

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.

**RESPONDENT’S REPLY TO CLAIMANT’S ANSWER ON PERU’S SUBMISSION ON
PRELIMINARY OBJECTIONS**

24 May 2021

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Table of Contents

	Page
I. Introduction.....	1
II. Mr. Amorrortu’s Claim Is Not a Claim for Which an Award in Favor of Claimant May Be Made Under the Treaty	2
A. The factual and legal standard of Article 10.20.4 of the Treaty	3
B. If Mr. Amorrortu was not entitled to a Contract, his claim necessarily fails.....	7
C. Mr. Amorrortu never acquired a “Bundle of Rights”	11
1. Claimant did not Satisfy the Preconditions to a Direct Negotiation	13
2. Direct negotiations do not give rise to a Bundle of Rights alleged by Mr. Amorrortu.....	21
3. Even if Direct Negotiations give rise to a Bundle of Rights, Mr. Amorrortu’s own allegations indicate that such rights were respected	22
III. Peru’s third-party funding (TPF) request does not estop it from objecting to the Tribunal’s jurisdiction.....	24
IV. The tribunal lacks jurisdiction as Mr. Amorrortu failed to submit a valid waiver in a timely fashion under Article 10.18.2 USPTPA	29
A. It Is Undisputed that the USPTPA Requires the Claimant to Submit an Unqualified and Signed Waiver with the Notice of Arbitration	30
1. Mr. Amorrortu failed to file a separate signed waiver to accompany his Notice of Arbitration	30
2. Mr. Amorrortu is not allowed to submit a qualified waiver under the Treaty; therefore, his waiver is invalid	33
B. Mr. Amorrortu Cannot Cure his Defective Waiver Without Peru’s Consent.....	37
V. Request for Relief	39

I. INTRODUCTION

1. In accordance with the Tribunal’s Procedural Order No. 3 dated January 21, 2021,¹ and the procedural calendar set forth on February 9, 2021, the Republic of Peru (“Peru”, “the Republic”, or “Respondent”) hereby presents its Reply to Claimant’s Answer (“Reply”) to Peru’s 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 (“USPTPA” or the “Treaty”), and the 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. **Section II** of this Reply addresses Peru’s Objection 1- that Mr. Amorrortu has failed to assert a claim for which a favorable award may be made as a matter of law. As discussed below, nothing argued by Claimant in his Answer changes this conclusion. Indeed, certain critical concessions made by Mr. Amorrortu further demonstrate that his claim lacks legal merit.

3. **Section III** briefly addresses Mr. Amorrortu’s estoppel argument and demonstrates that it is wholly unfounded. As part of this argument, we observe that the Tribunal enjoys certain inherent and special powers to decide matters without barring a finding of lack of jurisdiction.²

4. **Section IV** addresses Peru’s Objection 4 - that this Tribunal lacks jurisdiction because Mr. Amorrortu has failed to present a valid waiver in a timely manner. Despite Claimant’s effort to twist the plain and unambiguous text of the USPTPA and introduce concepts unfounded in the law, the fact remains that Mr. Amorrortu presented a defective waiver both in form and substance, and failed to correct it in the timeframe established by the Treaty. Accordingly, a condition to Peru’s consent to this arbitration has not been satisfied, and Mr. Amorrortu’s claim should be dismissed. Claimant’s attempt to cure his defective waiver via his pending Request for

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

² As noted in Section III, among these powers is the *competence specialis* conferred by the USPTPA to decide on Peru’s Objection 1 regardless of its decision on its jurisdictional objection (Objection 4). Peru respectfully reiterates its request that the Tribunal comply with its treaty obligation to rule on Objection 1, irrespective of its finding on Objection 4 and notes that Claimant has made no objection in that regard.

Leave to Amend his Notice of Arbitration must be denied, as no cure is possible without Peru's consent.

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

5. In a vain attempt to salvage his claim from an Article 10.20.4 dismissal, Claimant has made certain clarifications and concessions that only serve to expose further its lack of merit. Critically, Mr. Amorrortu clarifies that he "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"³ (the "Blocks"). As explained further below, this is ultimately fatal to his claim in light of the USPTPA, Mr. Amorrortu's Statement of Claim, and long-standing investment arbitration jurisprudence.

