

PCA Case No. 2020-11

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

- and -

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

- between -

BACILIO AMORRORTU (USA)

(the “Claimant”)

- and -

THE REPUBLIC OF PERU

(the “Respondent”, and together with the Claimant, the “Parties”)

**CLAIMANT’S ANSWER TO PERU’S SUBMISSION PURSUANT TO ARTICLE
10.20.4 OF THE TREATY AND SUBMISSION ON WAIVER OBJECTION UNDER
ARTICLE 23 OF UNCITRAL ARBITRATION RULES**

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I. INTRODUCTION

1. In Respondent's submission pursuant to Article 10.20.4 of the Treaty and submission on Waiver Objection under Article 23 of UNCITRAL Arbitration Rules (**Peru's Submission on Preliminary Objections**), Peru argues that Bacilio Amorrortu (**Amorrortu** or the **Claimant**) does not possess any right to a direct negotiation (**Objection 1**) and that Amorrortu did not submit a valid waiver (**Objection 4**). Both of these objections fail.

2. Objection 1 is a fact intensive objection based on the false premise that Amorrortu did not commence a direct negotiation process with PeruPetro, S.A. (**PeruPetro**). This argument is belied by Amorrortu's factual allegations and PeruPetro's own Rules and Procedures for the Direct Negotiation of Contracts.¹ Indeed, Objection 1 can be summarily rejected as inconsistent with Amorrortu's factual allegations, which must be assumed as true at this procedural juncture.²

3. In his Statement of Claim, Amorrortu established, among other things, that:

- i. he formed Baspetro S.A.C. (**Baspetro**) with the objective to operate oil fields in Peru and recover the contractual rights to operate Block III of the Talara Basin;³
- ii. In 2013 and 2014, he communicated with the President of PeruPetro, Luis Ortigas (**Ortigas**) and PeruPetro for several months regarding the availability of Block III;⁴
- iii. he met with Ortigas on May 22, 2014 and presented his plans for Block III and his history operating Block III;⁵

¹ PeruPetro Procedure GFCN-008, Contracting Through Direct Negotiation, 13 August 2012 (**CLA-44**) (**PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts**).

² USPTPA Investment Chapter (**CLA-1**) Art. 10.20.4(c).

³ Claimant's Statement of Claim, 11 September 2020, ¶ 8.

⁴ Claimant's Statement of Claim, 11 September 2020, ¶¶ 67-71.

⁵ Claimant's Statement of Claim, 11 September 2020, ¶ 72.

- iv. Ortigas instructed Amorrortu to present a proposal for direct negotiation for the operation of Block III and to also present a proposal for Block IV (the ***Baspetrol Proposal*** or ***the Proposal***);⁶
- v. and he submitted the Baspetrol Proposal on May 28, 2014, including the additional requested proposal to operate Block IV.⁷

4. Pursuant to PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts, the submission of the direct negotiation proposal ***at the request*** of PeruPetro commenced the process of direct negotiation.⁸ At that point, PeruPetro had the obligation to consider the Baspetrol Proposal in compliance with the principles of good faith, equal treatment, impartiality, due process, procedural conduct, and predictability under Peruvian law.⁹ Obviously, the corruption scheme designed to grant the contracts to operate Blocks III and IV to Graña y Montero violates all of these principles.

5. Peru seems to suggest that the direct negotiation process could only be commenced once PeruPetro confirmed that Blocks III and IV were available for direct negotiation. This argument is inconsistent with PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts, which make clear that the direct negotiation process starts upon the submission of a direct negotiation proposal by an interested oil company to PeruPetro. In any event, in this particular case, the Baspetrol Proposal was submitted at PeruPetro's request. Indeed, Amorrortu was initially only interested in Block III and submitted a proposal for Block IV at PeruPetro's request. On these

⁶ Claimant's Statement of Claim, 11 September 2020, ¶ 73.

⁷ Claimant's Statement of Claim, 11 September 2020, ¶ 74.

⁸ Claimant's Statement of Claim, 11 September 2020, ¶¶ 73, 197; First Expert Report of Anibal Quiroga, 9 September 2020 (***CER – 1 [Quiroga]***), ¶¶ 44-45.

⁹ CER – 1 [Quiroga], ¶¶ 116-192.

facts, Peru cannot seriously deny that the direct negotiation process was commenced once Amorrortu, through his company, Baspetro, submitted the requested direct negotiation proposal.

6. The same is true of the argument that Blocks III and IV were not available for direct negotiation. The President of PeruPetro, Ortigas, asked Amorrortu to submit a proposal for direct negotiation **before** the commencement of the public bidding process and, for the contemplated period starting in May 2015,¹⁰ the Blocks were not subject to any contract. Therefore, as a matter of Peruvian Law, Blocks III and IV were available for direct negotiation when Amorrortu submitted the Baspetro Proposal.

7. Peru further claims that Amorrortu failed to obtain the certification of Baspetro as a qualified oil company to commence the direct negotiation process. However, it is undisputed that PeruPetro failed to respond to Amorrortu's submissions within the ten-day period PeruPetro had to either reject or request any additional information needed to certify Baspetro as a qualified oil company. This administrative silence prevented Amorrortu from appealing any adverse decision with respect to Baspetro's qualifications and, more importantly at this juncture, this administrative silence under Peruvian law estops Peru from contending that Baspetro was not qualified for purposes of the direct negotiation process.¹¹ Tellingly, Amorrortu and the members of the Baspetro team had been working in the Talara Basin – and Block III in particular – since 1976 and met all the applicable qualification requirements.

¹⁰ See Baspetro Proposal, 27 May 2014 (**C-11**), p. 10; see also Directory Agreement No. 034-2014, 20 March 2014 (**C-3**).

¹¹ Second Expert Report of Anibal Quiroga, 26 April 2021 (**CER – 2 [Quiroga]**), ¶¶ 9-24.

8. As part of Objection 1, Peru also argues that the commencement of the direct negotiation process does not guarantee the execution of a contract for Blocks III and IV. This argument misconstrues Amorrortu's claims. Amorrortu has never claimed that the direct negotiation process guarantees, **as a matter of law**, the execution of the contracts to operate Blocks III and IV. Amorrortu's claims are based on the undisputable fact that (i) he invested in Baspetro as an "enterprise" with the reasonable expectation to have the Baspetro Proposal considered by Peru and its agencies in a process free of corruption and (ii) that Amorrortu, through Baspetro, acquired all of the rights appurtenant or concomitant to the direct negotiation process under Peruvian law. Specifically, the direct negotiation process guarantees the exclusive technical evaluation and the community analysis of a direct negotiation proposal before any competing company is invited to participate in the process. This substantive right to an exclusive analysis has significant value. The direct negotiation process gives oil companies a competitive advantage that is practically and factually insurmountable and that, in most if not all cases, concludes with the execution of the contract, particularly in the case of a company that has the experience and success of Amorrortu in the Talara Basin.¹² This is the bundle of rights that Amorrortu acquired before PeruPetro aborted the process and opened an arbitrary and illegal bidding process as a result of the Corruption Scheme.¹³ Simply put, Amorrortu invested in an enterprise, and the United States-Peru Trade Promotion Agreement (the **USPTA** or the **Treaty**) protects this investment as well as Amorrortu's

¹² Claimant's Statement of Claim, 11 September 2020, ¶ 194.

¹³ Claimant's Statement of Claim, 11 September 2020, ¶ 10.

reasonable expectations in making this investment. This is not a controversial proposition.

9. What is really controversial, is Peru's claim that reasonable expectations are not protected by the USPTPA. This bold statement is belied by the text of the Treaty, which explicitly extends its protections to "*an investor that attempts through concrete action to make, is making, or has made an investment.*"¹⁴ If an investor that attempts through concrete action to make an investment enjoys the protections of the Treaty, then Amorrortu, who made an investment in an enterprise, acquired the rights concomitant to the direct negotiation process, is certainly protected by the Treaty. Peru's argument to the contrary is simply frivolous. Indeed, Peru's argument was rejected by the tribunals in *Lemire*, *Bosca*, and *EDF*, three decisions that are quoted extensively in Claimant's Statement of Claim and that are completely ignored by Peru in its Submission on Preliminary Objections. This Tribunal should reject Peru's argument and share the view "*expressed by other tribunals that one of the major components of the [Fair and Equitable Treatment] standard is the parties' legitimate and reasonable expectations with respect to the investment they have made.*"¹⁵

10. To be clear, the facts establish that in the absence of the massive Corruption Scheme designed to benefit Graña y Montero, Amorrortu would have secured the contract to operate Blocks III and IV. But the well-established likelihood that the direct negotiation process would conclude in the execution of a contract is an issue

¹⁴ USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

¹⁵ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, (Bernardini, Rovine, Derains) (**CLA-4**), ¶ 216.

that pertains to the damages that Amorrortu has suffered and that has very little bearing on the viability of Amorrortu's claims. Therefore, Objection 1 must be overruled.

11. Objection 4 similarly fails. Peru contends that it has not consented to this arbitration because Amorrortu's waiver is purportedly defective. What Peru conveniently forgets is that it filed a motion asking the Tribunal to order Amorrortu to confirm that it had a third-party funder, to identify the identity of the third-party funder, and to produce the funding agreement. The Tribunal granted Peru's motion in part, and Amorrortu identified the name of his third-party funder in compliance with the Tribunal's order. Having availed itself of the jurisdiction of this Tribunal, Peru is estopped from claiming that this Tribunal does not have its jurisdictional consent. This arbitral ship is already sailing, and Peru voluntarily and without reservation got on board.

12. This is not the first time in which Peru has made a belated challenge to its arbitral consent.¹⁶ The late assertion of its consent objection seems to be part of Peru's strategy to derail and delay arbitral proceedings, and Peru has been admonished for this conduct.¹⁷ This Tribunal should not countenance this strategy

¹⁶ *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID, Case No. UNCT/18/2, (Fernandez-Armesto, Drymer, Stern) (hereinafter, **Gramercy v. Peru**) (where Peru derailed and delayed the arbitration based on a purported waiver defect).

¹⁷ *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) (**RLA-32**) (hereinafter, **Renco 1 Partial Award**), ¶ 123.

and should require Peru to pay Amorrortu's costs and fees in connection to this frivolous objection.

