ Memorial (11 September 2020), ¶ 197 (emphasis added); *see also* Expert Report of Aníbal Quiroga León (9 September 2020) (“**Quiroga Expert Report**”), ¶ 109 (Free Translation by the Republic of Peru: “[The first step to determine whether it is possible to proceed with the qualification of a Company and then analyze the start of negotiations is that] PeruPetro must verify the availability of the requested area.”) (Spanish original text reads: “[El primer paso para determinar si es posible proceder a calificación de una empresa para después analizar el comienzo de negociación es que] PeruPetro debe verificar la disponibilidad del área solicitada.”); *see also* *Id.*, ¶ 110, p. 47, second table on page recognizing that step “1” for the procedure of negociación directa is answering whether “the area is available for Direct Negotiation?”. *See also* Expert Report of Carlos Raúl José Vizquerra Pérez Albela (4 March 2021) (“**Vizquerra Expert Report**”), ¶ 34, *et seq.* (citing to the same procedure Mr. Quiroga refers to in ¶ 110 and concluding that such procedure “sets forth the requirement of a preliminary determination as to whether the requested area is available to be addressed through a direct negotiation procedure.”) (**RER-1**) (Free Translation by the Republic of Peru: Spanish original text reads: “establece como requisito determinar previamente si el área solicitada es un área disponible para ser materia de un procedimiento de negociación directa.”).

<sup>62</sup> *See* Claimants’ Memorial (11 September 2020), note 102.

tender process.<sup>63</sup> Mr. Amorrortu was invited to participate in the process and he in fact participated by submitting a proposal.<sup>64</sup>

31. Thus, Mr. Amorrortu's own allegations fail to support the assertion that PeruPetro had any intention to submit Blocks III and IV to direct negotiation. Rather, the facts adduced by Claimant consistently demonstrate PeruPetro's intention to submit these Blocks to a public tender. Mr. Amorrortu effectively admits that such intention was directly communicated to Mr. Amorrortu as early as August 2013, and that he was aware of that intention.

32. Mr. Amorrortu's allegations with respect to direct negotiations are limited to three central facts (i) that Mr. Ortigas instructed Mr. Amorrortu to submit a proposal for direct negotiations and that such proposal would be evaluated;<sup>65</sup> (ii) that Mr. Amorrortu submitted the proposal shortly thereafter, in May 28, 2014;<sup>66</sup> and (iii) that on July 16, 2014, Mr. Ortigas informed Mr. Amorrortu that PeruPetro had rejected this proposal.<sup>67</sup> Notably, nothing in Claimant's allegations indicate that negotiations were ever actually commenced with Mr. Amorrortu, or that meetings were ever held to discuss a possible contract.

33. As a result, Mr. Amorrortu's claim rests entirely on his legal contention that his mere submission of a *proposal* commenced direct negotiations and provided him with a bundle of rights.<sup>68</sup> As discussed below, this is simply not the case as a matter of law.

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<sup>63</sup> Letter from Luis Ortigas to Bacilio Amorrortu (12 August 2013) (C-6); Letter from PeruPetro, S.A. to Bacilio Amorrortu (20 August 2014) (C-13).

<sup>64</sup> Letter from Bacilio Amorrortu to "Comisión de la Licitación Pública Internacional No. PERUPETRO-1-2014" (31 October 2014) (C-14); Claimants' Memorial (11 September 2020), ¶ 86.

<sup>65</sup> Claimants' Memorial (11 September 2020) ¶ 73.

<sup>66</sup> Claimants' Memorial (11 September 2020), ¶ 74.

<sup>67</sup> See Claimants' Memorial (11 September 2020), ¶ 83.

<sup>68</sup> See Claimants' Memorial (11 September 2020), ¶ 192 ("on May 28, 2014, [the day when the Baspetro was sent to PeruPetro] 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.

## 2. Mr. Amorrortu Mischaracterizes the Direct Negotiation “Process”

34. Mr. Amorrortu claims he was “able to commence an exclusive direct negotiation process with PeruPetro to operate Blocks III and IV and acquired the appurtenant right under Peruvian law.”<sup>69</sup> According to Mr. Amorrortu, this process was commenced by his submission of a proposal for direct negotiation.<sup>70</sup>

35. Mr. Amorrortu describes this process as consisting of what he calls “three phases” and refers to PeruPetro’s Rules and Procedures for the Direct Negotiation of Contract.<sup>71</sup> Mr. Amorrortu asserts that the “First Phase” of direct negotiations commences with a letter of interest by a company and involves the preliminary steps of determining “whether the oil block is available for direct negotiation,” that is, as indicated earlier, ensuring that the relevant oil block “is not under contract and is not the subject of a public bidding process.”<sup>72</sup> Mr. Amorrortu observes that “[i]f the property is not available for direct negotiation, PeruPetro must send a letter to the oil company [so indicating], which has to be pre-approved by the general management and the contract division.”<sup>73</sup>

36. In the “Second Phase”, the interested company is evaluated to determine if it can receive a certification of qualification. As Mr. Amorrortu observes, a “certification of qualification gives the certified oil company *the right to proceed to the contract negotiation phase of the Direct Negotiation Process with PeruPetro.*”<sup>74</sup> Mr. Amorrortu further notes that a certification of qualification may be granted if an oil company presents: (i) documents demonstrating its financial capacity; (ii) commitment of an operator with the technical capacity to conduct the oil operations with an experienced oil services company; and (iii) “a sworn declaration confirming that the

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<sup>69</sup> Claimants’ Memorial (11 September 2020), ¶ 192.

<sup>70</sup> Claimants’ Memorial (11 September 2020), ¶¶ 73-74, 197 (“The Direct Negotiation Process is commenced with the submission of a proposal for direct negotiation by an interested oil company.”)

<sup>71</sup> Claimants’ Memorial (11 September 2020), ¶¶ 194-210.

<sup>72</sup> Claimants’ Memorial (11 September 2020), ¶ 197.

<sup>73</sup> Claimants’ Memorial (11 September 2020), ¶ 199.

<sup>74</sup> Claimants’ Memorial (11 September 2020), ¶ 201 (emphasis added).



company has a team with the experience and expertise necessary to complete the project.”<sup>75</sup> Mr. Amorrortu alleges that, if within 10 days of a request for certification, no observation is made by PeruPetro to such a request, PeruPetro is “obligated to issue the certification of qualification.”<sup>76</sup> As will be discussed further below this is incorrect statement of Peruvian law.

37. Finally, in the “Third Phase”, Mr. Amorrortu indicates that, after the qualification phase, if no other company is interested in the relevant oil block, then, PeruPetro “must proceed to work with the direct negotiation oil company and prepare the contract.”<sup>77</sup>

38. Mr. Amorrortu’s description of the PeruPetro’s Rules and Procedures for the Direct Negotiation of Contract (Exhibit CLA-044) (“Rules and Procedures”) is incorrect in many respects and mischaracterizes its content. First, the division into three “phases” of a “process” is nowhere indicated in the Rules and Procedures. Rather the Rules and Procedures consist of a long list of action items, which “start” with the receipt of a letter of interest and “ends” with the signing of contracts for exploration and exploitation of hydrocarbons.<sup>78</sup> The Rules and Procedures also contains flowcharts that visualize the action item list.<sup>79</sup> It is misleading, however, to characterize the direct negotiation “process” as having “begun” upon submission of a letter of interest. This is because under Peruvian law, including the terms of the Rules and Procedures, and indeed as recognized by Mr. Amorrortu and his legal expert, various steps have to occur before actual negotiations of a contract begins.<sup>80</sup> Those preconditions are set forth below.

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<sup>75</sup> Claimants’ Memorial (11 September 2020), ¶ 202.

<sup>76</sup> Claimants’ Memorial (11 September 2020), ¶ 203.

<sup>77</sup> Claimants’ Memorial (11 September 2020), ¶¶ 206-209.

<sup>78</sup> PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 5-10 (CLA-44).

<sup>79</sup> PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 11-16 (CLA-44).

<sup>80</sup> PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 5-16 (CLA-44); Claimants’ Memorial (11 September 2020), ¶¶ 198, 204, 208 (copying tables of the procedure of direct negotiation which, cumulative, comprise 26 consecutive steps necessary to conduct a direct negotiation). *See also* Quiroga Expert Report, ¶ 109 (listing at least 15 steps for the conclusion of a contract per direct negotiation).

### 3. Preconditions to Contract via Direct Negotiation under Peruvian Law and Applicable Regulations

39. Applicable Peruvian law and regulations establish several preconditions for a direct negotiation of a contract for the exploration and/or exploitation of an oil block.

40. *First*, article 11 of Peru’s Organic Hydrocarbons Law No. 26221 of 1993, expressly provides PeruPetro with the discretion of selecting direct negotiation as one of two modalities to celebrate contracts with qualifying oil companies (the other being a public tender).<sup>81</sup> Assuming that other preconditions for a direct negotiation are met, PeruPetro formally confirms its discretionary decision to engage in a direct negotiation by sending a written communication to the interested company setting forth of the commencement date of negotiations and requesting that the interested company designate the representatives who will participate in the negotiation.<sup>82</sup> Without such a formal determination, no direct negotiation can commence.

41. *Second*, as set forth in PeruPetro’s Rules and Procedure, before any direct negotiation can commence, a determination must be made as to whether the relevant oil block is available for such procedure.<sup>83</sup> As Peru’s legal expert Mr. Carlos Vizquerra, states, an area is unavailable if PeruPetro has already decided to subject the relevant block to a public tender.<sup>84</sup>

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<sup>81</sup> Organic Hydrocarbons Law No. 26221 (13 August 1993), Art. 11 (**CLA-45**); *see also* PeruPetro’s Direct Negotiation and Competitive Bidding Process Contracting Policy: Board Agreement No. 029-2017 (10 April 2017), Art. 2.2 (**RLA-34**). *See also* Quiroga Expert Report, ¶ 89 (Free Translation by the Republic of Peru: “Article 11 of the Organic Hydrocarbons Law provides that hydrocarbon exploitation contracts may be entered into, *at PeruPetro’s discretion*, after direct negotiation or by call for bids.”) (Spanish original text reads: “El Artículo 11° del TUO de la Ley Orgánica de Hidrocarburos dispone que los contratos de explotación de hidrocarburos pueden celebrarse, *a criterio de PeruPetro*, previa negociación directa o por convocatoria”) (emphasis added). *See*, relatedly, recognizing PeruPetro’s control over the negotiation and conclusion of contracts *Id.*, ¶ 88 (Free Translation by the Republic of Peru: “PeruPetro is in charge of the negotiation, execution, and supervision of hydrocarbon exploitation license agreements.”) (Spanish original text reads: “La negociación, celebración y supervisión de los contratos de licencia para la explotación de hidrocarburos se encuentra a cargo de PeruPetro [...]”).