6. Putting that aside for the moment, Mr. Amorrortu's clarification significantly limits the scope of his claim. Mr. Amorrortu's claim rests entirely on his alleged right to the direct negotiation process itself (apparently, without regard to whether it entitles him to an eventual contract). According to Claimant, the direct negotiation process, once started, gave him a certain "bundle of rights" that "guarantee[] the exclusive technical evaluation and the community analysis of a direct negotiation proposal before any competing company is invited to participate in the process."⁴ This alleged bundle of rights supposedly "has significant value" because the "direct negotiation process gives oil companies a competitive advantage that is practically and factually unsurmountable and that, in most if not all cases, concludes with the execution of the contract."⁵ In this way, Mr. Amorrortu, after having conceded that he never had a right to a contract, as a matter of law, attempts to turn the issue of a contract into an issue of fact, that according to Mr. Amorrortu, is relevant only to the issue of damages, and not to the viability of the claim itself.⁶

7. Mr. Amorrortu's claim, thus clarified, is fraught with logical and legal holes that serve only to sink it. This will be discussed below. After a recapitulation of the relevant standards

³ 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 ("**Claimant's Answer**"), ¶ 8 (emphasis omitted).

⁴ *Id.*, ¶ 8.

⁵ *Id.*, ¶ 8.

⁶ *Id.*, ¶ 10.

for an Article 10.20.4 objection, and highlighting Mr. Amorrortu’s conclusory arguments that need not be taken as true, Peru provides an overview of critical factual concessions by Mr. Amorrortu, which are fatal to his claim (**Section A**). Next, Peru explains, why Mr. Amorrortu’s concession that he was not guaranteed a contract as a matter of law is fatal to his claim, which should be dismissed on this basis alone. (**Section B**). Finally, Peru systematically demonstrates why Mr. Amorrortu’s claim based solely on a “bundle” of direct negotiation rights, has no basis as a matter of law: (i) no direct negotiation ever commenced, or could commence, as a matter of law; (ii) even assuming *arguendo*, that such a process had commenced, this would not have offered Mr. Amorrortu any rights to exclusivity, and (iii) even assuming *arguendo* that a direct negotiation process offers an opportunity to have advanced consideration of a proposal by PeruPetro, Mr. Amorrortu’s own allegations and evidence submitted demonstrate that such “rights” were respected. (**Section C**). Ultimately, Mr. Amorrortu simply does not have a cognizable right that can be protected under the Treaty. No assertions of facts (conclusory or otherwise) changes this legal truism, and as such, Mr. Amorrortu’s claim must fail.

A. The factual and legal standard of Article 10.20.4 of the Treaty

8. In its Submission on Preliminary Objections of 15 March 2021 (“Submission on Preliminary Objections”), Peru elaborated on the factual and legal standards applicable to an Article 10.20.4 Objection. Specifically, Peru noted that “the [T]ribunal shall assume to be true claimant’s factual allegations in support of any claim in the [...] statement of claim.”⁷ The Tribunal may also “consider any relevant facts not in dispute.”⁸ However, “mere conclusions unsupported by relevant factual allegations need not be accepted as true.”⁹ In addition, legal allegations must not be accepted as true.¹⁰ Accordingly, questions concerning applicable

⁷ USPTPA Investment Chapter (12 April 2006), Art. 10.20.4(c) (**CLA-1**); Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 12 (brackets in original).

⁸ USPTPA Investment Chapter (12 April 2006), Art. 10.20.4(c) (**CLA-1**).

⁹ Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 12; *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.”).

¹⁰ Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 12; *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

international or Peruvian law can be disputed, and Respondent “maintains the right to object to unfounded conclusions or suggestions of fact and law.”¹¹ The Parties do not dispute this applicable standard.

9. Mr. Amorrortu’s description of “relevant allegations” is replete with legal assertions, and conclusory unsupported allegations that, contrary to Claimant’s assertion, should not be assumed as true under the relevant Article 10.20.4 standards.¹² For the sake of clarity, Peru highlights below those assertions which the Tribunal should not take as true and which are, in reality, properly disputed in this proceeding:

- That Mr. Amorrortu “commenced a direct negotiation process with PeruPetro for the operation of Blocks III and IV.”¹³ This is a conclusion of law, which Peru has demonstrated to be false.
- That “this [alleged] direct negotiation process gave Mr. Amorrortu a bundle of rights under Peruvian law.”¹⁴ This is a conclusion of law, which Peru has demonstrated to be false.
- That “[t]he commencement of a direct negotiation process in essence, guarantees the execution of a contract.”¹⁵ This is a conclusory assertion unsupported by any factual allegations. Indeed, the assertion is made without any citation or any reference to concluded direct negotiations.¹⁶

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.”).

¹¹ Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 12; Peru’s Notice of Intent to Submit Preliminary Questions (9 December 2020), p. 4.

¹² Claimant’s Answer, ¶¶ 19-44.

¹³ *See id.*, ¶¶ 23, 31.

¹⁴ *See id.*, ¶ 23.

¹⁵ *See id.*, ¶ 24.