13. On the merits, Objection No. 4 fails as contrary to the text of Article 10.18(2)(b) of the USPTPA and in the alternative, as moot in light of Amorrortu's pending motion or application for leave to amend (**Application to Amend**) the Notice of Arbitration (**NOA**). Amorrortu has made clear to Peru that no other action arising out of the subject investment was pending in any other jurisdiction and that, in an effort to avoid any further delay,¹⁸ he was willing to amend his waiver to explicitly renounce his right to bring any such action. Amorrortu filed an Application to Amend to submit an unconditional waiver¹⁹ and has waived, under oath, any right to present any claim against Peru in any other jurisdiction.²⁰

14. Peru's position on this issue is a moving target seeking to weaponize, in bad faith, the decision in *Renco 1* beyond its context. First, Peru argued that the purported defective waiver had to be cured at the moment of the filing of the Claimant's Statement of Claim.²¹ Then, after learning of Amorrortu's willingness to amend the purported defective waiver, Peru shifted its strategy to argue that it could not be cured at any point during the arbitration.

15. The inconsistency of Peru's position confirms what is clear, Objection 4 is nothing more than a frivolous bad faith attempt by Peru to derail this arbitration.

¹⁸ Amorrortu's waiver is not defective. However, for purposes of the preliminary objections, Amorrortu is willing to amend his waiver irrespective of the merits of Peru's arguments.

¹⁹ Claimant's Application to Amend, 22 December 2020, p. 8.

²⁰ First Declaration of Bacilio Amorrortu, 25 April 2021 (**CDecl. – 1 [Amorrortu]**).

²¹ Peru's Notice of Intent to Submit Preliminary Objections, 9 December 2020, p. 14.

16. Therefore, as discussed in more detail below, both Objections 1 and 4 must be overruled and Peru must file its Statement of Defense.

17. This Answer to Peru's Submission on Preliminary Objections is divided in the following sections:

- i. **Section II** sets forth the relevant factual allegations from Claimant's Statement of Claim;
- ii. **Section III** addresses the relevant procedural history of this arbitration;
- iii. **Section IV** demonstrates that Objection 1 lacks any legal or factual support;
- iv. **Section V** addresses Objection 4 and establishes that this Tribunal has jurisdiction to adjudicate Amorrortu's claims; and
- v. **Section VI** establishes that, in the alternative, Objection 4 is moot in light of Amorrortu's pending Application to Amend.

18. Together with this brief, Amorrortu submits and incorporates his Witness Statement and Declaration, the First and Second Expert Reports of Anibal Quiroga Leon, and Claimant's Statement of Claim filed on September 11, 2020 in its entirety.

II. RELEVANT ALLEGATIONS FROM CLAIMANT'S STATEMENT OF CLAIM

19. The following allegations are taken almost verbatim from Claimant's Statement of Claim and must be assumed as true for purposes of Peru's Preliminary Objections pursuant to Article 10.20.4(c) of the USPTPA.

1) AMORRORTU FORMS BASPETROL

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

industry as the “*Amorrortu block*” because it has been successfully serviced and operated by the Amorrortu family company for more than twenty years.²²

21. In 1995, Amorrortu’s company was forced to surrender the license to operate Block III because of the fierce political persecution launched by the dictatorial government of President Alberto Fujimori. This political persecution led Amorrortu to seek asylum in the United States, which he obtained from the United States Department of Justice on April 26, 2000.²³

22. In 2010, Amorrortu became a citizen of the United States.²⁴

23. In 2012, after the return of democracy in Peru and the execution of the USPTPA with its anti-corruption promises, Amorrortu formed Baspetro with the objective to operate oil fields in Peru and recover the contractual rights to operate Block III of the Talara Basin. Amorrortu assembled a team of experts in the region, all of whom had unmatched experience servicing the oil wells in the Talara Basin. Armed with this wealth of experience, unique know-how, and willingness to waive any pending claim he had against Peru for the expropriation of his former company and the abuse of human rights that led to his asylum, Amorrortu commenced a direct negotiation process with PeruPetro for the operation of Blocks III and IV. The commencement of this direct negotiation process gave Amorrortu a bundle of rights under Peruvian law, including the substantive right to have a good faith exclusive consideration of

²² Claimant’s Statement of Claim, 11 September 2020, ¶ 5.

²³ Claimant’s Statement of Claim, 11 September 2020, ¶ 6.

²⁴ Claimant’s Statement of Claim, 11 September 2020, ¶ 7.

the Baspetro Proposal, through a number of well-defined phases established in PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts.²⁵

24. The commencement of a direct negotiation process in essence, guarantees the execution of a contract, particularly when the oil company has a successful track record operating the blocks. Indeed, there is no record of any direct negotiation process that had not culminated in the execution of a contract after the completion of the required phases. This is why the direct negotiation rights are so valuable to oil companies. Further, the Baspetro Proposal had an attractive component which guaranteed 5% of the expected revenues to the local communities.²⁶

2) **BASPETROL COMMENCES DIRECT NEGOTIATIONS WITH PERUPETRO**

25. Aware that in 2013 the original contract to operate Block III would come to an end, Amorrortu contacted Ortigas, and expressed his interest to take over the exploration and exploitation of Block III.²⁷

26. On August 12, 2013, PeruPetro indicated that Block III would not be available for direct negotiation. Amorrortu also learned that PeruPetro was purportedly contemplating extending the contract to InterOil.²⁸

27. On January 16, 2014, Amorrortu sent an email to PeruPetro expressing his disagreement with the decision to extend InterOil's contract regarding Block III. He also reiterated his willingness and ability to operate Block III.²⁹

²⁵ Claimant's Statement of Claim, 11 September 2020, ¶ 8.

²⁶ Claimant's Statement of Claim, 11 September 2020, ¶ 9.

²⁷ Claimant's Statement of Claim, 11 September 2020, ¶ 67.

²⁸ Claimant's Statement of Claim, 11 September 2020, ¶ 68.

²⁹ Claimant's Statement of Claim, 11 September 2020, ¶ 69.

28. On February 6, 2014, Amorrortu had a telephone conference with Ortigas, where he gave Ortigas more details about his plan to modernize the oil industry in the Talara Basin. On March 20, 2014, Amorrortu, through Baspetro, reiterated to PeruPetro that Baspetro was available for immediate operation of Block III.³⁰

29. Under very controversial circumstances, on March 20, 2014, PeruPetro approved a temporary operation contract in favor of Interoil for Blocks III and IV for an additional 12-month period.³¹

30. On May 22, 2014, Ortigas met with Amorrortu. In that meeting, Amorrortu once again went over his professional background in the oil industry in Talara, the abuses he experienced from the Peruvian government, the political persecution, and his subsequent political asylum in the U.S.³² It was during this meeting when Ortigas instructed Amorrortu to prepare the Baspetro Proposal for the operation of Blocks III and IV. Ortigas further told Amorrortu that the Baspetro Proposal would be subject to a legal-technical-economic analysis by PeruPetro's Administration and that it would be discussed by PeruPetro's Board, which is the process required by PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts.³³

31. On May 28, 2014, Amorrortu sent the Baspetro Proposal via email to PeruPetro. A hard copy of the same Proposal was also submitted to PeruPetro at their offices in Lima, Peru. The Baspetro Proposal complied with all the requirements

³⁰ Claimant's Statement of Claim, 11 September 2020, ¶ 70.

³¹ Claimant's Statement of Claim, 11 September 2020, ¶ 71.

³² Claimant's Statement of Claim, 11 September 2020, ¶ 72.

³³ Claimant's Statement of Claim, 11 September 2020, ¶ 73.

as instructed by Ortigas, including the additional proposal to operate Talara's Block IV.³⁴

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

32. The Baspetrol Proposal provided, among other things, relevant technical information showcasing Amorrortu's expertise and Baspetrol's qualifications to operate Blocks III and IV. The Baspetrol Proposal explained that even if Blocks III and IV were "*marginal oil fields*", these require a significant technical process for efficient operation. The process consists of drilling new wells and extending existing ones, as well as "*increasing recovery*", reconditioning, well servicing, and improvements to production facilities in wells and on the surface. According to the Baspetrol Proposal, this process would ensure increased and sustained daily production.³⁵

33. The Proposal guaranteed that Baspetrol would engage a first-class international technical team consisting of international experts in the oil field, complemented by local Peruvian technicians and engineers with extensive experience in marginal oil field operations. Amorrortu further emphasized that this team had access to the latest technology to ensure sustained and growing hydrocarbon production. The Baspetrol Proposal indicated that Amorrortu had strong professional relationships with these experts, most of whom had worked with multinational oil companies.³⁶

³⁴ Claimant's Statement of Claim, 11 September 2020, ¶ 74.

³⁵ Claimant's Statement of Claim, 11 September 2020, ¶ 75.

³⁶ Claimant's Statement of Claim, 11 September 2020, ¶ 76.

34. Additionally, the technology was environmentally friendly. Therefore, considering the population that lives in the area where Blocks III and IV are located, as well as the agricultural landscape, this conscious environmental control would minimize the risks to humans and the environment that is usually associated with oil and gas exploration. These protections would also ensure the safety of the personnel working in the Blocks.³⁷

35. Further, the Proposal indicated that the technical information obtained from Blocks III and IV would be evaluated with a focus on carrying out deep analyses of the reservoirs and seismic information, and if necessary, a reinterpretation using the latest technology.³⁸

36. The Proposal also guaranteed that all Peruvian personnel who were working in Blocks III and IV would continue in their jobs. The Proposal also emphasized Baspetro's plan to partner with PetroPeru in the operation of the Blocks.³⁹

37. Most importantly, the Proposal had an economic framework that fulfilled PeruPetro's expectations with respect to an increase in oil production in the Blocks and an increase of the financial return for PeruPetro. To this end, the Baspetro Proposal contemplated significant and realistic investments in the drilling of new oil wells, in the re-activation of existing oil wells, and allocated 50% of the revenue to PeruPetro.⁴⁰

³⁷ Claimant's Statement of Claim, 11 September 2020, ¶ 77.

³⁸ Claimant's Statement of Claim, 11 September 2020, ¶ 78.

³⁹ Claimant's Statement of Claim, 11 September 2020, ¶ 79.

⁴⁰ Claimant's Statement of Claim, 11 September 2020, ¶ 80.