<sup>82</sup> *See* Vizquerra Expert Report, ¶ 44 (**RER-1**).

<sup>83</sup> *See* PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 5-10 (**CLA-44**), ¶ 8, p. 5.

<sup>84</sup> Vizquerra Expert Report, ¶ 8, *et seq.* (**RER-1**) (Free Translation by the Republic of Peru: “the areas requested by Amorrortu were not available to be considered in direct negotiations because the Perupetro Executive Board, in its capacity as a collegiate body duly empowered to do so, had already formally decided to carry out a selection process as the form contracting to choose the new contractor for those same blocks.”) (Spanish original text reads: “[...] las áreas solicitadas por Amorrortu no se encontraban disponibles para ser consideradas en una negociación directa debido a que el Directorio de Perupetro, en su condición de órgano colegiado debidamente facultado para ello, ya había

42. *Third*, even if PeruPetro formally decides to conduct direct negotiation, and the relevant area is available for such procedure, both the Regulation on the Qualification of Petroleum Companies and PeruPetro’s Rules and Procedure require that the company requesting the negotiation must obtain a certification that is a qualified oil company (a “certification of qualification”).<sup>85</sup> In the case of a company without previous experience in exploration and exploitation, such as Baspetro,<sup>86</sup> an application for a certification of qualification *must* be accompanied by the following:

- i. proof of the entity’s existence;
- ii. sworn statement of not being in bankruptcy, or similar status, nor having any legal impediment to contract with the State;
- iii. sworn statement that the entity has qualified staff to conduct exploration and exploitation activities;
- iv. financial statements for the last 3 years;
- v. information regarding the entity’s exploitation and exploration activities for the prior 3 years, if any;
- vi. a sworn statement to comply with applicable provisions on environmental protection;
- vii. documentation that demonstrates that the entity has the economic and financial capacity to develop the related activities;

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decidido formalmente llevar a cabo un proceso de selección como modalidad de contratación para elegir al nuevo contratista de esos mismos lotes”).

<sup>85</sup> Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 2 (CLA-3) (Free Translation by the Republic of Peru: “All Oil Companies must be duly qualified by PERUPETRO S.A. to start the negotiation of a Contract. The granting of Qualification shall not generate any right over the Contract area.”) (Spanish original text reads: “Toda Empresa Petrolera deberá estar debidamente calificada, por PERUPETRO S.A., para iniciar la negociación de un Contrato. El otorgamiento de Calificación no generará derecho alguno sobre el área de Contrato.”); See PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 5-10 (CLA-44).

<sup>86</sup> As Mr. Amorrortu admits, Baspetro was constituted in 17 October 2012, specifically for his “expectation” to obtain Blocks III and V and did not have any active Operations. Claimants’ Memorial (11 September 2020), ¶¶ 8, 53, 188. The “projects” in which Mr. Amorrortu alleges Baspetro engaged consist of various meetings by Mr. Amorrortu with executive in Texas, and other oil companies, ostensibly to organize Baspetro’s corporate, administrative and logistical structure. Claimants’ Memorial (11 September 2020), ¶¶ 60-66. However, according to Mr. Amorrortu’s own allegations, no projects or operations were ever actually conducted.

- viii. commitment to engage a technically capable operator to conduct the exploration and exploitation activities.

43. Only if a company has made a proper application, with all relevant documentation, and is deemed to have the relevant qualifications, can it be issued a certification and proceed to direct negotiation.<sup>88</sup>

44. *Fourth*, even if the above-referenced conditions are met and actual negotiations commence, Peruvian law and regulations do not guarantee or confer a right to an eventual contract. The Regulation on Qualification expressly provides that the granting of a qualification certification (a prerequisite for direct negotiation) “does not generate any right whatsoever” with respect to a contract.<sup>89</sup> Furthermore, PeruPetro’s Rules and Procedure establish at least two situations where a direct negotiation is terminated without a contract. The first is the requirement of a 30-day period in which other companies have an opportunity to express interest in the blocks that are the subject of direct negotiation. If other companies express interest of such blocks, the negotiation is terminated and a tender is conducted.<sup>90</sup> The second is the establishment of a 60-day period to

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<sup>87</sup> Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), arts. 5, 6 (**CLA-3**); *see also* Vizquerra Expert Report, ¶ 16, fns. 4, 5 (**RER-1**); *see also* Quiroga Expert Report, ¶¶ 94-95.

<sup>88</sup> Quiroga Expert Report, ¶ 89 (Free Translation by the Republic of Peru: “Article 11 of the Organic Hydrocarbons Law provides that hydrocarbon exploitation contracts may be entered into, *at PeruPetro’s discretion*, after direct negotiation or by call for bids.”) (Spanish original text reads: “El Artículo 11° del TUO de la Ley Orgánica de Hidrocarburos dispone que los contratos de explotación de hidrocarburos pueden celebrarse, *a criterio de PeruPetro*, previa negociación directa o por convocatoria”) (emphasis added).

<sup>89</sup> Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, Art. 2 (**CLA-3**) (Free Translation by the Republic of Peru: “The granting of Qualification will not create any right whatsoever over the area to contract.”) (Spanish original text reads: “El otorgamiento de Calificación no generará derecho alguno sobre el área de Contrato.”); Vizquerra Expert Report, ¶ 9 (**RER-1**) (Free Translation by the Republic of Peru: “Perupetro’s granting of qualification as an oil company does not generate any right for the qualified company other than being able to participate in a direct negotiation process or selection process for a requested contract area or open to competition, respectively.”) (Spanish original text reads: “El otorgamiento de la calificación como empresa petrolera por parte de Perupetro no genera ningún derecho para la empresa calificada distinto al estar en capacidad de participar en un proceso de negociación directa o proceso de selección sobre un área de contrato solicitada o abierta a concurso, respectivamente.”).

<sup>90</sup> *See* PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 13 (**CLA-44**).

conclude a contract once the formal commencement of a negotiation begins, as noted above.<sup>91</sup> If no contract is finalized within this timeframe the direct negotiation is terminated.<sup>92</sup>

#### **4. Mr. Amorrortu Never Complied with the Preconditions for a Direct Negotiation as a Matter of Law**

45. As discussed below, Baspetro never met any of the preconditions for a direct negotiation established under applicable Peruvian laws and regulations. As a result, neither Baspetro nor Mr. Amorrortu acquired a right to such procedure.

##### **a. There was never a formal determination by PeruPetro to commence Direct Negotiations as required by law**

46. As noted above, the Peruvian law applicable at the time of Mr. Amorrortu's submission of his proposal for direct negotiation, the Organic Hydrocarbons Law of 1993, established that direct negotiation is a modality to contract with oil companies that PeruPetro *may* select, *at its discretion*.<sup>93</sup> Mr. Amorrortu's expert, Mr. Quiroga León agrees. He explains, "Contracts [...] *may* be held by direct negotiation, or by public tender, *at PeruPetro's discretion*."<sup>94</sup>

47. An interested company's proposal for direct negotiation, or indeed, an area's potential availability for direct negotiations, does not affect this underlying discretion. Ultimately, a direct negotiation process could only commence upon *PeruPetro's determination* to apply such process to an oil block. Only then do the conditions to proceed to a potential negotiation (including verification if the block is available, and the qualification of the company) become relevant. In

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<sup>91</sup> See PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 8, 15 (CLA-44).

<sup>92</sup> See PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 8, 15 (CLA-44).

<sup>93</sup> Organic Hydrocarbons Law No. 26221 (13 August 1993), Art. 11 (CLA-45); see also PeruPetro's Direct Negotiation and Competitive Bidding Process Contracting Policy: Board Agreement No. 029-2017 (10 April 2017), Art. 2.2 (RLA-34).

<sup>94</sup> Quiroga Expert Report, ¶ 89 (Free Translation by the Republic of Peru: Spanish original text reads: "El Artículo 11° del TUO de la Ley Orgánica de Hidrocarburos dispone que los contratos de explotación de hidrocarburos pueden celebrarse, *a criterio de PeruPetro*, previa negociación directa o por convocatoria") (emphasis added). See, relatedly, recognizing PeruPetro's control over the negotiation and conclusion of contracts *Id.*, ¶ 88 (Free Translation by the Republic of Peru: "PeruPetro is in charge of the negotiation, execution, and supervisión of hydrocarbon exploitation license agreements.") (Spanish original text reads: "La negociación, celebración y supervisión de los contratos de licencia para la explotación de hidrocarburos se encuentra a cargo de PeruPetro [...]").

other words, the availability of an oil block for direct negotiation and the interested company's certification of qualification are necessary, but not sufficient, steps to commence a direct negotiation. Ultimately, whether or not PeruPetro proceeds to a direct negotiation is subject to PeruPetro's discretionary determination.

48. To be sure, this determination, when taken, must comply with certain formal requirements in accordance with the mandates of Peruvian law. As Peru's legal expert, Carlos Vizquerra, explains, if such a determination is made, "the request for direct negotiation must be addressed by Perupetro communicating the start date of the negotiations and requesting that [the interested company] appoint representatives who will participate exclusively in the negotiation."<sup>95</sup>

49. In this case, no such formal determination existed. Indeed, Mr. Amorrortu's own allegations are consistent with the fact that PeruPetro never made such a determination. On the contrary, PeruPetro communicated on various occasions and in various ways its intention to submit Blocks III and IV to a public tender, and not a direct negotiation. Furthermore, Mr. Amorrortu's proposal was ultimately rejected without any commencement date being established. According to Mr. Amorrortu's own allegations, the only formal determination made by PeruPetro with respect to the blocks was to submit them to a public tender.<sup>96</sup> Accordingly, there is no legal basis to claim that Mr. Amorrortu had a right to a direct negotiation when the PeruPetro never made the formal determination to subject the blocks to a direct negotiation, as required by law.

**b. Blocks III and IV were never available for direct negotiation, as required by law**

50. Putting aside the lack of PeruPetro's formal determination, the preliminary conditions to commence a direct negotiation were never obtained. First, as indicated above and as Mr. Amorrortu acknowledges,<sup>97</sup> because PeruPetro had already decided to subject Blocks III and

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<sup>95</sup> See Vizquerra Expert Report, ¶ 44 (**RER-1**) (Free Translation by the Republic of Peru: Spanish original text reads: "[...] el Procedimiento Contratación [*sic*] por Negociación Directa establece que la solicitud de negociación directa debe ser respondida por Perupetro comunicando la fecha de inicio de las negociaciones y solicitando a la Empresa Petrolera la designación de los representantes que participarán exclusivamente en la negociación.").

<sup>96</sup> Claimants' Memorial (11 September 2020), ¶ 82; PeruPetro Press Release (14 July 2014) (**C-12**).

<sup>97</sup> Claimants' Memorial (11 September 2020), ¶ 197; *see also* Quiroga Expert Report, ¶ 109 (Free Translation by the Republic of Peru: "[The first step to determine whether it is possible to proceed with the qualification of a Company and then analyze the start of negotiations is that] PeruPetro must verify the availability of the requested area.")

IV to public bidding, they were not available for direct negotiations in accordance with PeruPetro's own regulations. Accordingly, Mr. Amorrortu's proposal was ineligible and incapable of generating rights.<sup>98</sup>

**c. Baspetro never obtained a qualification certification as required by law**

51. Even if the areas were available for direct negotiation, Mr. Amorrortu's company, Baspetro, never obtained the certification of qualification necessary to proceed to actual negotiations. As noted earlier, Peruvian law requires that the interested oil company first receive a qualification certification before being able to engage in an actual direct negotiation process.<sup>99</sup> Mr. Amorrortu's expert, Quiroga León confirms this, explaining that only after a "favorable qualification is obtained, [...] the company is authorized to access the direct negotiation

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(Spanish original text reads: "[El primer paso para determinar si es posible proceder a calificación de una empresa para después analizar el comienzo de negociación es que] PeruPetro debe verificar la disponibilidad del área solicitada"); *see also Id.*, ¶ 110, p. 47, second table on page recognizing that step "1" for the procedure of negociación directa is answering whether "the area is available for Direct Negotiation?". *See also Vizquerra Expert Report*, ¶ 34, *et seq.* (**RER-1**) (citing to the same procedure Mr. Quiroga refers to in ¶ 110 and concluding that such procedure "sets forth the requirement of a preliminary determination as to whether the requested area is available to be addressed through a direct negotiation procedure.") (Free Translation by the Republic of Peru: Spanish original text reads: "establece como requisito determinar previamente si el área solicitada es un área disponible para ser materia de un procedimiento de negociación directa").

<sup>98</sup> While PeruPetro's Rules and Procedures indicate that if a block area is not available for direct negotiation, a letter notifying the company that its proposal is ineligible should be sent after its review by the and signature by the General Manager, Rules and Procedures, failure to send such a letter does not and cannot dissolve the relevant contract, and thus does not take away the area's unavailability. The requirement for formal notices, while set forth in the Rules and Procedures, is in some respects redundant where the existence of the contract is publicly available and widely known, as was the case with the Interoil Contract. PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation, p. 11 (**CLA-44**).

<sup>99</sup> Vizquerra Expert Report, ¶ 6 (**RER-1**) (Free Translation by the Republic of Peru: "[The] qualification which is a prerequisite and *sine qua non* for the initiation of direct negotiation") (Spanish original text reads: "[La] calificación que es requisito previo y *sine qua non* para el inicio de la negociación directa"). Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 2 (**CLA-3**) (Free Translation by the Republic of Peru: "All Oil Companies must be duly qualified by PERUPETRO S.A. to start the negotiation of a Contract. The granting of Qualification shall not generate any right over the Contract area.") (Spanish original text reads: "Toda Empresa Petrolera deberá estar debidamente calificada, por PERUPETRO S.A., para iniciar la negociación de un Contrato. El otorgamiento de Calificación no generará derecho alguno sobre el área de Contrato.").

procedure”.<sup>100</sup> Notably, Mr. Amorrortu does not and cannot present a certification of qualification, because it never received one.<sup>101</sup>

52. Based on the evidence submitted by Mr. Amorrortu, it is clear that Mr. Amorrortu did not comply with the legal requisites for a certification of qualification. As noted earlier, and as Mr. Amorrortu’s own legal expert recognizes, Peruvian law establishes that a request for

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<sup>100</sup> Quiroga Expert Report, ¶ 103 (Free Translation by the Republic of Peru: “Once the favorable qualification is obtained, either by express decision or due to the expiration of the term for issuing it, the company is authorized to access the direct negotiation procedure.”) (Spanish original text reads: “Obtenida la calificación favorable, sea por decisión expresa o por el vencimiento del plazo para emitirla, la empresa que [sic] habilitada para acceder al procedimiento de negociación directa”); *Id.*, ¶ 89 (Free Translation by the Republic of Peru: “in regards to direct negotiations, the interested company must first obtain a qualification from the aforementioned state-owned Company.”) (Spanish original text reads: “[...] en lo que concierne a las negociaciones directas, la empresa interesada debe obtener previamente una calificación de la precitada empresa estatal.”); *Id.* ¶ 91 (Free Translation by the Republic of Peru: “Article 2° of the Regulations for the Qualification of Oil Companies establishes as a prerequisite for the start of the negotiation of a contract with PeruPetro the qualification as an oil company before such Entity”) (Spanish original text reads: “El artículo 2° del Reglamento de Calificación de Empresas Petroleras establece como requisito previo al inicio de la negociación de un contrato con PeruPetro obtener la calificación como empresa petrolera ante dicha Entidad”); *Id.*, ¶ 110 (Free Translation by the Republic of Peru: “[...] the combined reading of the Regulations for the Qualification of Oil Companies and the Procedure and Indicators for the Qualification of Oil Companies could be understood as meaning that the qualification procedure must be completed before the beginning of the procedural stages of direct negotiation [...]”) (Spanish original text reads: “[...] la lectura conjunta del Reglamento de Calificación de Empresas Petroleras y del Procedimiento e Indicadores para Calificación de Empresas Petroleras se podría entender que el procedimiento de calificación se debe agotar antes del inicio de los estadios procedimentales propios de la negociación directa [...]”).

<sup>101</sup> Vizquerra Expert Report, ¶ 49 (**RER-1**) (Free Translation by the Republic of Peru: “Perupetro did not grant Baspetro the qualification as an oil company, which is a prerequisite for the initiation of direct negotiations.”) (Spanish original text reads: “Perupetro no le otorgó a Baspetro la calificación como empresa petrolera, la cual es requisito previo para el inicio de la negociación directa”). Mr. Amorrortu’s expert, Mr. Quiroga León argues that, in practice, PeruPetro seems to follow the qualification and the direct negotiation proceedings on a parallel fashion. Quiroga Expert Report, ¶ 110. Even if assuming this is correct for purposes of this 10.20.4 application, the fact remains that without certification of qualification, by law, there simply cannot be a direct negotiation.; PeruPetro’s Direct Negotiation and Competitive Bidding Process Contracting Policy: Board Agreement No. 029-2017 (10 April 2017), Art. 2.2 (**RLA-34**) (Free Translation by the Republic of Peru: “indicating that for a request of direct negotiation to move forward, the relevant oil company, along with its request for such negotiation, shall (i) ‘[p]rove higher technical capacity at PERUPETRO’s Administration satisfaction, according to the approved guidelines;’ (ii) ‘[a]ppear as oil and gas exploration and production company or as oil and gas integrated company’ in selected publications; ‘include[at its proposal] a work program’ and (iv) a ‘Qualification request’”) (Spanish original text reads: “[...] indicando que para que una solicitud de negociación directa avance, la empresa petrolera correspondiente, junto con su solicitud de dicha negociación, deberá (i) ‘demostrar, a satisfacción de la Administración de PERUPETRO S.A. conforme a los lineamientos aprobados por esta, capacidad técnica superior.’ (ii) ‘Figurar como empresa de exploración y producción de petróleo y gas, o empresa integrada de petróleo y gas’ en selectas publicaciones; ‘presentando una propuesta de programa de trabajo’; y (iv) su ‘solicitud de calificación’”).



qualification of an entity without previous experience in exploration and exploitation, such as Baspetrol<sup>102</sup>, *must* be accompanied by the following documents and information:

- i. proof of the entity's existence;
- ii. sworn statement of not being in bankruptcy, or similar status, nor having any legal impediment to contract with the State;
- iii. sworn statement that the entity has qualified staff to conduct exploration and exploitation activities;
- iv. financial statements for the last 3 years;
- v. information regarding the entity's exploitation and exploration activities for the prior 3 years, if any;
- vi. a sworn statement to comply with applicable provisions on environmental protection;
- vii. documentation that demonstrates that the entity has the economic and financial capacity to develop the related activities;
- viii. commitment to engage a technically<sup>103</sup> capable operator to conduct the exploration and exploitation activities.

53. None of this required documentation was submitted with Baspetrol's 16-page proposal for direct negotiation.

54. In his Memorial, Mr. Amorrortu inaccurately characterizes the statements of his own expert, affirming that Mr. Quiroga "explains" that Baspetrol "had complied with all the qualification requirements."<sup>104</sup> However, in his expert report Mr. Quiroga limits himself to argue that PeruPetro did not strictly follow the action items he considered pertinent to the direct negotiation "process".<sup>105</sup> At no point does Mr. Quiroga state, let alone demonstrate, that the

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<sup>102</sup> As Mr. Amorrortu admits, Baspetrol was constituted in 17 October 2012, specifically for his "expectation" to obtain Blocks III and V and did not have any active Operations. Claimants' Memorial (11 September 2020), ¶¶ 8, 53, 188. The "projects" in which Mr. Amorrortu alleges Baspetrol engaged consist of various meetings by Mr. Amorrortu with executive in Texas, and other oil companies, ostensibly to organize Baspetrol's corporate, administrative and logistical structure. Claimants' Memorial (11 September 2020), ¶¶ 60-66. However, according to Mr. Amorrortu's own allegations, no projects or operations were ever actually conducted.