38. In sum, the Proposal was very attractive and beneficial for PeruPetro and the local community of Talara.⁴¹

4) **PERUPETRO VIOLATES AMORRORTU'S LEGITIMATE RIGHT TO DIRECT NEGOTIATION FOR BLOCKS III & IV**

39. In violation of the direct negotiation process commenced by Baspetro, on July 14, 2014, PeruPetro commenced a public bidding process and invited oil companies interested in the exploitation of hydrocarbons to participate in International Public Bidding Process No. PERUPETRO-001-2014-LOT III and International Public Bidding Process No. PERUPETRO-002-2014-LOT IV (the ***International Public Bidding Process***). Given this unusual development, Amorrortu immediately traveled to Peru to meet again with Ortigas.⁴²

40. On July 16, 2014, Amorrortu met with Ortigas in Peru. At the meeting, Ortigas informed Amorrortu for the first time that the Board of Directors of PeruPetro had rejected the Baspetro Proposal and instead opted for a public bidding of Blocks III and IV. Ortigas gave no explanation as to why the Board rejected the Baspetro Proposal. This statement turned out to be false.⁴³

41. Upon leaving the meeting with Ortigas, Amorrortu met with Isabel Tafur (***Tafur***), the Chief Administrator of PeruPetro, who informed Amorrortu that her office had no knowledge of the Baspetro Proposal. This meant that the Baspetro Proposal was never transmitted to the General Management of PeruPetro. Tafur then requested a copy of the Proposal which Amorrortu sent to her a few hours later.⁴⁴

⁴¹ Claimant's Statement of Claim, 11 September 2020, ¶ 81.

⁴² Claimant's Statement of Claim, 11 September 2020, ¶ 82.

⁴³ Claimant's Statement of Claim, 11 September 2020, ¶ 83.

⁴⁴ Claimant's Statement of Claim, 11 September 2020, ¶ 84.

42. Again, completely ignoring the law and the implications of a direct negotiation, on August 20, 2014, PeruPetro sent a letter to Amorrortu, inviting Baspetro to participate in the International Public Bidding Process for Block III, "*in line with the proposal that [Baspetro] presented [to PeruPetro on May 28, 2014].*"⁴⁵ PeruPetro ignored that Amorrortu had commenced a direct negotiation process, that Baspetro had been qualified, and that Amorrortu was entitled to have the Baspetro Proposal evaluated through this exclusive process.⁴⁶

43. On October 31, 2014, in order to prevent PeruPetro from using the pretext of non-participation in the International Public Bidding Process to deny the Baspetro Proposal altogether, Amorrortu presented a bid as part of the public tender.⁴⁷ Notably, Amorrortu never withdrew, nor was he required by PeruPetro to withdraw, the Baspetro Proposal in order to participate in the rigged public bidding process.

44. On November 3, 2014, PeruPetro informed Amorrortu that Baspetro did not meet the technical requirements of the International Public Bidding Process. The process was purposely designed to exclude Baspetro and award the contract to Graña y Montero. On December 12, 2014, PeruPetro announced Graña y Montero as the only company to qualify for the bid for Blocks III and IV.⁴⁸ What Amorrortu did not know at the time was that the perceived favoritism in favor of a local company was in fact part of one of the largest corruption schemes in the history of Latin America.⁴⁹

⁴⁵ Claimant's Statement of Claim, 11 September 2020, ¶ 85.

⁴⁶ Claimant's Statement of Claim, 11 September 2020, ¶ 85.

⁴⁷ Claimant's Statement of Claim, 11 September 2020, ¶ 86.

⁴⁸ Claimant's Statement of Claim, 11 September 2020, ¶ 87.

⁴⁹ Claimant's Statement of Claim, 11 September 2020, ¶ 88.

III. PROCEDURAL HISTORY

45. On September 24, 2019, Peru received Amorrortu's Notice of Intent (**NOI**), dated September 19, 2019, to Arbitrate under the USPTPA.
46. On February 13, 2020, Amorrortu filed his NOA.
47. On March 16, 2020, Claimant was formally informed by counsel for Respondent that Mr. Toby Landau was Peru's appointed arbitrator.
48. On March 21, 2020, Peru filed its Response to Claimant's NOA.
49. On March 23, 2020, the Parties communicated to the Permanent Court of Arbitration (**PCA**) their agreement on the applicable Arbitration Rules and the designation of the PCA as the administering authority.
50. On April 23, 2020, the Parties informed the PCA that they had agreed to appoint arbitrator William Ian Corneil Binnie as presiding arbitrator in these proceedings.
51. On April 24, 2020 the PCA confirmed that it would be informing Judge Binnie of his appointment.
52. On June 3, 2020 the Parties held a first procedural meeting.
53. On June 29, 2020, the Tribunal issued Procedural Order No. 1 (**PO1**), establishing the Procedural Calendar of the arbitration. Section 3.3. of the PO1 provides that, "*[n]o later than in its Statement of Defense, the Respondent may submit a request that the Tribunal rule on certain matters pertaining to jurisdiction and / or liability in a preliminary phase, setting forth in full the grounds for such request.*"⁵⁰

⁵⁰ Procedural Order No. 1, 29 June 2020, ¶ 3.3.

54. By letter dated September 25, 2020, Peru requested that the Tribunal order Amorrortu “[t]o disclose the names of any funder(s) with whom Mr. Amorrortu or [his] legal representatives may have entered or plan to enter into an agreement in relation to this case; [t]o confirm that the funding arrangement includes payment of an adverse cost award; [t]o provide copies of the relevant provision from the funding agreement(s) relating to (i) cost awards, and (ii) aspects of the conduct, termination, or settlement of the present arbitration that require funder approval.”⁵¹

55. By letter dated October 2, 2020, Amorrortu (i) confirmed “that he is relying on the assistance of a third party to pay for the costs of these proceedings”; (ii) offered to disclose the identity of the funder to the Tribunal and to Peru if this information was deemed necessary by the Tribunal; and (iii) requested that the Tribunal dismiss the Respondent’s request that it disclose certain terms of the funding agreement.⁵²

56. By letter dated October 6, 2020, Peru commented on Amorrortu’s letter of October 2, 2020 and reiterated its request, as set out in its letter of September 25, 2020.

57. On October 19, 2020, the Tribunal issued Procedural Order No. 2 (**PO2**) holding that “the identity of the third party funder should be disclosed both to the Tribunal and to the Respondent.”⁵³

58. On December 9, 2020, the Respondent submitted a Notice of Intent to Submit Preliminary Objections, whereby it requested that the Tribunal suspend the

⁵¹ Peru’s Letter to Tribunal Requesting Disclosure of Third Party Funder, 25 September 2020, p. 7.

⁵² Claimant’s Letter to Tribunal Regarding Third Party Funder, 2 October, 2020, p. 2.

⁵³ Procedural Order No. 2, 19 October 2020, ¶ 8.

proceedings on the merits and consider certain objections to the Tribunal's jurisdiction as preliminary questions.

59. On December 10, 2020, the Tribunal (i) invited Amorrortu's comments on Peru's Application; and (ii) ordered the suspension of the deadline for the filing of Peru's Statement of Defense due December 21, 2020, as well as all subsequent deadlines set out in the Procedural Calendar.

60. On December 22, 2020, Amorrortu (i) submitted an Application to Amend his Notice of Arbitration "*to provide the purportedly defective waiver that Peru claims Article 10.18.2(b) requires;*" and (ii) requested that the Tribunal adjudicate such motion "*before proceeding with the other jurisdictional objections raised by Peru and the merits of Amorrortu's claims.*"⁵⁴

61. On January 15, 2021, Peru requested the Tribunal "(1) *to reject Claimant's Application, or (2) in the alternative, [to] reserve decision on the Application until it has heard Peru's Article 10.20.4 objections and Rule 23(3) jurisdictional objections, and (3) to proceed with establishing a procedural calendar to hear all of Peru's preliminary objections on a concurrent basis.*"⁵⁵

62. On January 17, 2021, Amorrortu requested leave to reply to the Respondent's communication of January 15, 2021.

63. On January 21, 2021, the Tribunal issued its Decision on Bifurcation by which Peru's application regarding jurisdictional objections was partially granted.

⁵⁴ Claimant's Application to Amend, 22 December 2020, pp. 2, 8.

⁵⁵ Peru's Letter to Tribunal Regarding Objections 1 and 4, 15 January 2021, pp. 13-14.

IV. OBJECTION 1 FAILS: AMORRORTU'S INVESTMENT IN PERU GIVES RISE TO A TREATY CLAIM FOR WHICH AN AWARD MUST BE GRANTED

64. Peru maintains that “no direct negotiation was ever commenced”⁵⁶ because a number of “steps have to occur before actual negotiations of a contract begins.”⁵⁷ Specifically, Peru identifies four “preconditions” that have to be satisfied to commence a process of direct negotiation: i. PeruPetro must send a written communication to the interested company setting forth the commencement date of negotiations and requesting that the interested company designate the representative who will participate in the negotiation; ii. a determination must be made by PeruPetro as to whether the relevant oil block is available for direct negotiation; iii. the interested company must be certified as qualified; and iv. even if all these requirements are satisfied, there is no guarantee to an eventual contract.⁵⁸

65. Each of these phases were satisfied by Amorrortu. As explained in more detail below:

- i. PeruPetro’s Rules and Procedures for the Direct Negotiation of Contracts establish different distinct phases for the negotiation of direct contracts (**Subsection 1**);
- ii. the direct negotiation process commenced when Amorrortu submitted the Baspetro Proposal requested by PeruPetro (**Subsection 2**);
- iii. Blocks III and IV were available for direct negotiation (**Subsection 3**);
- iv. Peru is estopped under Peruvian administrative law from arguing that Baspetro was not qualified (**Subsection 4**); and
- v. the bundle of rights concomitant to a corruption free direct negotiation process are protected by the USPTPA (**Subsection 5**).

⁵⁶ Peru’s Submission on Preliminary Objections, 15 March 2021, ¶ 26.

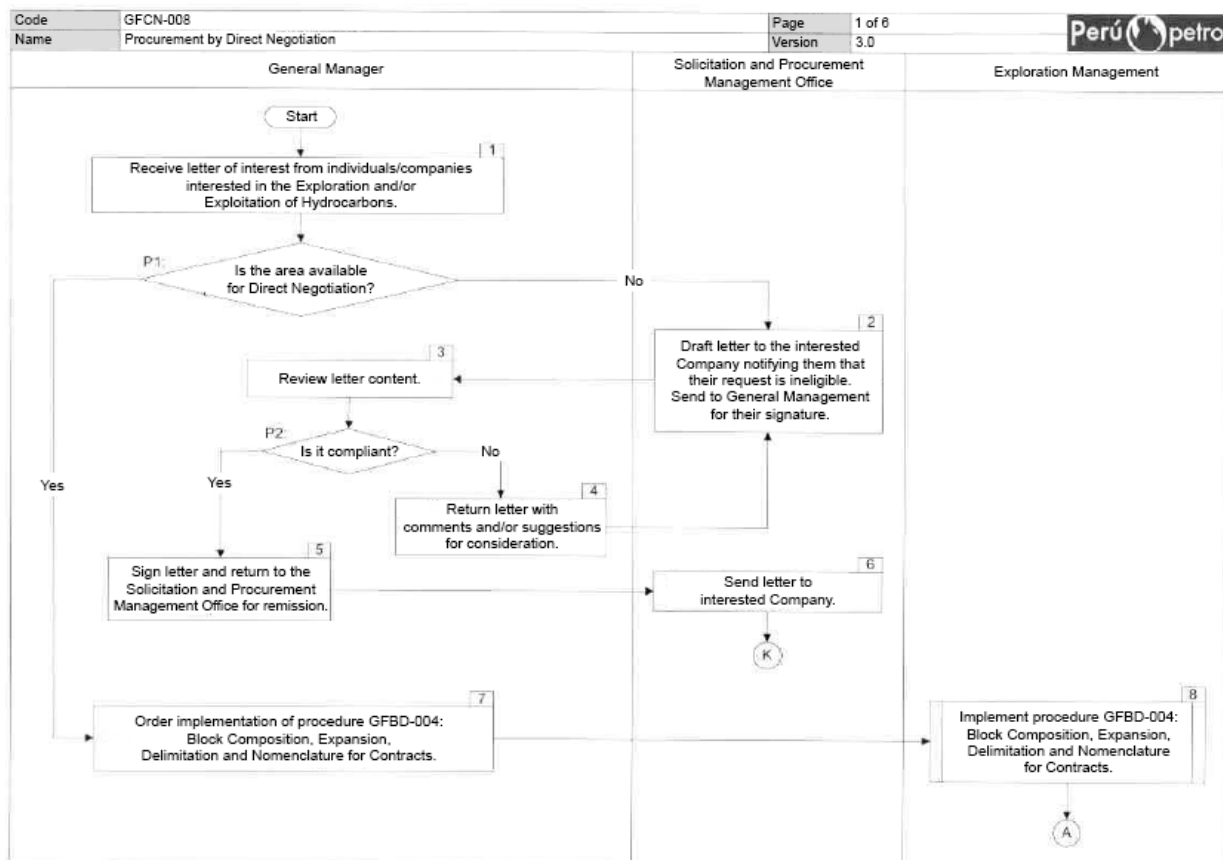
⁵⁷ Peru’s Submission on Preliminary Objections, 15 March 2021, ¶ 38. (Emphasis in the original).

⁵⁸ Peru’s Submission on Preliminary Objections, 15 March 2021, ¶¶ 40-44.

1) **PERUPETRO'S RULES AND PROCEDURES FOR THE DIRECT NEGOTIATION OF CONTRACTS**

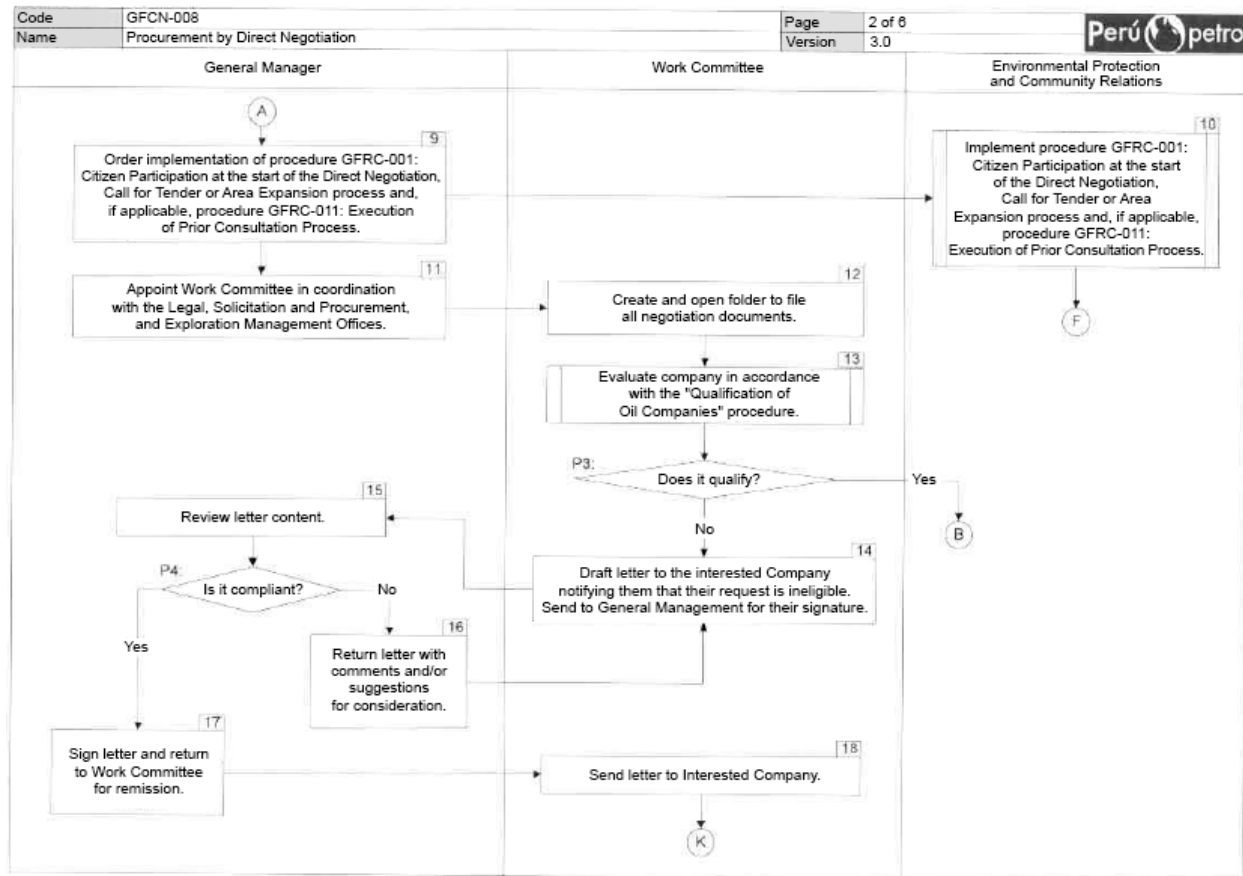
66. As Peru admits, Peru's Organic Hydrocarbons Law gives PeruPetro the discretion to assign contracts for the operation of Peru's oil fields by a process of direct negotiation.⁵⁹ As explained in Claimant's Statement of Claim, PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts that were in place in 2014 establish three distinct decisional phases in the direct negotiation process.

67. An initial phase in which the commission appointed by PeruPetro to negotiate direct contracts with oil companies determines the availability of the subject project as illustrated in the following chart:

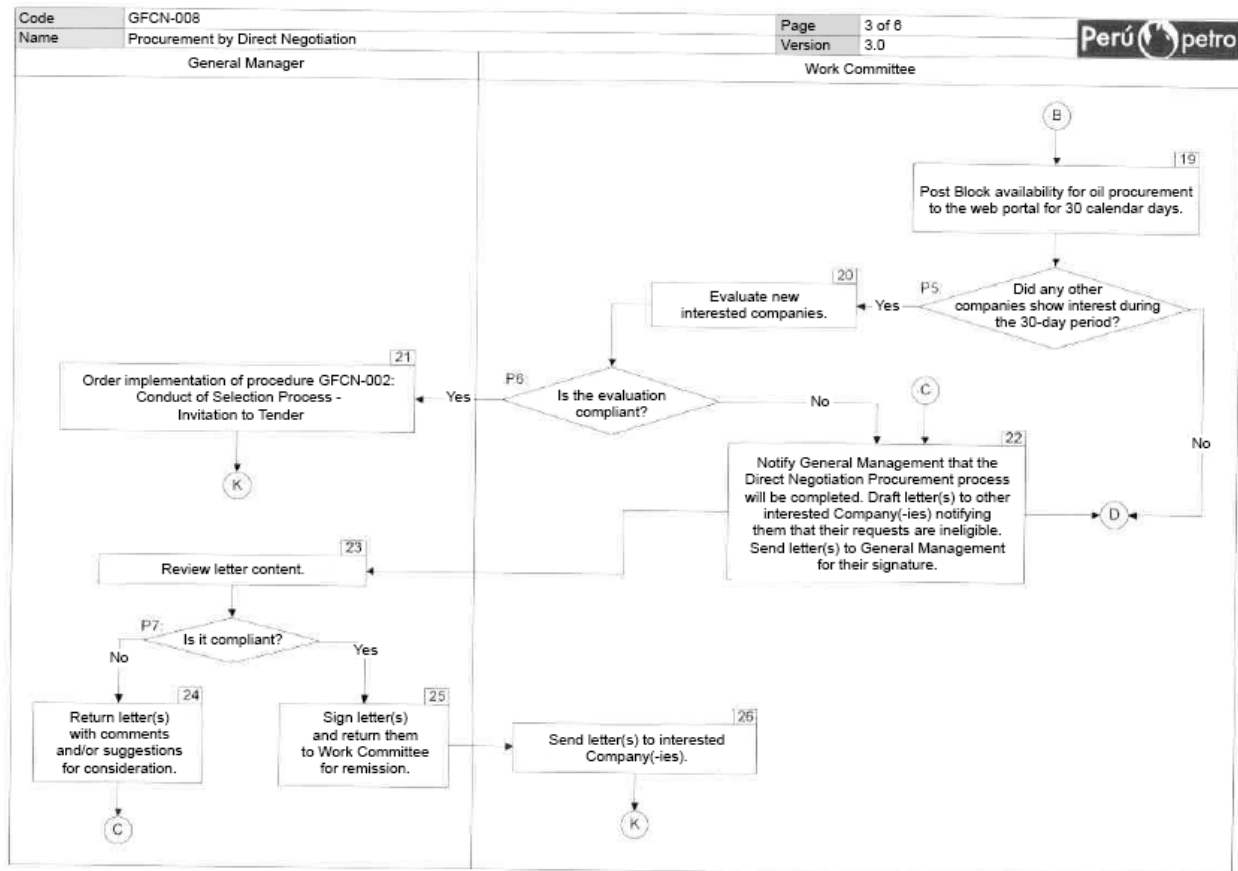


⁵⁹ Peru's Submission on Preliminary Objections, 15 March 2021, ¶ 40.