<sup>103</sup> Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), arts. 5, 6 (CLA-3); *see also* Vizquerra Expert Report, ¶ 16, fns. 4, 5 (RER-1); *see also* Quiroga Expert Report, ¶¶ 94-95.

<sup>104</sup> Claimants' Memorial (11 September 2020), ¶ 221, citing to Quiroga Expert Report, ¶¶ 22-25 (*see* note 320).

<sup>105</sup> *See id.*

Baspetrol Proposal complied with all the legal requirements for it to be entitled to a certification for qualification.<sup>106</sup>

55. The failure to present the requisite documents for qualification is critical because it means that, as a matter of law, Baspetrol had not formally triggered the qualification process or the timeframes set forth therein. The Regulation on the Qualification of Petroleum Companies (“Regulation on Qualification”) states that “PERUPETRO S.A. is obliged to grant the Qualification to an Oil Company within ten (10) business days from receipt of a request [that complies with requirements of] Articles 5 or 6 [...] ***only if the Oil Company presents the documents mentioned in said Articles, in a complete manner.***”<sup>107</sup>

56. Mr. Amorrortu attempts to turn this applicable law on its head and argues that because PeruPetro did not expressly deny Baspetrol a certification of qualification within the above-referenced 10-day period, PeruPetro’s silence constituted an implicit determination that the underlying project was available and that Baspetrol was qualified”.<sup>108</sup> This argument is wholly unsupported on several grounds.

57. First, as noted in the language cite earlier, the Regulation on Qualification expressly conditions any obligation to grant a certification of qualification within 10 days of the submission of all required documents.<sup>109</sup> Further, the Regulation on Qualification expressly provides:

The process of Qualification shall commence with the presentation of a request by the Oil Company to PERUPETRO S.A. accompanied by the documents set forth in Article 5 of the present Regulation; in said request there should be an indication of an intention to negotiate

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<sup>106</sup> Quiroga Expert Report, ¶¶ 22-25.

<sup>107</sup> Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 14 (CLA-3) (Free Translation by the Republic of Peru: Spanish original text reads: “PERUPETRO S.A. se encuentra obligada a otorgar la calificación a una Empresa Petrolera, dentro de los diez (10) días hábiles de recibida la solicitud [que cumpla con los requisitos de] los artículos 5 o 6 [...] ***siempre y cuando la Empresa Petrolera presenta los documentos mencionados en dichos artículos de manera completa.***”) (emphasis added).

<sup>108</sup> Claimants’ Memorial (11 September 2020), ¶¶ 196; *see also Id.*, 203.

<sup>109</sup> Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 9 (CLA-3).

a Contract or to associate with an Oil Company that is party to a pending Contract.”<sup>110</sup>

58. The Regulation on Qualification notably distinguishes between a request that commences the qualification process and the statement of intent to negotiate a contract. In other words, a company’s request or proposal for direct negotiation does not by itself constitute a request for qualification, unless it includes all of the required documentation. Without such a properly submitted request, the qualification process (and the timeframes set forth in the Regulation on Qualification) do not commence to run.

59. As indicated earlier, none of the requisite documentation for qualification was submitted with the Baspetro Proposal. Mr. Amorrortu also does not allege that he submitted the requisite documentation at some later date. To the contrary, his argument relies exclusively on the presentation of the Baspetro Proposal.<sup>111</sup> However, this is insufficient under the express terms of the Regulation on Qualification. Accordingly, having failed to submit the required documentation (and thus present a valid request for qualification), the qualification process was never commenced and the 10-day period under the Regulation was never triggered.

60. Second, even if assuming *arguendo* that the Baspetro Proposal could be construed to be a compliant request for qualification and the 10-day period for a response from PeruPetro was triggered, the Regulation on Qualification nowhere establishes that PeruPetro’s silence can be deemed implied consent.<sup>112</sup> The Regulation on Qualification limits itself to establish penalties on

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<sup>110</sup> Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 4 (CLA-3) (Free Translation by the Republic of Peru: Spanish original text reads: “El proceso de Calificación se iniciará con la presentación de una solicitud de la Empresa Petrolera a PERUPETRO S.A., acompañando los documentos que se detallan en el Artículo 5 del presente Reglamento; en dicha solicitud deberán manifestar su intención de negociar un Contrato o de asociarse con una Empresa Petrolera que tenga un Contrato vigente.”)

<sup>111</sup> See for instance, Claimants’ Memorial (11 September 2020), ¶¶ 8, 156, 202.

<sup>112</sup> Vizquerra Expert Report, ¶ 31 (RER-1) (Free Translation by the Republic of Peru: “The lack of response from Perupetro within the term established in the Procedure (i) implies that the Procedure was never initiated because Amorrortu did not comply with the aforementioned requirements and formalities of the Regulation; or (ii) assuming as true that the request for direct negotiation also constituted a request for Qualification, implies administrative responsibility of Perupetro’s officers, provided that the Oil Company has submitted the documents for the Procedure in a complete manner, but not the affirmative facta of the Request.”) (Spanish original text reads: “La falta de respuesta de Perupetro en el plazo establecido en el Procedimiento (i) implica que el Procedimiento nunca se inició debido a que Amorrortu no cumplió con los ya mencionados requisitos y formalidades del Reglamento; o (ii) suponiendo como cierto que la solicitud de negociación directa también constituyó una solicitud de Calificación, implica responsabilidad

PeruPetro’s officials who fail to comply with the 10-day requirement; but nowhere does it establish that, in addition, the company is deemed to be certified.<sup>113</sup> Accordingly, Mr. Amorrortu cannot rely on silence to assert that it was deemed a qualified oil company. To the contrary, the only manner in which this qualification is given under the Regulation on Qualification is by the issuance of a certificate, which, as stated earlier, was never given to Baspetrol.

61. In conclusion, no direct negotiation was ever in place as a matter of law and, on three separate legal grounds, Mr. Amorrortu never obtained any right to a direct negotiations.<sup>114</sup>

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administrativa de los funcionarios de Perupetro, siempre y cuando la Empresa Petrolera haya presentado los documentos para el Procedimiento de manera completa, mas no la afirmativa ficta de la Solicitud.”).

<sup>113</sup> *Id.*

<sup>114</sup> Because Mr. Amorrortu never obtained a right to a direct negotiation, Peru respectfully submits that the Tribunal’s analysis can end there. However, even assuming *arguendo* that a right to a direct negotiation was conferred, Mr. Amorrortu’s claim still fails as a matter of law because these rights became inoperative and were effectively waived when Mr. Amorrortu submitted a bid in the public tender. As discussed *supra*, in accordance with PeruPetro’s plans for Blocks III & IV, an invitation for bids for a public tender to such Blocks was published on July 14, 2014 and PeruPetro also invited Mr. Amorrortu to present a bid for the public tender. Letter from PeruPetro, S.A. to Bacilio Amorrortu (20 August 2014) (C-13); PeruPetro S.A., Press Release (14 July 2014) (C-12); Claimants’ Memorial (11 September 2020), ¶ 82. On behalf of Baspetrol, Mr. Amorrortu willingly accepted this invitation and on October 31, 2014, presented a bid. Letter from Bacilio Amorrortu to “Comisión de la Licitación Pública Internacional No. PERUPETRO-1-2014” (31 October 2014) (C-14); Claimants’ Memorial (11 September 2020), ¶ 86. Peruvian law clearly establishes two separate modalities under which PeruPetro can contract with petroleum companies for the exploration and exploitation of oil blocks: direct negotiation or public tender. See Vizquerra Expert Report, ¶¶ 6, 8, 47 (RER-1); see also Quiroga Expert Report, ¶ 203. As Mr. Vizquerra explains, these modalities are mutually exclusive, such that if blocks are subject to a public tender they are deemed unavailable for direct negotiation. Vizquerra Expert Report, ¶¶ 35, 39 (RER-1); Claimants’ Memorial (11 September 2020), ¶ 197. Similarly, the process of direct negotiation necessarily excludes the possibility of submitting blocks that are the object of those negotiations to a public tender. Vizquerra Expert Report, ¶ 35 (RER-1). Thus, participation in a public tender is inherently incompatible with any right to direct negotiation and would render any such right moot. See, for instance, Vizquerra Expert Report, ¶¶ 50, 51 (RER-1). In his Statement of Claim, Mr. Amorrortu alleges that he presented his bid “in order to prevent PeruPetro from using the pretext of non-participation in the International Public Bidding Process to deny the Baspetrol Proposal.” Claimants’ Memorial (11 September 2020), ¶ 86. However, Mr. Amorrortu made no qualification to PeruPetro in that respect, or made any reservation of any alleged right to a direct negotiation. This, notwithstanding Mr. Amorrortu’s declared knowledge of Peruvian law including that a public tender would be incompatible with a direct negotiation. See Claimants’ Memorial (11 September 2020), ¶ 56 (“Amorrortu: (i) searched and reviewed the laws in force in Peru regarding commercial entities based in Peru.”). As Mr. Vizquerra states, “[i]n my opinion, Amorrortu’s decision to participate in the International Public Tender is a confirmation that Amorrortu was not participating in any direct negotiation process.” Vizquerra Expert Report, ¶ 50 (RER-1) (Free Translation by the Republic of Peru: Spanish original text reads: “En mi opinión, la decisión de Amorrortu de participar en la Licitación Pública Internacional es una confirmación de que Amorrortu no participaba en proceso de negociación directa alguno.”). Accordingly, as a matter of law, Mr. Amorrortu had no right to a direct negotiation capable of protection under the USPTPA and no award can be ruled in favor of Claimant.

Because Mr. Amorrortu's claim is anchored on his alleged right to such a direct negotiation, an award in favor of Mr. Amorrortu cannot be made as a matter of law.

**D. Beyond a Right to Direct Negotiation, Mr. Amorrortu never had a Right to a Contract**

62. In order for Mr. Amorrortu's claim to succeed, and for him to be entitled to the damages he seeks, Mr. Amorrortu would have to establish not only that he had a right to a direct negotiation, but that such a direct negotiation would have resulted in an actual contract.