68. A second phase in which the oil company is qualified, its proposal is evaluated, and the community reach process is commenced as shown below:



69. And, a third phase in which PeruPetro gives notice of the direct negotiation process to the public at large and invites the submission of competing proposals from any oil company interested in the project:



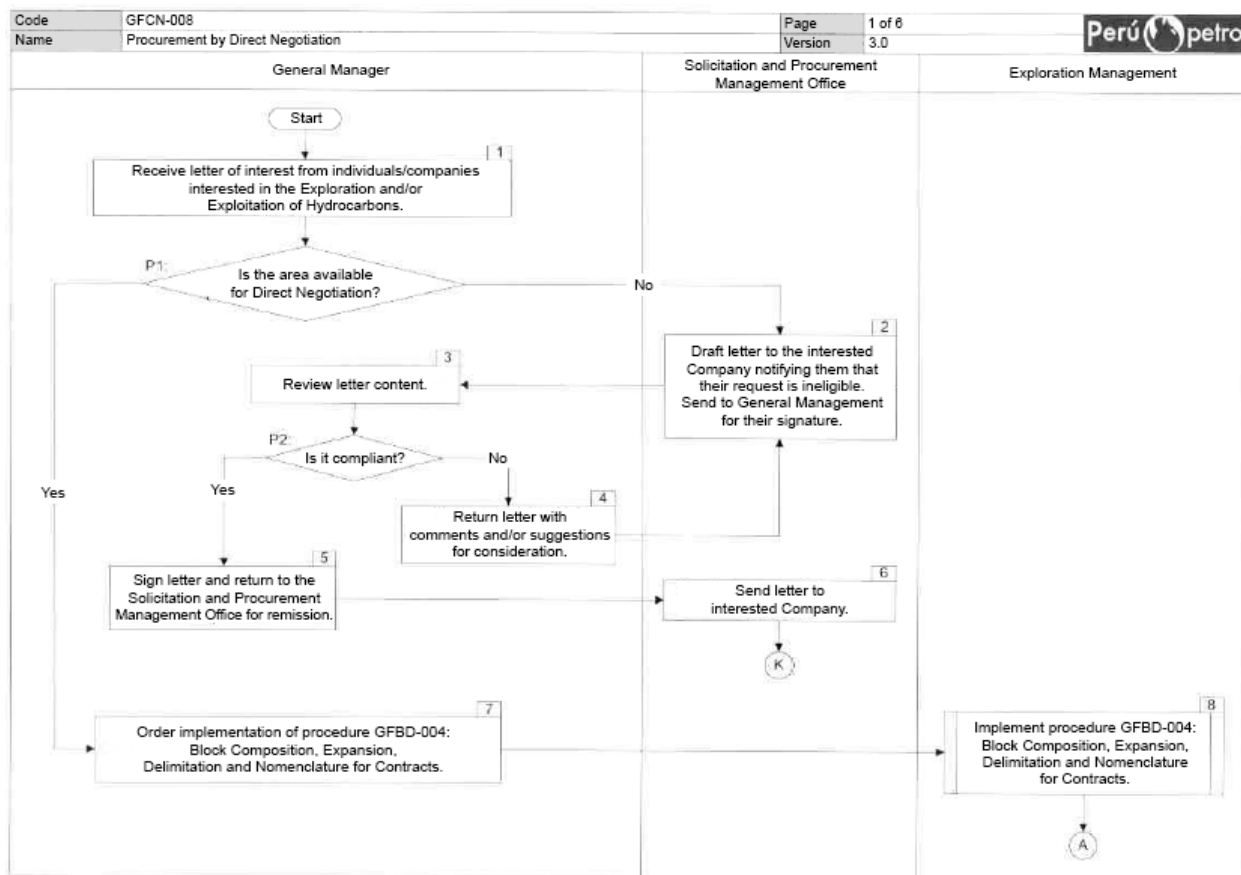
70. Once these three phases are satisfied, then the PeruPetro team proceeds to draft the concession contract with the oil company. In its Submission on Preliminary Objections, Peru seems to take issue with the characterization of the steps set forth in PeruPetro’s Rules and Procedures for the Direct Negotiation of Contracts as phases.⁶⁰ Certainly, these steps are distinctively grouped in three distinct charts. But irrespective of the title that Peru deems to be appropriate, Peru cannot seriously

⁶⁰ Peru’s Submission on Preliminary Objections, 15 March 2021, ¶ 38.

dispute that these steps are part of the direct negotiation process or procedure established in PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts.

2) THE DIRECT NEGOTIATION PROCESS COMMENCED WHEN BASPETROL SUBMITTED THE BASPETROL PROPOSAL FOR BLOCKS III AND IV AT THE REQUEST OF PERUPETRO

71. The direct negotiation process is commenced with the submission of a proposal for direct negotiation by an interested oil company. PeruPetro's Rules and Procedures for the Direct Negotiation of Contracts makes that clear:



72. As the flow chart indicates, once an interested oil company submits a proposal for direct negotiation, the interested oil company has the right to have its proposal subjected to the various steps or phases established in the Rules and Procedures for

the Direct Negotiation of Contracts. Peru's argument that the process does not begin until PeruPetro responds to this letter has no legal support, particularly in a case in which the proposal has been submitted at the request of PeruPetro through its President. Once Amorrortu submitted the proposal requested by PeruPetro, the direct negotiation process had started and was subject to the principles of good faith, equal treatment, impartiality, due process, procedural conduct, and predictability under Peruvian law.⁶¹ PeruPetro could not just shelve the Baspetro Proposal to favor a corrupt oil company as part of a corrupt bidding process.

3) **BLOCKS III AND IV WERE AVAILABLE FOR DIRECT NEGOTIATION**

73. Peru claims that oil Blocks III and IV were not available for direct negotiation.⁶² This argument is devoid of any legal or factual support.

74. From a legal perspective, a block is available for direct negotiation when the block has not been contractually assigned for the contemplated period⁶³ and is not the subject of a bidding process that has been open to the public for that period.⁶⁴ On May 28, 2014, when Amorrortu submitted the Baspetro Proposal, Blocks III and IV were not under contract for the proposed period and were not the subject of a public bidding process. Indeed, the public bidding process was not announced until July 14, 2014. Peru cannot say that Blocks III and IV were not available.

75. From a factual perspective, the Baspetro Proposal was requested by PeruPetro. This request, by definition, means that the Blocks were available. Indeed,

⁶¹ See, e.g., CER – 2 [Quiroga], ¶¶ 8, 47, 56-57.

⁶² Peru's Submission on Preliminary Objections, 15 March 2021, ¶ 50.

⁶³ See Baspetro Proposal, 27 May 2014 (**C-11**), p. 10; see also Directory Agreement No. 034-2014, 20 March 2014 (**C-3**).

⁶⁴ CER – 1 [Quiroga], ¶¶ 22-25.

Peru requested the Baspetro Proposal not once,⁶⁵ but twice.⁶⁶ As such, having requested Amorrortu to submit direct negotiation proposals for Blocks III and IV, Peru cannot now argue that the Blocks were not available unless Peru takes the position that PeruPetro's President lied to Amorrortu.

76. PeruPetro suggests that as early as April of 2014, its Directory had decided that Blocks III and IV were to be submitted to public bidding.⁶⁷ This argument misses the mark. First, irrespective of what internal decision PeruPetro had made, the fact is that the Blocks were available for direct negotiation when Amorrortu submitted the Baspetro Proposal, as the corrupt International Public Bidding Process was not opened until July 14, 2014. Second, Amorrortu was never told that when he submitted the Baspetro Proposal the Blocks were not available for direct negotiation. On the contrary, PeruPetro's Directory verbally informed Amorrortu that it had "rejected" the Baspetro Proposal, even though PeruPetro's Administration was not even aware of the Baspetro Proposal.⁶⁸

77. Peru cannot deny that Amorrortu submitted the Baspetro Proposal at the request of PeruPetro's President, who went as far as asking Amorrortu to extend his

⁶⁵ Claimant's Statement of Claim, 11 September 2020, ¶ 73, *supra* ¶ 30.

⁶⁶ Claimant's Statement of Claim, 11 September 2020, ¶ 84, *supra* ¶ 41.

⁶⁷ Amorrortu had no knowledge that PeruPetro had decided to open a public bidding process designed to benefit Graña y Montero. In fact, the commencement of a public bidding process is a highly unusual decision given that Baspetro had expressed an interest in direct negotiation, and PeruPetro had a practice of commencing the direct negotiation process at the request of any oil company interested in an oil block, particularly an oil company with the experience of Amorrortu. See Claimant's Statement of Claim, 11 September 2020, ¶ 73, n. 102.

⁶⁸ Claimant's Statement of Claim, 11 September 2020, ¶¶ 83-84.

proposal to Block IV. This fact, which remains a constant in the analysis of each of the arguments surrounding the direct negotiation process, is fatal to Peru's argument that the blocks were somehow not available for direct negotiation.

4) **PERU CANNOT ARGUE THAT BASPETROL WAS NOT QUALIFIED TO COMMENCE DIRECT NEGOTIATION WITH PERUPETRO**

78. Peru is correct in that before the direct negotiation process commences, Baspetro must comply with the qualification certification requirements of Article 11 of the Law of Hydrocarbons.⁶⁹ However, Peru ignores that this certification requirement is deemed to be satisfied when a proposal for direct negotiation is submitted to PeruPetro, and PeruPetro does not issue any response identifying any of the limited statutory basis for denial of certification.⁷⁰

79. Article 2 of the Rules of Qualification for Oil Companies establishes that "*every oil company shall be duly qualified by PeruPetro, S.A., to commence the negotiation of a contract.*"⁷¹ The qualification process is very well defined in the Rules of Qualification. The process begins with the submission by the oil company expressing its interest in negotiating a contract for the operation or exploitation of oil fields in Peru. A recently incorporated company like Baspetro is required to include in its presentation: (i) documents establishing that the company has the financial capacity to complete the underlying project; (ii) the commitment of an operator with the technical capacity to conduct the oil operations or a contract with an experienced oil services company; and (iii) a sworn declaration confirming that the company has a

⁶⁹ See CER – 1 [Quiroga] ¶ 134.