63. Even if Mr. Amorrortu could somehow show that Bapsetrol obtained a qualification certification due to PeruPetro's silence, and that this would have given him a right to a direct negotiation (notwithstanding the clear Peruvian legal principles that state otherwise), Mr. Amorrortu's claim would still fail. This is because, as a matter of law, he never was entitled to an actual contract over Lots III and IV. As noted earlier, the Regulation on Qualification expressly provides that the granting of a qualification certification (a prerequisite for direct negotiation) "does not generate any right whatsoever" with respect to a contract.<sup>115</sup>

64. Indeed, as with any negotiation, the parties could ultimately fail to come to terms. In addition, under the PeruPetro's Rules and Procedures, a direct negotiation is terminated if no contract is reached within 60 calendar days.<sup>116</sup> In addition, the direct negotiation process includes a period of 30 days in which other companies may show interest in the same Blocks, in which case the negotiation is terminated and a tender is conducted.<sup>117</sup>

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<sup>115</sup> Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, Art. 2 (CLA-3) (Free Translation by the Republic of Peru: "[...] The granting of Qualification will not create any right whatsoever over the area to contract") (Spanish original text reads: "[...] El otorgamiento de Calificación no generará derecho alguno sobre el área de Contrato."); Vizquerra Expert Report, ¶ 9 (Free Translation by the Republic of Peru: "Perupetro's granting of qualification as an oil company does not generate any right for the qualified company other than being able to participate in a direct negotiation process or selection process for a requested contract area or open to competition, respectively.") (Spanish original text reads: "El otorgamiento de la calificación como empresa petrolera por parte de Perupetro no genera ningún derecho para la empresa calificada distinto al estar en capacidad de participar en un proceso de negociación directa o proceso de selección sobre un área de contrato solicitada o abierta a concurso, respectivamente.").

<sup>116</sup> See PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 8, 15 (CLA-44).

<sup>117</sup> See PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 13 (CLA-44).

65. Because Amorrortu was never guaranteed a contract over Lots III and IV, irrespective of any alleged right to a direct negotiation, his claim fails as a matter of law.

**E. Expectations are not protected by the Treaty**

66. Ultimately, with no right established under Peruvian law, Mr. Amorrortu’s had nothing but a desire, or a legally unfounded expectation, to engage in direct negotiations with PeruPetro. This is recognized by his expert, Quiroga León, who observes that Mr. Amorrortu had an “expectation” to obtain a contract via direct negotiation.<sup>118</sup> Yet, investment arbitration awards have made it clear that mere expectations to obtain a contract, akin to Mr. Amorrortu’s expectation to engage in direct negotiations and possibly acquire a right over Blocks III and IV, are not protected by international law.

67. In *Nagel v. Czech Republic*, for example, similarly to the case at hand, the Czech Government awarded a Global Systems Mobile (“GSM”) license under a public tender process, a process not expected by claimant, to a bidder other than claimant.<sup>119</sup> Crucially, in that case, contrary to Mr. Amorrortu’s position here, claimant had already concluded an agreement with a Czech State-owned entity to “seek to obtain” such license.<sup>120</sup> The Tribunal found that absent conferral of the actual license, no right existed to such a license that could be protected by the Treaty, notwithstanding the existing contract.<sup>121</sup> Here, Mr. Amorrortu lacked not only a contract to exploit either Blocks III and/or IV, but also any agreement with Peru giving any sort of assurance

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<sup>118</sup> Quiroga Expert Report, ¶ 7 (Free Translation by the Republic of Peru: “the present arbitration was initiated by Bacilio Amorrortu against the Republic of Peru based on the investment made by Amorrortu in Peru; with the expectation of obtaining a contract by means of a direct negotiation to continue with the oil production operations of lots III and IV of the Talara oil basin, located in the Piura Region, Peru.”) (Spanish original text reads: “[...] el presente arbitraje fue iniciado por Bacilio Amorrortu en contra de la República del Perú en base a la inversión realizada por Amorrortu en el Perú; con la expectativa de obtener un contrato por medio de una negociación directa para continuar con las operaciones de producción de petróleo de los lotes III y IV de la cuenca petrolera de Talara, ubicada en la Región de Piura, Perú.”).

<sup>119</sup> *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award (9 September 2003) (Danelius, Hunter, Kronke), ¶¶ 4, 8, 12-13 (RLA-5).

<sup>120</sup> *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award (9 September 2003) (Danelius, Hunter, Kronke), ¶ 1 (RLA-5).

<sup>121</sup> *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award (9 September 2003) (Danelius, Hunter, Kronke), ¶¶ 327, 329 (RLA-5).

of a direct negotiation or of a contract.<sup>122</sup> To the contrary, applicable Peruvian law quite clearly indicates that Mr. Amorrortu had no right to either. His mere desire for a direct negotiation and, potentially, a contract, is therefore not protected by the USPTPA.<sup>123</sup>

### III. THE TRIBUNAL LACKS JURISDICTION AS MR. AMORRORTU DID NOT SUBMIT A VALID WAIVER UNDER ARTICLE 10.18.2 USPTPA

68. As noted above, Claimant has failed to assert a claim for which an award can be made in his favor as a matter of law. Should the Tribunal find otherwise, Claimant's claims should still be dismissed, because of Mr. Amorrortu's defective waiver. The defective nature of Mr. Amorrortu's waiver has effectively been conceded by Claimant, as will be noted in an overview of the procedural history of this matter relevant to the waiver (**Subsection A**). Below, Peru details the ways in which Mr. Amorrortu's waiver fails to comply with the express requirements of the Treaty and is therefore invalid. (**Subsection B**). Because a compliant waiver is a precondition to Peru's consent and the Tribunal's jurisdiction (**Subsection C**), Mr. Amorrortu's invalid waiver cannot be cured without Peru's consent (**Subsection D**). Accordingly, this Tribunal lacks jurisdiction over Mr. Amorrortu's claims.

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<sup>122</sup> See Sections II.C & D *supra*.

<sup>123</sup> See *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award (29 March 2005) (Danelius, Bring, Smets), pp. 19, 69, 72 (**RLA-8**) (holding that only legally binding commitments with economic value are entitled to treaty protection); *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003) (Robinson, Rubin, Jacovides), ¶ 2 (**RLA-4**); *Deutsche Telekom AG v. The Republic of India*, UNCITRAL, PCA Case No. 2014-10, Interim Award (13 December 2017) (Kaufmann-Kohler, Price, Stern), ¶ 181 (**RLA-35**) ("the Tribunal stresses that the situation before it differs from the cases relied upon by India. In *Mihaly*, the agreements entered into by the claimant were non-binding; in *Petrobart*, the negotiations 'did not result in any binding undertakings in the Contract'; in *Zhinvali*, the 'negotiations [...] to conclude a definitive set of agreements [...] never came to fruition'; in *Nagel*, the claimant entered into a cooperation agreement 'only of a preparatory nature'. By contrast, in the present case, Devas had a binding agreement contemplating the lease of valuable satellite spectrum, which agreement became effective after Antrix informed Devas that it had obtained full clearance from the Government to proceed with the lease."). In this same vein, last June 5, 2020, the *Nelson v. Mexico* tribunal determined that draft agreements that were not concluded under Mexican law, and did not create rights under such law, could not be considered as "investments" and could hence not advance a claim for unlawful expropriation nor violation of fair and equitable treatment under NAFTA. See *Mr. Joshua Dean Nelson v. The United Mexican States*, ICSID Case No. UNCT/17/1, Final Award (5 June 2020) (Zuleta, Veeder, Gomezperalta Casali), ¶¶ 228, 241-242, 281-283; 313-314 (**RLA-39**),=.

**A. The Procedural Posture concerning Mr. Amorrortu's Defective Waiver**

69. Mr. Amorrortu's waiver has been defective since the commencement of this arbitration.

70. On February 13, 2020, Mr. Amorrortu filed its Notice of Arbitration, which included a non-compliant waiver.<sup>124</sup> On September 11, 2020, Claimant submitted his Statement of Claim with a reference to the waiver included in the Notice of Arbitration.<sup>125</sup> On December 09, 2020, Peru notified the Tribunal of its intent to submit preliminary objections, including a jurisdictional objection due to an invalid waiver.<sup>126</sup> On December 16, 2020, Claimant sought Peru's consent to cure his invalid waiver.<sup>127</sup> As Peru did not consent to such a cure,<sup>128</sup> on December 23, 2020, Claimant submitted a request to the Tribunal for leave to amend his Notice of Arbitration as an attempt to cure his defective waiver.<sup>129</sup> On January 15 2021, consistent with its prior position expressed to Claimant, Peru objected to Claimant's request to amend.<sup>130</sup> Peru requested that the Tribunal reject such request or reserve its decision until it decided Peru's jurisdictional objection with respect to waiver.<sup>131</sup>

71. On January 21, 2021, the Tribunal issued Procedural Order No. 3 where it determined that it would hear Peru's waiver objection as preliminary question.<sup>132</sup>

72. The Republic below demonstrates the invalidity of Mr. Amorrortu's waiver and the consequent failure to meet the conditions to Peru's consent to arbitration.

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<sup>124</sup> Notice of Arbitration (13 February 2020), ¶ 88.

<sup>125</sup> Claimants' Memorial (11 September 2020), ¶ 172.

<sup>126</sup> Peru's Notice of Intent to Submit Preliminary Objections (9 December 2020), pp. 13-14.

<sup>127</sup> Letter from Peru to ICSID regarding Claimant's Request for leave to Amend (January 15, 2021), p. 2.

<sup>128</sup> *Id.*

<sup>129</sup> Claimant's Application (22 December 2020), p. 8.

<sup>130</sup> Peru's Response to Claimant's Request for Leave to Amend (15 January 2021).

<sup>131</sup> Peru's Response to Claimant's Request for Leave to Amend (15 January 2021), p. 13.

<sup>132</sup> Procedural Order No. 3 (21 January 2021), ¶ 11.



**B. The Treaty Requires the Claimant to Submit an Unqualified and Signed Waiver with The Notice of Arbitration**

73. Article 10.18 USPTPA establishes the “Conditions and Limitations” of a Party’s consent to arbitration. This provision requires any claimant who starts an arbitration proceeding to submit a waiver of its right to commence or continue any proceeding before any court or tribunal. Article 10.18.2(b)(i) of the USPTPA provides:

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

74. That is, once an investor chooses international arbitration under the treaty, it must waive the exercise of any claim before another dispute resolution mechanism, including those already initiated and those it could initiate.<sup>134</sup> Tribunals have noted that a waiver is meant “to avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions.”

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75. Under Article 10.18(2) USPTPA, a tribunal can accept the waiver *only if* the claimant complies with both the formal *and* the material requirements.<sup>136</sup> On the one hand, a waiver is formally valid when the claimant submits and signs the written waiver that accompanies its notice of arbitration without any reservation of rights. On the other hand, a waiver is materially

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<sup>133</sup> USPTPA, Investment Chapter (12 April 2006), Art. 10.18(2)(b) (CLA-1).

<sup>134</sup> *Supervisión y Control S.A. v. Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) (von Wobeser, Klock, Silva Romero), ¶ 294 (RLA-33).

<sup>135</sup> *Supervisión y Control S.A. v. Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) (von Wobeser, Klock, Silva Romero), ¶ 294 (RLA-33).

<sup>136</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶¶ 60, 73 (RLA-32) (“an arbitration agreement will be formed under the Treaty only if the investor satisfies the formal and material waiver requirements of Article 10.18(2)(b).”) (emphasis omitted). For case law under other treaties recognizing the two requirements of the waiver: *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award (2 June 2000) (Hight, Siqueiros, Cremades), ¶ 20 (RLA-3); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011) (Jan van den Berg, Grigera Naón, Thomas), ¶ 79 (RLA-17).

valid when the claimant does not initiate or continue any other legal proceedings.<sup>137</sup> Here, Mr. Amorrortu's waiver is formally non-compliant in two ways. First, the supposed waiver was not made and signed by Mr. Amorrortu himself, but rather simply included as a concluding paragraph in Claimant's Notice of Arbitration signed by Claimant's counsel (1.). Second, Mr. Amorrortu's purported waiver is qualified as it concludes with a reservation of rights which is contrary to the entire purpose of the waiver requirement (2.).

### 1. Mr. Amorrortu failed to provide a signed waiver along with his Notification of Arbitration

76. Article 10.18.2 requires the claimant to provide a written waiver along with the notice of arbitration as it provides that “[n]o claim may be submitted to arbitration under this Section unless [...] the notice of arbitration is accompanied [...] by the claimant's written waiver.”<sup>138</sup> This means that (a) the waiver has to accompany the Notice of Arbitration, as a separate document, presented as either an exhibit or an annex; and (b) the *claimant*, and not its counsel, must sign and submit its written waiver, as a proof of its consent to arbitration.

77. The Notice of Arbitration must be “accompanied” by a compliant waiver, as a separate document. Notably, the USPTPA (and CAFTA-DR)<sup>139</sup> uses the word “accompanied” instead of “included” as is the case in the NAFTA waiver provision.<sup>140</sup> To accompany should be understood as to “[p]rovide (something) *as a complement or addition to* something else.”<sup>141</sup>

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<sup>137</sup> *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011) (Jan van den Berg, Grigera Naón, Thomas), ¶ 84 (RLA-17).

<sup>138</sup> USPTPA, Investment Chapter (12 April 2006), Art. 10.18(2)(b) (CLA-1) (emphasis added).

<sup>139</sup> CAFTA, Chapter 10 (5 August 2004), Art. 10.18(2)(b) (RLA-6).

<sup>140</sup> NAFTA, Chapter 11, Investment (1994), Art. 1121(3) (RLA-2) (“A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be *included* in the submission of a claim to arbitration.”) (emphasis added).

<sup>141</sup> Lexico, ‘Accompany’, available at <https://www.lexico.com/en/definition/accompany> (last accessed 04 Feb. 2021) (R-2). See also Oxford English Dictionary, Third Edition (December 2011), ‘Accompany’, Definition 2.a (R-1): “To add or join (a thing or †person) *with* another; to supplement *with*. Also *with by*.” (emphasis in original).

Therefore, “[a] [c]laimant complies with the requirement of DR-CAFTA Article 10.18.2(b) by physically submitting the waiver document accompanying his request for arbitration.”<sup>142</sup>

78. Additionally, Article 10.18.2(b) makes clear that the waiver must be submitted “by the claimant” itself. To comply with this requirement, a claimant must sign the waiver annexed to the Notice of Arbitration to “indicate that [he] wrote the document or [...] agree[d] with what [the waiver] says.”<sup>143</sup>

79. Notably, in all the CAFTA-DR cases, the claimants submitted their waiver as a separate document that they personally signed.<sup>144</sup> Given that USPTPA Article 10.18.2 and DR-

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<sup>142</sup> *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Non-Disputing Party Submission of the Republic of Costa Rica (20 Oct. 2010) (Jan van den Berg, Grigera Naón, Thomas), ¶ 3 (**RLA-14**) (emphasis added). See also *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011) (Jan van den Berg, Grigera Naón, Thomas), ¶ 84 (**RLA-17**) (“the Tribunal concludes that Article 10.18(2)(b) of CAFTA requires Claimants to file a formal “written waiver””) (emphasis added).

<sup>143</sup> Collins Dictionary, ‘Signature’, available at <https://www.collinsdictionary.com/us/dictionary/english/signature> (last accessed 24 February 2021) (**R-4**). See also Cambridge Dictionary, ‘Signature’, available at <https://dictionary.cambridge.org/us/dictionary/english/signature> (last accessed 24 February 2021) (**R-3**): “your name written by yourself, always in the same way, usually to show that something has been written or agreed by you.” (emphasis added).

<sup>144</sup> *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Notice of Arbitration (2 July 2009) (Jan van den Berg, Grigera Naón, Thomas), Exhibits A and B (**RLA-12**); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Request for Institution of Arbitration Proceedings (14 June 2007) (Sureda, Eizenstat, Crawford), ¶ 14 (**RLA-9**) (“As required by Article 10.18.2, RDC and FVG provide copies of their written consents and waivers as Exhibit 8.”) and ¶ 19 (“RDC’s consent to submit this dispute under ICSID Arbitration Rules expressed in this Request and the attached consents and waivers.”); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Notice of Arbitration (20 Oct. 2010) (Mourre, Park, Wobeser), ¶ 22 (**RLA-15**) (“A copy of its waiver is attached hereto.”); *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Notice of Arbitration and Statement of Claim (10 June 2013) (Bethlehem, Kantor, Vinuesa), ¶ 7 (**RLA-24**) (“The waivers are attached at Appendix E to this Notice of Arbitration and Statement of Claim.”); *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (31 May 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 10 (**RLA-31**) (“By letter of July 28, 2014, the Claimant confirmed that in accordance with DR-CAFTA Article 10.18(2)(b)(i) it waived “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”) (emphasis omitted); *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Notice of Arbitration (2 Jan. 2014) (Siqueiros, Baker, Nikken), ¶ 3(d) (**RLA-27**) (“The Claimants and their Enterprises also provide respectively at Annexes A and B to this Notice of Arbitration written waiver of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, in accordance with DR-CAFTA Article 10.18(1)(b).”) (emphasis omitted); *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Notice of Arbitration (9 Nov. 2018) (Kalici, Townsend, Douglas), ¶ 17 (**RLA-36**) (“A copy of Claimants’ waiver is attached hereto”); Pleadings for *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua* (ICSID Case No. ARB/17/44) are not publicly available. See also under

CAFTA Article 10.18.2 share identical language (and are indeed derived from the same U.S. Model Treaty),<sup>145</sup> a claimant which initiates a USPTPA case is under the same obligation as a claimant under DR-CAFTA: to provide as a separate document from their pleadings that is signed.

80. Here, there is no doubt that Mr. Amorrortu failed to comply with the separate document and the signature requirements. As noted before, Mr. Amorrortu's lawyers incorporated a waiver paragraph into the Notice of Arbitration instead of submitting a separate document signed by Mr. Amorrortu himself.<sup>146</sup>

81. Consequently, Mr. Amorrortu's waiver is invalid as it was not submitted and signed by Claimant himself.

## 2. Mr. Amorrortu's waiver is conditional and therefore invalid

82. To be formally valid, a waiver "must accomplish its intended effect [... which] is to have Claimants relinquish 'any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach.'"<sup>147</sup> A waiver is thus formally compliant when it is not qualified or conditioned because "the repeated references to the word 'any' in Article

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NAFTA, Chapter 11, Investment (1994), Art. 1121(3) (**RLA-2**) ("A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be *included* in the submission of a claim to arbitration.") (emphasis added); *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Notice of Arbitration (29 April 2011) (Derains, Chetoff, Lowe), Annex A (**RLA-19**) and *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Amended Notice of Arbitration (15 January 2013) (Derains, Chetoff, Lowe), Annex A (**RLA-22**); *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Claimant's Notice of Arbitration (30 August 2013) (Sureda, Kaufmann-Kohler, Alarcón), ¶ 6 (**RLA-26**) ("KBR and COMMISA's consent and waiver, attached at Annex A to this Notice of Arbitration") (emphasis omitted).

<sup>145</sup> U.S. Model Bilateral Investment Treaty (2004), Art. 26 (**RLA-7**).

<sup>146</sup> Notice of Arbitration (13 February 2020), ¶ 88.

<sup>147</sup> *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011) (Jan van den Berg, Grigera Naón, Thomas), ¶ 80 (**RLA-17**), referring to CAFTA, Chapter 10, Investment (5 August 2004), Art. 10.18(2)(b) (**RLA-6**) which is identical to USPTPA, Investment Chapter (12 April 2006), Art. 10.18(2)(b) (**CLA-1**).

10.18 [of the USPTPA] demonstrate that an investor’s waiver must be comprehensive: waivers qualified in any way are impermissible.<sup>148</sup>

83. In *Renco I*, the claimant qualified its waiver as it reserved its rights to bring claims in another forum. In its award rendered under the auspices of the USPTPA, the tribunal stressed that:

Article 10.18(2)(b) is a “no U-turn” provision which is intended to provide flexibility, by allowing recourse to other fora up to a point, and certainty, by prohibiting any such recourse thereafter. In particular, it prevents an investor from returning to a domestic court after submitting its claims to arbitration.