⁷⁰ *Id.* at ¶ 99.

⁷¹ *Id.* at ¶ 91.

team with the experience and expertise necessary to complete the project.⁷² These requirements were easily satisfied by Baspetro, which through various presentations and written proposals had established that Amorrortu had successfully operated and/or serviced Block III and worked in the Talara Basin for more than twenty years. Amorrortu had also put together a team of unquestionable technical capacity and had a business plan to fund the operations of Baspetro.

80. Within 10 days from receiving the request from the oil company, PeruPetro has to give notice to the oil company of any missing document, which must be presented in 30 days after receipt of the notice.⁷³ If PeruPetro does not make any observation to the request within the 10-day period, PeruPetro is obligated to issue the certification of qualification and the oil company is deemed to have satisfied the qualification requirements for all legal purposes. Specifically, Article 14 of the Rules of Qualification states that, "*PeruPetro is obligated to grant the certification of qualification of the oil company, within the ten days from receipt of the request*" provided that the oil company presents the required documents and if no additional document is requested to cure any deficiency in the request after the completion of the evaluation process.⁷⁴

81. In its Submission on Preliminary Objections, Peru argues that the principle of administrative silence does not apply in the context of the certification of a company as qualified to commence a process of direct negotiation.⁷⁵ This is wrong.

⁷² *Id.* at ¶ 95.

⁷³ *Id.* at ¶¶ 96, 97.

⁷⁴ *Id.* at ¶ 105.

⁷⁵ Peru's Submission on Preliminary Objections, 15 March 2021, ¶¶ 56 – 61.

82. As Expert Quiroga explains in his Second Expert Report, the “*legal fiction*” of the administrative silence applies to this type of processes by a “*systematic interpretation*” of the articles of the Law No. 27444, by a series of applicable norms. These are, the Peruvian Constitution, Articles 62 and 66 of the Law of General Administrative Procedure by operation of the concession process and the Preliminary Title, Section I(8); the Consolidated Text of the Hydrocarbons Law, Articles 10(a) and 12; and, the Civil Code by operation of Article 1357.⁷⁶ The administrative silence is “*a legal fiction intended to protect those administered against a Public Administration that is not very diligent or unjustifiably reluctant in the exercise of its functions.*”⁷⁷

83. This doctrine applies in the process of qualification of an oil company within the direct negotiation process, because “*in the absence of an express observation, error, omission or request for additional information made by the competent authority, it must grant the certification.*”⁷⁸

84. Having failed to raise any issue with respect to Baspetro’s qualifications and having deprived Amorrortu of the opportunity to appeal such decisions, Peru cannot now contend that Baspetro was not a qualified oil company through which Amorrortu commenced the process of direct negotiation. Peruvian law simply does not allow

⁷⁶ CER – 2 [Quiroga], ¶ 11.

⁷⁷ CER – 2 [Quiroga], ¶ 18 (Free Translation by Claimant Bacilio Amorrortu: Spanish original text reads “. . . silencio administrativo es una ficción jurídica destinada que protege a los administrados frente a una Administración Pública poco diligente o injustificadamente renuente en el ejercicio de sus funciones.”).

⁷⁸ CER – 2 [Quiroga], ¶ 22 (Free Translation by Claimant Bacilio Amorrortu: Spanish original text reads: “ante la falta de una observación expresa, error, omisión o solicitud de información adicional formulada por la autoridad competente, esta se encuentra en la obligación de otorgar dicha calificación.”).

Peru to benefit from its own failure to comply with its administrative rules, particularly in this case in which as established in Claimant's Statement of Claim, Baspetro was led by a team of professionals that had successfully operated Block III and other blocks in the Talara Basin.

5) **AMORRORTU'S REASONABLE EXPECTATIONS TO A CORRUPTION FREE DIRECT NEGOTIATION PROCESS ARE PROTECTED BY THE USPTPA**

85. In its Submission on Preliminary Objections, Peru states that "*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.*"⁷⁹ As this statement confirms, the issue of whether the direct negotiation was likely to result in a contract for the operation of Blocks III and IV is a factual question that is more related to the issue of damages than to the viability of Amorrortu's claims. Peru cannot deprive Amorrortu of his due process right to present evidence confirming that the direct negotiation process would have resulted in a contract in the absence of corruption.

86. Peru claims that Amorrortu's expectations are not covered by the Treaty. This argument is wrong and is belied by the explicit language of the USPTPA, which broadly defines investment to include, not only the rights of an investor in an enterprise, but also any rights or claims the investor may have under Peruvian law in this case, particularly with respect to the expansion of the assets and rights of its

⁷⁹ Peru's Submission on Preliminary Objections, 15 March 2021, ¶ 62.

initial investment.⁸⁰ Indeed, the USPTPA goes as far as protecting “*an investor that attempts through concrete action to make, is making, or has made an investment.*”⁸¹

87. Peru’s argument that the USPTPA does not protect Amorrortu’s reasonable expectations is simply unprecedented. As explained in more detail in Claimant’s Statement of Claim, most arbitral tribunals that have dealt with this issue share the view that “*one of the major components of the [Fair and Equitable Treatment] standard is the parties’ legitimate and reasonable expectations with respect to the investment they have made.*”⁸² This reasonable expectation includes the expectation to negotiate an agreement free of corruption, particularly under the protections of a Treaty that devotes an entire chapter to anti-corruption practices and that recognizes as one of its objectives the elimination of corruption.⁸³

⁸⁰ See USPTPA Investment Chapter (**CLA-1**), Art. 10.28; see also USPTPA Chapter One (**CLA-6**), Art. 1.3.

⁸¹ USPTPA Investment Chapter (**CLA-1**), Art. 10.28.

⁸² *EDF v. Romania*, Award, (**CLA-4**), ¶ 216; see *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, (*Fernandez-Armesto, Paulsson, Voss*), (**CLA-34**), ¶ 69; see also *Luigiterzo Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, (*Lalonde, Price, Stern*), (**CLA-46**), ¶ 235; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (*Watts, Yves Fortier, Behrens*), (**CLA-23**), ¶ 302; *Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, (*Grigera Naon, Fernandez Rozas, Bernal Vereza*), (**CLA-73**), ¶ 154; *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, (*Levy, Alexandrov, Abi-Saab*), (**CLA-75**), ¶¶ 667-668; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the Ad Hoc Committee, 25 March 2010 (*Schwebel, McLachlan, Silva Romero*) (**CLA-58**), ¶ 609.

⁸³ USPTPA Chapter Nineteen (**CLA-42**).

88. For its bold proposition that Amorrortu's reasonable expectations are not protected by the Treaty, Peru cites the decision in *Nagel v. Czech Republic*.⁸⁴ But in the *Nagel* decision, the reasonable expectations at issue were based on allegations of oral communications purportedly promising the right to a license, which were not supported by facts. In this case, Amorrortu's reasonable expectations are based on the Treaty's anti-corruption statements and Peru's legal framework establishing the direct negotiation process and the rights concomitant to this process.

89. As Claimant's Statement of Claim makes clear, when Amorrortu, through Baspetro, commenced the direct negotiation process, Amorrortu acquired a number of substantive rights, including the right to a direct negotiation conducted in compliance with the norms of good faith, impartiality, observance of principles of due process, and predictability.⁸⁵ These rights are not simply procedural inchoate rights. These are substantive rights with monetary value particularly in light of the fact that Amorrortu had operated Block III for more than twenty years and had the *know-how* and capability to optimize the wells in Blocks III and IV. The bundle of rights acquired by Amorrortu constituted an integral part of Amorrortu's business plan when he formed Baspetro. Amorrortu's reasonable expectations matured when he formally commenced the direct negotiation process. At that point, Amorrortu was set apart from other investors and Baspetro became an oil company vested with all the rights of an oil company qualified to negotiate with PeruPetro. Indeed, pursuant to the

⁸⁴ *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, (Danelius, Hunter, Kronke), (**RLA-5**).

⁸⁵ See CER – 1 [Quiroga] at ¶¶ 116-192.

certification of qualification rules, Amorrortu, through Baspetro, had commenced a direct negotiation process.

90. Peru's arguments ignore that, as explained in Claimant's Statement of Claim, PeruPetro turned its well-defined process to evaluate a direct negotiation proposal on its head to favor Graña y Montero and to further a massive corruption scheme that escalated all the way to the presidency of Peru. That corruption constitutes a violation of the protections of the USPTPA. Certainly, Amorrortu will have to prove the financial value of his acquired rights, but that question of damages is not relevant at this juncture.

V. OBJECTION 4 FAILS: AMORRORTU'S WAIVER IS NOT DEFECTIVE

91. In Objection 4, Peru argues that Amorrortu's waiver in his NOA is defective in two aspects. First, Peru objects that the waiver was included in the NOA and signed by Amorrortu's counsel.⁸⁶ According to Peru, Article 10.18(2)(b) of the USPTPA requires a waiver in a document separate from the NOA and formally signed by Amorrortu himself. Second, Peru argues that Amorrortu's waiver contains an inappropriate reservation of rights in the event of dismissal of the alleged claims for lack of jurisdiction.⁸⁷ Peru contends that this reservation is impermissible. Both of these arguments are based on a tortured and erroneously formalistic interpretation of Article 10.18(2)(b) of the USPTPA that should be rejected by this Tribunal.

92. In its Submission on Preliminary Objections, Peru claims that Amorrortu has conceded the defective nature of his waiver.⁸⁸ That is simply not true. In a good

⁸⁶ Peru's Submission on Preliminary Objections, 15 March 2021, ¶ 75.