84. Additionally, the same tribunal clearly indicated that

“[t]he waiver required by Article 10.18(2)(b) [USPTPA] is intended to operate as a “once and for all” renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits).”<sup>150</sup>

85. Therefore, it is evident that a conditional waiver will be rejected as it would not satisfy this requirement.

86. Here, Mr. Amorrortu’s waiver does not comply with Article 10.18(2) USPTPA as it is qualified. Mr. Amorrortu’s purported waiver concludes with the following: “[t]o the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the

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<sup>148</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 79 (RLA-32) (emphasis added).

<sup>149</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 96 (RLA-32) (emphasis added).

<sup>150</sup> *Id.*, ¶ 99 (emphasis added).

merits.”<sup>151</sup> In *Renco I*, the claimant submitted a waiver with the exact same reservation of rights,<sup>152</sup> and the tribunal held that it was conditional and therefore invalid.<sup>153</sup>

87. Mr. Amorrortu’s reservation of rights makes the waiver conditional, as it evidences a clear intention to initiate other proceedings if the Tribunal declines to hear his claims. Because Claimant submitted a waiver that does not comply with the formal requirements of Article 10.18.2 USPTA, the Tribunal should find that the waiver is invalid and therefore dismiss the case.

### C. Peru’s Consent to Arbitration and the Tribunal’s Jurisdiction are Conditioned by the Submission of a Valid Waiver

88. Article 10.18.2(b)(i) of the USPTA, which establishes the requirement to submit a complete and unconditional waiver with the notice of arbitration, is expressly entitled: “**Conditions and Limitations on Consent of Each Party.**”<sup>154</sup> As the *Renco I* tribunal held, analyzing the same treaty, “the submission of a formally compliant waiver (and the material obligation to abstain from initiating or continuing proceedings in a domestic court) is a precondition to the State’s ‘consent’ to arbitrate and to the Tribunal’s jurisdiction.”<sup>155</sup>

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<sup>151</sup> Notice of Arbitration (13 February 2020), ¶ 88 (emphasis added).

<sup>152</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Claimant’s Notice of Arbitration and Statement of Claim (4 April 2011) (Moser, Yves Fortier, Landau), ¶ 78 (**RLA-18**) (“Finally, as required by Article 10.18(2) of the Treaty, Renco and its affiliate DRP waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimants reserve the right to bring such claims in another forum for resolution on the merits.”) (emphasis added).

<sup>153</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 119 (**RLA-32**).

<sup>154</sup> USPTA, Investment Chapter (12 April 2006), Art. 10.18(2)(b)(i) (**CLA-1**) (emphasis added).

<sup>155</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 142 (**RLA-32**) (emphasis added). *See also Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011) (Jan van den Berg, Grigera Naón, Thomas), ¶ 115 (**RLA-17**) (“As analyzed above, the waiver is required as a condition to Respondent’s consent to CAFTA.”)

89. Although Claimant might rely on NAFTA cases to support his defense, the language of the waiver provision title in the Treaty and CAFTA-DR significantly differs from NAFTA<sup>156</sup>. As the *Renco I* tribunal observed:

the United States has amended the waiver language in its treaties, including in Article 10.18(2) of the Treaty and in the DR-CAFTA, to expressly state that the waiver must accompany “the notice of arbitration”. Moreover, the title of the waiver provision also was amended by including in the title of Article 10.18 of the Treaty (as well as in the equivalent provisions of the DR-CAFTA and the US Model BIT) the word “consent.”<sup>157</sup>

90. Thus, the United States expressly amended the waiver language in its subsequent treaties, DR-CAFTA and USPTPA, so as to require the investor to submit a valid, irrevocable and unconditional waiver,<sup>158</sup> as a precondition of its consent to arbitration. Here, by invalidly conditioning his waiver, Mr. Amorrortu has failed to comply with this precondition, and as a consequence, Peru cannot be said to have consented to this arbitration. As a result, the Tribunal lacks jurisdiction.

91. In *Commerce Group v. El Salvador*, the tribunal held that “[i]f the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties’ CAFTA

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<sup>156</sup> The Tribunal should note that even under NAFTA, some tribunals found that the waiver was a condition to consent. *See Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction (2 April 2015) (Derains, Chertoff, Lowe), ¶ 291 (**RLA-29**): “NAFTA Article 1121, entitled “Conditions Precedent to Submission of a Claim to Arbitration” stipulates the conditions that a claimant must meet in order to submit a claim under NAFTA Chapter Eleven. A claimant’s failure to meet these conditions renders the NAFTA Party’s consent to arbitrate without effect.” (emphasis added). *See also Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award (2 June 2000) (Highet, Siqueiros, Cremades), ¶ 14 (**RLA-3**): “Under NAFTA Article 1121 a disputing investor may submit to arbitration proceedings, to quote literally, “*Only if*” certain prerequisites are met, comprising, in general terms, consent to and waiver of determined rights.” (emphasis in original). In any event, this is moot because of the change in the treaty language.

<sup>157</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 141 (**RLA-32**).

<sup>158</sup> *See also* M. Bravin *et al.*, Investment Treaty Arbitration: USA, (28 Sept. 2020), ¶ 10 (**RLA-40**) (“Investment treaties based on the 2004 and 2012 US Model BITs provide that no claim may be submitted to arbitration without the prerequisite waiver of a right to bring a claim in another forum (eg, Uruguay BIT (2006), Rwanda BIT (2012), Panama FTA (2008)). CAFTA-DR (2009) and USMCA (2020) contain a similar waiver provision. Investment treaties based on the 1994 and 1998 US Model BITs do not have such a ‘waiver’ requirement.”) (emphasis added).

dispute.”<sup>159</sup> Likewise, the tribunal in *Renco I* dismissed the claimant’s claims for lack of jurisdiction, as the submitted waiver was conditional and thus defective.<sup>160</sup>

92. Therefore, an invalid waiver is a fatal jurisdictional defect.<sup>161</sup> When an invalid waiver remains uncured, the tribunal lacks jurisdiction and must dismiss the claims.<sup>162</sup>

**D. Amorrortu’s defective waiver can be cured *only* with Peru’s consent**

93. Any attempt from Mr. Amorrortu to cure his defective waiver should be rejected, since any cure is conditional upon the respondent’s consent. Indeed, “[i]t is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied.”<sup>163</sup>

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<sup>159</sup> *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011) (Jan van den Berg, Grigera Naón, Thomas), ¶ 115 (**RLA-17**).

<sup>160</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 189 (**RLA-32**).

<sup>161</sup> See *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent Preliminary Objections (13 March 2020) (Kalicki, Townsend, Douglas), ¶ 121 (**RLA-38**); *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 152 (**RLA-32**); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5 (17 November 2008) (Sureda, Eizenstat, Crawford), ¶ 48 (**RLA-10**). See also under the Chile-Colombia Free Trade Agreement with a similar waiver provision, *Carlos Ríos and Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award (16 Jan. 2021), ¶ 153 (**RLA-41**): (Free Translation by the Republic of Peru: “A breach of FTA Article 9.18.2(b) implies that the claim in question ‘[may not] be submitted to arbitration’. In accordance with the ordinary meaning of the terms and title of this provision (i.e., ‘Conditions and Limitations on the Consent of the Parties’), it is clear that Article 9.18 defines the conditions under which the parties to the Treaty consent to the submission of a claim to arbitration. To the extent that it concerns the State’s consent to be bound by a particular dispute resolution mechanism, Art. 9.18.2(b) imposes a requirement of a jurisdictional nature. This is not disputed by the Claimants.”) (Spanish original text reads: “El incumplimiento del Artículo 9.18.2(b) del TLC implica que la reclamación en cuestión “[no] podrá someterse a arbitraje”. De conformidad con el sentido corriente de los términos y del título de esta disposición (a saber, “Condiciones y Limitaciones al Consentimiento de las Partes”), es claro que el Artículo 9.18 define las condiciones bajo las cuales las partes del Tratado consienten a que una reclamación sea sometida a arbitraje. En la medida de que concierne el consentimiento del Estado a verse vinculado por un determinado mecanismo de resolución de disputas, el Artículo 9.18.2(b) impone un requisito de carácter jurisdiccional. Esto no es cuestionado por los Demandantes.”).

<sup>162</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 73 (**RLA-32**) (“Compliance with Article 10.18(2) [USPTA] is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal’s jurisdiction.”)

<sup>163</sup> *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5 (17 November 2008) (Sureda, Eizenstat, Crawford), ¶ 61 (**RLA-10**).



94. In *Renco I*, the tribunal explained that the “jurisdictional defect could only be cured (a) if Renco took the positive step of withdrawing the reservation of rights, or submitting a new waiver without the reservation of rights, and Peru consented to this by way of a variation of Article 10.18(2)(b) of the Treaty.”<sup>164</sup> The United States of America has taken the formal position agreeing with this posture, stating:

The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent as a function of the respondent’s general discretion to consent to arbitration. Therefore, while a tribunal may determine whether a waiver complies with the requirements of Article 10.18, a tribunal itself cannot remedy an ineffective waiver.

95. Mr. Amorrortu cannot feign ignorance of this condition to consent. Indeed, he has demonstrated that he was well aware of this essential rule and that his waiver was defective. Mr. Amorrortu first inquired whether the Republic would consent to the cure of his invalid waiver before presenting his Request for Leave to Amend his Notice of Arbitration as an attempt to circumvent Peru’s necessary consent.<sup>166</sup>

96. However, as discussed above, compliance with the waiver requirement under the terms of the Treaty is a precondition to Peru’s consent and thus jurisdictional in nature. Accordingly, to the extent Mr. Amorrortu maintains his Request for Leave to cure his waiver, the Tribunal must reject it because, respectfully, it has no power to permit such a cure and Peru did not, does not consent to such a cure. As a result, the Tribunal must dismiss the case as Mr. Amorrortu improperly commenced these proceedings with a defective waiver.<sup>167</sup>

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<sup>164</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 152 (**RLA-32**) (emphasis added).

<sup>165</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Second Non-Disputing State Party Submission of the United States of America (1 September 2015) (Moser, Yves Fortier, Landau), ¶ 16 (**RLA-30**).

<sup>166</sup> *See supra*, **Section III.A**. As Peru noted in its Response to Claimant’s Request for Leave to Amend, the Treaty appears to provide a small window in which Claimant could have cured his defective waiver before submitting his Statement of Claim and commencing the arbitration under the terms of Article 10.16(4) of the USPTA. *See* Peru’s Response to Claimant’s Request for Leave to Amend, p. 5. This window however has expired. The arbitration having been deemed “commenced”, the failure to have presented a valid waiver is fatal to jurisdiction absent Peru’s consent which it has not given.

<sup>167</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 173 (**RLA-32**): “Accordingly, the Tribunal concludes that it has no power

97. For the reasons stated above, Mr. Amorrortu’s defective waiver fails to comply with the conditions to Peru’s consent to arbitration under the USPTPA. Accordingly, this Tribunal is devoid of jurisdiction and Mr. Amorrortu’s claims must therefore be dismissed.

**IV. THE TRIBUNAL MUST RENDER A DECISION ON PERU’S ARTICLE 10.20.4 OBJECTION REGARDLESS OF ITS DECISION ON ITS WAIVER OBJECTION**

98. Peru respectfully requests the Tribunal to address and decide Objection 1 regardless of whether and what it decides with respect to Objection 4.<sup>168</sup> The Tribunal has the authority and obligation to do so under the USPTPA.

99. The plain text of Article 10.20.4 USPTPA requires the Tribunal not only to “address”, but also to “decide” Peru’s 10.20.4 objection “as a preliminary question” (**Subsection A**). Thus, even if the Tribunal may dispose of the case by upholding Peru’s waiver objection, it still must render a decision as to Objection 1. Not rendering a decision as to the 10.20.4 USPTPA objection would contradict the ordinary meaning of the terms of the Treaty, depriving the provision of its *effet utile* and would undermine its very purpose and intent (**Subsection B**).

**A. Article 10.20.4 USPTPA requires the Tribunal to address and decide Objection 1**

100. Article 10.20.4 of USPTPA provides that:

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

101. This provision thus distinguishes two responsibilities of the Tribunal: one discretionary, and one compulsory. The Tribunal has the *discretion* to address any objections to

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to sever the reservation of rights from Renco’s waiver and remedy Renco’s non-compliance with the formal requirement of Article 10.18(2)(b).”

<sup>168</sup> This is consistent with Peru’s request in its Notice of Objections that the Tribunal considers all its objections under Article 10.20.4 of the USTPA and under Article 23(3) of the UNCITRAL Rules “as preliminary questions and concurrently.” See Peru’s Notice of Intent to Submit Preliminary Questions (9 December 2020), p. 1.

jurisdiction preliminarily; however, it has the *obligation* to address and *decide* any objection about the legal sustainability of the claim.

102. It has been widely recognized that a tribunal’s mandate in an arbitration is “not to override the drafting choices evident in a particular treaty, [...] but rather to respect and enforce the choices already made by the Contracting Parties, to the extent these can be divined through the interpretative tools that the VCLT [Vienna Convention on the Law of Treaties] provides [...]”<sup>169</sup>

As the Vienna Convention states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

103. Here, the Treaty unequivocally establishes a mandatory duty for the Tribunal to “address” a legal merits objection as a preliminary question, which this Tribunal is doing in this bifurcated phase of the proceedings. More importantly, the provision also establishes a mandatory duty to “decide as a preliminary question” any objection that the claim cannot prevail as a matter of law. This means that the Tribunal must decide the Republic of Peru’s Objection 1 preliminarily, notwithstanding any decision pertaining to its jurisdiction under Article 23 of the UNCITRAL Arbitration Rules.

104. The use of the auxiliary verb “shall” confirms the Tribunal’s mandate under Article 10.20.4 USPTPA. As the tribunal in *Wintershall v. Argentina* explained, “[t]he use of the word ‘shall’ [...] is itself indicative of an ‘obligation’ – not simply a choice or option. The word ‘shall’ in treaty terminology means that what is provided for is legally binding.”<sup>171</sup>

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<sup>169</sup> *Nissan Motor Co., LTD. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction (29 April 2019) (Kalicki, Hobér, Khehar), ¶¶ 216-217 (**RLA-37**) (emphasis added). See also *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (Nariman, Bernárdez, Bernardini), ¶ 79 (**RLA-11**); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Opinion of Professor Domingo Bello Janeiro (22 August 2012), p. 6 (“it should be remembered that in *claris non fit interpretatio*, when terms are clear and meaning is obvious, those who interpret and apply the law do not need additional means of interpretation and should not prefer a meaning other than the literal meaning of the words.”) (**RLA-21**).

<sup>170</sup> Vienna Convention on the Law of Treaties, Art. 31(1) (**RLA-1**).

<sup>171</sup> *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (Nariman, Bernárdez, Bernardini), ¶ 119 (emphasis in original) (**RLA-11**). See also *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013) (Townsend,

105. This Tribunal itself has acknowledged this when it held that “[it] does not enjoy discretion to defer consideration of Objection 1 [the Article 10.20.4 objection]” and determined that said objection “shall be addressed and decided as a preliminary question.”<sup>172</sup>

**B. Article 10.20.4 of the USPTPA would be rendered meaningless if the Tribunal does not decide Objection 1**

106. Article 10.20.4 USPTPA would be deprived of its *effet utile* if this Tribunal renders a decision on Objection 4 but fails to decide Objection 1.

107. The distinction established by the Treaty between a tribunal’s authority to “address” and its authority to “address and decide”, would be rendered meaningless, if the Objection 1 is not decided at this stage. This would be contrary to the principle of effectiveness (*effet utile*). As noted by the tribunal in *Renco I*, “the principle of effectiveness (*effet utile*) is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that ‘every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or inutile)’”.<sup>173</sup>

108. Moreover, reserving a decision on Peru’s Objection 1 and relying exclusively on a decision on Peru’s Objection 4, would contradict and undermine the provision’s object and purpose. Article 10.20.4 USPTPA confers upon the Tribunal a *competence specialis* to rule on the legal merits of a claim “without prejudice” to its determination on jurisdiction. In other words, within the confines of an Article 10.20.4 objection, the Tribunal is empowered—indeed, *mandated*—to make a determination about the merits of a case, even if it has determined or will subsequently determine that it does not have jurisdiction.

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Lambrou, Boisson de Chazournes), ¶ 28 (RLA-25); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012) (Dupuy, Brower, Bello Janeiro), ¶ 181 (RLA-20).

<sup>172</sup> Procedural Order No. 3 (21 Jan. 2021), ¶ 9 (emphasis added).

<sup>173</sup> *The Renco Group Inc. v. Republic of Peru I*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent Preliminary Objections Under Article 10.20.4 (18 December 2014) (Moser, Fortier, Landau), ¶ 177 (emphasis added) (RLA-28). See also *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010) (Robinson, Alexandrov, Turbowicz), ¶ 223 (RLA-16).

109. This promotes the systematic procedural efficiency that is at the heart of Article 10.20.4. The objective of this provision is to dispose of cases that are without legal merit at an early stage and thus avoid requiring a State Party to incur the time and expense of defending against such unmeritorious claims, as well as avoid unnecessarily burdening the investor-State dispute system. As commentators have observed “[t]he rule [set forth in Article 10.20.4] promotes judicial efficiency by disposing of legally defective cases before the disputing parties have expended time and money litigating a fatally flawed claim.”<sup>174</sup> In plain terms, the purpose of Article 10.20.4 is to weed out flawed claims, such as the one asserted by Mr. Amorrortu, from the very outset.

110. This is particularly important in this case. Claimant has already declared that, should the Tribunal uphold Peru’s jurisdictional objection he will “seek the same outcome as *Renco I*, that is, an immediate refile of the claim.”<sup>175</sup> This will require Peru to expend further public funds in defending against Mr. Amorrortu’s unmeritorious claim for a second time.<sup>176</sup> It will require future arbitrators and arbitral institutions to expend time resources to attend to the same defective claim. If Mr. Amorrortu’s claim lacks legal merit, it should be so found in the present arbitration, as specifically mandated by Article 10.20.4 of the USPTPA, and thereby avoid the unnecessary costs, time and burden of a new proceeding.

111. The express terms of the Treaty, its purpose and intent, and the principles of procedural economy, thus dictate that the Tribunal issue a decision as to Peru’s Objection 1 regardless of its determination as to Peru’s defective waiver objection.

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<sup>174</sup> See L.M. Caplan and J.K. Sharpe, *18 United States*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (C. Brown ed.) (17 January 2013), [PDF] p. 71 commenting on the United States’ Model BIT Article 28(4), which is identical to Article 10.20.4 USPTPA (**RLA-23**) (emphasis added).

<sup>175</sup> Claimant’s Response to Jurisdictional Objections, p. 7.

<sup>176</sup> Procedural Order No. 3 (21 Jan. 2021), ¶¶ 11-12. See also, Claimant’s Response to Jurisdictional Objections, p. 2 (“Amorrortu respectfully requests leave to amend his Notice of Arbitration to provide the purportedly defective waiver that Peru claims Article 10.18.2(b) requires and put this issue to rest.”).

**V. REQUEST FOR RELIEF**

112. For the foregoing reasons, the Republic of Peru respectfully requests that Tribunal:

- a. Decide that the claim asserted in this arbitration, as a matter of law, is not a claim for which an award in favor of Claimant may be made under the USPTA and dismiss Claimant's claim for breach of the fair and equitable standard in Article 10.5 of the USPTA in its entirety;
- b. Declare that Claimant's purported waiver submitted with his Notice of Arbitration does not comply with the USPTA and that, as a result, the Tribunal lacks jurisdiction over the claim presented in this arbitration;
- c. Reject Claimant's request for leave to amend his Notice of Arbitration in order to attempt to cure its defective waiver;
- d. Award such other relief as the Tribunal deems appropriate; and
- e. Order Claimant to pay all costs, attorneys' fees, and expenses of this arbitration.

Date: March 15, 2021

Respectfully submitted



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