⁸⁷ *Ibid.*

⁸⁸ Peru's Submission on Preliminary Objections, 15 March 2021, ¶ 68.

faith effort to expedite these proceedings and preemptively stop Peru in its attempt to use Article 10.18(2)(b) of the USPTPA as a shield to hide its violations of the Treaty, Amorrortu moved to amend his NOA and comply with Peru's unfounded demands. As this Tribunal aptly recognized in Procedural Order No. 3 (**PO3**) issued on January 21, 2021, this application to amend was filed in the event that the Tribunal sustained Objection 4.⁸⁹

93. As demonstrated below, Objection 4 fails and must be rejected because:

- i. Peru is estopped from arguing that it did not consent to this arbitration (**Subsection 1**);
- ii. Peru's interpretation of Article 10.18(2)(b) of the USPTPA is erroneous and divorced from the textual language of the Treaty (**Subsection 2**);
- iii. Amorrortu's pending application to amend renders Objection 4 moot (**Section VI**).

1) **PERU IS ESTOPPED FROM ARGUING THAT IT DID NOT CONSENT TO THIS ARBITRATION**

94. Peru availed itself of the jurisdiction of this Tribunal and requested an order compelling Amorrortu to state whether a third-party funder was financing this arbitration, and if so, to identify the third-party funder and to produce the funding agreement.⁹⁰ Peru's motion was granted in part and this Tribunal ordered Amorrortu to disclose the identity of his third-party funder.⁹¹ Having successfully requested relief from this Tribunal, Peru is now estopped from challenging its consent to this arbitration.

⁸⁹ Procedural Order No. 3, 21 January 2021, ¶ 11.

⁹⁰ Peru's Request for Disclosure of Third Party Funding Agreement, 25 September 2020, p. 8.

⁹¹ Procedural Order No. 2, 19 October 2020, ¶ 12.

95. The doctrine of estoppel (the ***Doctrine of Estoppel***) applies when a party has relied on the statement or conduct of the other either to its detriment or to the other's advantage.⁹² Estoppel requires the presence of the following three elements:

- i. A clear and unequivocal statement or conduct;
- ii. Reliance on that statement or conduct by one party;
- iii. Detriment to the party invoking the estoppel or an advantage to the party who made the statement.⁹³

96. The Doctrine of Estoppel applies with equal force to statement or conduct in litigation. In that context, the doctrine is usually referred to as judicial estoppel and applies "to prevent a State contesting [in a judicial or arbitral forum] a situation contrary to a clear and unequivocal [statement or conduct] made by [the State] to another [party]" causing the other party to rely, to its detriment, on that statement or conduct or securing the State "some benefit or advantage for itself."⁹⁴

97. In this case, there is no question that the three elements of the Doctrine of Estoppel are satisfied.

98. Until December 9, 2020 Peru's conduct in these proceedings clearly and unequivocally established Peru's consent to this arbitration. Indeed, other than a vague reference purportedly reserving the right to argue lack of jurisdiction "*ratione voluntatis, ratione personae, ratione materiae, and ratione temporis*" in the Response

⁹² Temple of Preah Vihear (Cambodia v. Thailand), Judgment 15 June 1962, (**CLA-106**).

⁹³ *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, (Kaplan, Beechey, Landau), (**CLA-107**), ¶ 261.

⁹⁴ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, (Böckstiegel, Van den Berg, Brower), 30 March 2010, (**CLA-108**), ¶ 350.

to Amorrortu's NOA, Peru never indicated that it had not given its consent to the arbitration in any document it filed in these proceedings.⁹⁵

99. There is no reference to Peru's lack of consent on the motion to compel Amorrortu to produce the information about the third-party funder. This Tribunal granted Peru's motion in part on October 19, 2020, and Amorrortu, relying on Peru availing to its consent to the jurisdiction of this Tribunal, complied with the Tribunal's order. It is clear and unequivocal that Peru benefited from Amorrortu's reliance, as it now has the name and identity of Amorrortu's funder.

100. This is a clear case of estoppel. Having benefitted from the order of this Tribunal at Peru's request, Respondent cannot now claim that it never consented to this arbitration. The application of the Doctrine of Estoppel is particularly appropriate in this case, because Peru regularly uses the belated assertion of its purported lack of consent as a strategy to delay and derail arbitrations filed under the USPTPA.⁹⁶

101. In *Renco 1*, Peru waited "nearly three years" after the arbitration had begun to assert its purported lack of consent.⁹⁷ The tribunal in *Renco 1* admonished Peru for its bad faith strategy and told Peru that:

The Tribunal has been troubled by the manner in which Peru's waiver objection has arisen in the context of this arbitration. The arbitration had already been on foot for quite some time before Peru filed its Memorial on Waiver in July 2015. By this stage over four years had passed since Renco filed its Notice of Arbitration; the Tribunal had already issued Procedural Order No. 1 which recorded the agreed briefing schedule for the arbitration; Renco had filed its Memorial on Liability; the Parties had exchanged voluminous submissions in connection with Renco's challenge to the scope of Peru's Preliminary Objections;

⁹⁵ Peru's Response to Notice of Arbitration, 21 March 2020, ¶ 5.

⁹⁶ *Renco 1* Partial Award, (**RLA-32**); see also *Gramercy v. Peru*.

⁹⁷ *Renco 1* Partial Award, (**RLA-32**), ¶ 180.

and the Tribunal had issued a substantive decision on December 18, 2014 in relation to the Scope of Peru's Preliminary Objections under Article 10.20(4). Clearly, it would have been preferable for all concerned if Peru had raised its waiver objection in a clear and coherent manner at the very outset of these proceedings. Instead, they emerged piecemeal over a relatively lengthy period of time.⁹⁸

102. The tribunal warned Peru that if it used the advantage obtained by its belated assertion of the purported lack of consent to argue that the claimant's claim were time-barred, the tribunal would deem that conduct to be an abuse of rights.⁹⁹ Peru **ignored** the admonishment and, in front of a newly constituted tribunal, asserted that the refiled claims were barred by the applicable limitations period.¹⁰⁰

103. This time Peru has gone even further. Peru not only delayed the assertion of its purported lack of consent, but it sought, and successfully obtained, substantive relief from this Tribunal before asserting its lack of consent. The Tribunal should not countenance this type of behavior and should reject it by holding that Peru, after availing itself of the jurisdiction of this Tribunal, cannot be heard to argue that it never gave its consent.

104. The Tribunal should award Amorrortu the costs and attorneys' fees incurred in opposing this frivolous objection pursuant to Article 10.20(6). Peru was admonished in *Renco 1* not to abuse its rights under Article 10.18(2)(b). Peru made a mockery of the Tribunal's admonishment and weaponized *Renco 1* in *Renco 2*. And Peru is

⁹⁸ Renco 1 Partial Award, (**RLA-32**), ¶ 123.

⁹⁹ Renco 1 Partial Award, (**RLA-32**), ¶ 188.

¹⁰⁰ *The Renco Group, Inc. v. Republic of Peru [II]*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, (Simma, Grigera Naón, Thomas), (**CLA-109**) (hereinafter, **Renco 2**) ¶ 114.

trying to do the same thing in this case. Enough is enough. An award of fees and costs under Article 10.20(6) is warranted.

2) **PERU'S INTERPRETATION OF ARTICLE 10.18(2)(B) IS ERRONEOUS AND DIVORCED FROM THE TEXTUAL LANGUAGE OF THE TREATY**

105. Article 10.18.2(b) of the USPTPA states that:

2. 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, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

106. There is no requirement in Article 10.18.2(b) that the waiver be filed in a separate form signed by the claimant (as opposed to his legal representative), and there is no requirement that the waiver encompass claims that could not be properly submitted to arbitration.

107. The principles governing the interpretation of a treaty are well-established. Article 10.18.2(b) of the USPTPA must be interpreted in good faith in accordance with (1) "*the ordinary meaning to be given to the terms of the treaty in their context*" and

(2) “*in light of its object and purpose.*”¹⁰¹ The interpretation analysis is primarily based on the “*plain language*” of the treaty.¹⁰² “*The preparatory work of the treaty and the circumstances of its conclusion*” are relevant to either confirm the meaning of the treaty provisions or to determine the meaning when the provisions are ambiguous or obscure.¹⁰³

108. Under these principles, Article 10.18.2(b) cannot be interpreted to require the formalistic and absolute waiver that Peru suggests.

- a) There is no requirement to present the waiver in a separate document signed by Amorrortu

109. Peru’s argument that the waiver must be presented in a document separate from the NOA and signed by Amorrortu (and not his counsel) has no explicit support in the text of Article 10.18.2(b) of the USPTPA, and does not advance the object and purpose of the Article.

110. ***The ordinary meaning.*** Peru claims that the use of the word “*accompanied*” in Article 10.18.2(b) indicates that the waiver must be contained in a separate document from the NOA.¹⁰⁴ There is nothing in Article 10.18.2(b) that explicitly indicates that the waiver must be contained in a separate document versus being included in the body of the NOA. In support of this argument, Peru relies on the

¹⁰¹ Vienna Convention on the Law of Treaties, Art. 31(1), (**RLA-1**); see *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent’s Preliminary Objections Under Article 10.20.4, 18 December 2014, (Moser, Yves Fortier, Landau), (**RLA-28**), (hereinafter, **Renco 1 Decision as to Scope**), ¶ 175.

¹⁰² Renco 1 Decision as to Scope, (**RLA-28**), ¶ 176.

¹⁰³ Vienna Convention on the Law of Treaties, Art. 32, (**RLA-1**); Renco 1 Decision as to Scope, (**RLA-28**), ¶ 178.

¹⁰⁴ Peru’s Submission on Preliminary Objections, 15 March 2021, ¶ 76.

dictionary definition of the word “*accompany*,” which means “*to provide (something) as a complement or addition to something else.*”¹⁰⁵ However, a closer look at the dictionary definition of “*accompany*” confirms that Peru has picked the definition that best suits its argument to the prejudice of other definitions. Indeed, Peru conveniently ignores that “*accompany*” is also understood as “*to be present or occur at the same time as.*”¹⁰⁶

111. This Tribunal should reject the invitation to interpret the word “*accompanied*” in the context of Article 10.18.2(b) based on the most restrictive meaning of the word. Instead, this Tribunal should understand the unrestricted use of the word “*accompanied*” in Article 10.18.2(b) to comprehensively and broadly include all its diverse forms and meanings. In fact, it is clear that, as long as the waiver is “*present or occur at the same time as*” the NOA, the requirements of Article 10.18.2(b) are satisfied irrespective of whether the waiver is included in the text of the NOA or as a separate document. If this Tribunal accepts Peru’s invitation to read a restrictive definition of “*accompany*,” it would be writing into Article 10.18.2(b) a restriction that was never agreed by the parties to the USPTPA.

112. Furthermore, there is nothing in Article 10.18.2(b) explicitly stating that the waiver cannot be signed by a representative of Amorrortu. Peru argues that “*Article 10.18.2(b) makes clear that the waiver must be submitted ‘by the claimant’ itself.*”¹⁰⁷ The clear issue with this argument is that the word “*itself*” does not appear in the

¹⁰⁵ Peru’s Submission on Preliminary Objections, 15 March 2021, ¶ 77.

¹⁰⁶ Oxford English Dictionary, Third Edition (December 2011), ‘*Accompany*’, Definition 1.c (**R-1**) (“To be present or occur at the same time as.”).

¹⁰⁷ Peru’s Submission on Preliminary Objections, 15 March 2021, ¶ 76.

text of Article 10.18.2(b). Again, Peru is impermissibly adding a restriction to the text of Article 10.18.2(b) of the USPTPA. Certainly, this Tribunal should read the word claimant of Article 10.18.2(b) in the broad sense to include Amorrortu's counsel as Amorrortu's representatives.

113. Peru cites a number of submissions in DR-CAFTA arbitrations to argue that "a claimant complies with the requirements of DR-CAFTA Article 10.18.2(b) by physically submitting the waiver document accompanying his request for arbitration."¹⁰⁸ But none of these submissions go as far as saying that a physical separate waiver signed by the claimant (and not its counsel) was the exclusive and sole manner to comply with the waiver requirement. Once more, Peru is inviting this Tribunal to be the first to add this restriction to the text of Article 10.18.2(b). This Tribunal should decline this illegitimate invitation.

114. **The object and purpose.** Article 10.18.2(b) is intended to avoid duplicative litigation and inconsistent verdicts. This objective is accomplished irrespective of whether the waiver is in a separate form or included in the text of any pleading. Similarly, this objective is advanced irrespective of whether the waiver is signed by the claimant or by the claimant's legal representative. In its Submission on Preliminary Objections, Peru does not even try to link its formalistic requirements to the object and purpose of Article 10.18.2(b). This failure is not accidental. Such formalistic requirements are completely divorced from the object and purpose of the provision.

¹⁰⁸ Peru's Submission on Preliminary Objections, 15 March 2021, ¶ 77.

b) There is no requirement of an absolute waiver

115. Peru also contends that Amorrortu's waiver is substantively defective.¹⁰⁹ Peru claims that Article 10.18.2(b) of the USPTPA requires an absolute waiver, irrespective of whether a claimant's claims were properly submitted to arbitration.¹¹⁰ Yet again, this requirement is not supported by either the ordinary meaning of Article 10.18.2(b), or its objective and purpose.

116. **Ordinary meaning.** Article 10.18.2(b) states, in relevant part to this case, that "no claim may be **submitted to arbitration** under this Section unless the notice of arbitration is accompanied . . . for claims **submitted to arbitration** under Article 10.16.1(a) by the claimant's written waiver . . . 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."¹¹¹ As the text of Article 10.18.2(b) makes clear, the requirement of a waiver is based on the premise that a claim has been submitted to arbitration under Article 10.16.1(a). In other words, the requirement of a waiver in 10.18.2(b) must be construed in the context of Article 10.16.1(a).

117. Article 10.16.1(a), in turn, establishes that, "*the claimant, on its own behalf, may submit to arbitration under this Section a claim that the respondent has breached an obligation under Section A*" that has caused damages to the claimant.¹¹² The result of reading this text in the context of Article 10.18.2(b) is that, a claimant

¹⁰⁹ See, e.g., Peru's Submission on Preliminary Objections, 15 March 2021, ¶ 5.

¹¹⁰ Peru's Submission on Preliminary Objections, 15 March 2021, ¶ 82.

¹¹¹ USPTPA Investment Chapter (**CLA-1**), Art. 10.18.2(b). (Emphasis added).

¹¹² USPTPA Investment Chapter (**CLA-1**), Art. 10.16.1(a). (Emphasis added).

that “**may submit a claim to arbitration**” under Article 10.16.1(a), needs to provide a waiver, but a claimant that “**may [not] submit a claim to arbitration,**” because such claim is outside of the jurisdiction of the tribunal, **does not** have to provide such waiver.

118. Peru suggests that Article 10.18.2(b) requires claimants to provide an unconditional waiver or, in other words, to make a definitive election if they decide to submit their claims to arbitration. As a consequence, the claimant must forgo any right to raise such claims in any other forum, even when those claims are dismissed for lack of jurisdiction.

119. This interpretation, however, is not consistent with other provisions of the USPTPA. In fact, when the USPTPA requires the claimant to make a definite election, this requirement is stated explicitly and is accompanied by a warning. For example, Article 10.18.4(a) contains the so called “*fork in the road*” provision that bars any Treaty claim previously submitted to an administrative tribunal or judicial court. Indeed, there is a clear warning in Article 10.18.4(b) explicitly advising investors of the requirements and consequences of the “*fork in the road*” provision. Article 10.18.4(b) states that:

For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definite, and the claimant may not thereafter submit the claim to arbitration under Section B.

120. Such warning appears nowhere in the USPTPA in connection with the waiver of Article 10.18.2(b). The absence of a warning is significant. Peru suggests that Article 10.18.2(b) contains an excessively harsh forfeiture requirement than the one contained in Article 10.18.4(b). Indeed, according to Peru, Article 10.18.2(b) of the

USPTPA requires claimants to forfeit any claim that is ultimately deemed to be outside of the jurisdiction of the arbitral tribunal. The absence of a warning is consistent with an interpretation of Article 10.18.2(b) that does not require the type of forfeiture that Peru contends.

121. Peru infers that the requirement that the waiver extends to “any” right to commence “any” proceeding means that the waiver must relinquish all claims irrespective of the jurisdiction of the arbitral tribunal. However, as the tribunal in *Renco 1* concluded, the qualifier “any”, must be construed in the appropriate statutory context and does not automatically mean all claims.¹¹³

122. Therefore, the use of the qualifier “any” does not weigh in favor of Peru’s interpretation. Without a doubt, Amorrortu has waived “any right” he has to initiate “any” proceedings, except to the extent that claims are dismissed for lack of subject matter jurisdiction.

123. Admittedly, the tribunal in *Renco 1* concluded that Article 10.18.2(b) required an absolute waiver, and the United States seems to be in agreement with this interpretation. *Renco 1* was the first decision interpreting Article 10.18.2(b), and it has a thorough analysis of this provision. But this analysis did not give the appropriate consideration to the requirements of Article 10.18.2(b) in the context of Article 10.16.1(a) and in the context of the warning of Article 10.18.4(b).

124. ***The object and purpose.*** Nothing in the object and purpose of the USPTPA suggests that a forfeiture requirement advances the object and purpose of the waiver

¹¹³ *Renco 1* Decision as to Scope, (RLA-28), ¶ 202 (holding that the word “any objection” can be interpreted in isolation and means any objection within the statutory context).

requirement, which is to prevent inconsistent verdicts. On the contrary, by definition, a dismissal for lack of jurisdiction would not result in inconsistent verdicts.

125. In *Renco 1*, the tribunal identified a few limited and extraordinary circumstances in which a dismissal for lack of jurisdiction could be inconsistent with a verdict. The impact of these isolated instances cannot be compared to the draconian forfeiture of claims outside of the arbitral jurisdiction. Peru and the United States had every right to impose this draconian requirement in their USPTPA and warn investors about this forfeiture, but they did not. This Tribunal should not incorporate by interpretation what the Parties did not write in the text of the Treaty.

VI. AMORRORTU'S PENDING APPLICATION TO AMEND RENDERS OBJECTION 4 MOOT

126. However, even if this Tribunal were inclined to accept the erroneous interpretations suggested by Peru, these arguments are moot in light of Amorrortu's pending Application to Amend his NOA and comply with Peru's formalistic interpretation of Article 10.18(2)(b). As such, Objection 4 must be rejected.

127. There is absolutely no reason to deny Amorrortu's pending Application to Amend his NOA. After all, the USPTPA explicitly contemplates the possibility of filing an amended notice of arbitration. For example, Article 10.20.4(a) explicitly establishes the deadline to submit preliminary objections in the case of an amendment to the "*notice of arbitration.*" Similarly, Article 10.20.4(c) states that for purposes of Article 10.20.4(a) objections, the factual allegations in support of any claim in the notice of arbitration "*or any amendment thereof.*"

128. Further, Article 22 of the applicable UNCITRAL Arbitration Rules, explicitly states that "*[d]uring the course of the arbitral proceedings, a party may amend or supplement its claim or defence . . . unless the arbitral tribunal considers it*

*inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances . . .”*¹¹⁴

129. In furtherance of his Application to Amend, Amorrortu has filed a declaration complying with Peru’s demands. As such, even if this Tribunal is inclined to ignore the fact that Peru is estopped from denying its consent to this arbitration and even if this Tribunal accepts Peru’s erroneous interpretation of the requirements of Article 10.18.2(b)(i), Objection 4 must be denied in light of Amorrortu’s Application to Amend.¹¹⁵

VII. CONCLUSION

130. For the foregoing reasons, the Claimant, Bacilio Amorrortu, respectfully requests the Tribunal to:

- 1) reject Objections 1 and 4;
- 2) award Amorrortu reasonable costs and attorneys’ fees incurred in opposing Objections 1 and 4 pursuant to Article 10.26 of the USPTPA;
- 3) award Amorrortu costs and attorneys’ fees incurred in opposing Objection 4 pursuant to Article 10.20(6) of the USPTPA;
- 4) order Peru to file its Statement of Defense without more delays; and
- 5) award such other relief as the Tribunal deems appropriate.

¹¹⁴ 2013 United Nations Commission on International Trade Law Arbitration Rules (**CLA-36**), Art. 22.

¹¹⁵ Peru claims that Objection 1 should be adjudicated by this Tribunal irrespective of the Tribunal’s ruling on Objection 4. Both objections fail and should be rejected on an expedited basis. As such, Amorrortu does not express an opinion as to the order, except that Peru’s insistence that this Tribunal adjudicates the merits of this dispute confirm that it has consented to this arbitration.

DATE: April 26, 2021

By: /s/ Francisco A. Rodriguez

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