¹⁶ While Amorrortu fails to cite any factual support for his assertion in his Answer to Peru’s Submission on Preliminary Objections, Peru observes that in his First Witness Declaration dated 10 September 2020, Mr. Amorrortu avers as to direct negotiations. He broadly states that in “more than 30 years of experience and following PeruPetro’s contracts, I do not know of any direct negotiation process that, once commenced, did not culminate in the execution of a contract.” First Witness Statement of Bacilio Amorrortu (10 September 2020), ¶ 86 (**CWS-1**). In a footnote to this statement, however, Mr. Amorrortu points to two *public tenders* in 2013 and 2014, and only two direct negotiations: one in 2015 with the company Pacifica Rubiales, and a second in 2020 with the company Tullow. Without getting into whether these observations are factually accurate, or discussing the specific circumstances of each supposed direct negotiation, which might in fact be distinguishable from Mr. Amorrortu’s proposal, the existence of only two recent directly negotiated contracts in “over 30 years of experience” hardly supports the conclusory blanket statement that the direct negotiation “guarantees” the execution of a contract. In any event, as discussed below, even assuming

- That “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.”¹⁷ These are legal conclusions, which Peru has demonstrated to be false.
- That “on July 14, 2014, PeruPetro commenced a public bidding process [in violation of the direct process commenced by Baspetro].”¹⁸ That there is an alleged “violation” of a direct bidding process is a legal conclusion that Peru has demonstrated to be false.
- That “on August 20, 2014, PeruPetro [...] invit[ed] Baspetro to participate in the International Public Bidding Process for Block III [...] completely ignoring the law and the implications of a direct negotiation.”¹⁹ The last clause is a gratuitous legal conclusion that Peru has demonstrated to be false.
- That “[t]he Baspetro Proposal complied with all the requirements as instructed by Ortigas [...].”²⁰ To the extent that “all the requirements” purports to refer to those applicable by relevant regulations, this is a legal conclusion that Peru has demonstrated to be false.
- That Mr. Ortigas’s statement on July 26, 2014, that PeruPetro’s Board of Directors had rejected the Baspetro Proposal and instead opted for a public bidding of Blocks III and IV, “turned out to be false.”²¹ This is a conclusion contradicted by Mr. Amorrortu’s other allegations and documents in the record.

10. Having clarified which statement of Mr. Amorrortu need not be deemed to be true, it is important to highlight certain undisputed facts observed by Peru that Claimant does not address in his Answer. These are the following:

- As early as 12 August 2013, Mr. Ortigas advised Mr. Amorrortu in writing that Block III was not available for direct negotiation and that any future contract with respect to the Block would be done by public tender.²²

arguendo that, as a factual matter, all prior direct negotiations ended in a contract, the only relevant point is that PeruPetro at all times retained the discretion, as a matter of law, not to issue a contract as a result of direct negotiations. Mr. Amorrortu concedes this, and it is fatal to his case.

¹⁷ Claimant’s Answer, ¶ 42.

¹⁸ *See id.*, ¶ 39 (emphasis added).

¹⁹ *See id.*, ¶ 42 (emphasis added).

²⁰ *See id.*, ¶ 31.

²¹ *Id.*, ¶ 40.

²² Letter from Luis Ortigas to Bacilio Amorrortu (12 August 2013) (C-6).

- The temporary contract extension with Interoil over Blocks III and IV, made publicly available in Peru’s *Diario Oficial*, expressly indicated that the contract was extended to give PeruPetro time to carry out the “selection process” (as opposed to a “negotiation process”) to celebrate a new License Agreement.²³
- Mr. Amorrortu concedes that the process of direct negotiation only commences after four preconditions have been satisfied, and that among these preconditions is confirmation that the areas be available for direct negotiation, and that the interested company is certified as qualified.²⁴
- Mr. Amorrortu does not dispute that PeruPetro’s Regulation on the Qualification of Petroleum Companies (“Regulation for Qualification”) requires an application for certification of qualification to be accompanied by the following:²⁵
 - 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. 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 capable operator to conduct the exploration and exploitation activities.²⁶

²³ Decreto Supremo No. 012-2014-EM and No. 013-2014-EM (5 April 2014), p. 1 (CLA-59).

²⁴ Claimant’s Answer, ¶ 64.

²⁵ See Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Arts. 5, 6 (CLA-3).

²⁶ Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 52; 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 First Expert Report of Carlos Raúl José Vizquerra Pérez Albela (15 March 2021) (“**First Vizquerra Expert Report**”), ¶ 16, notes 4, 5 (RER-1); see also Expert Report of Aníbal Quiroga León (9 September 2020) (“**First Quiroga Expert Report**”), ¶¶ 94-95 (CER-1).

- The Baspetro Proposal did not include any of these items.²⁷
- Mr. Amorrortu does not dispute that the Regulation on Qualification expressly conditions the beginning of the qualification process, and any timeframes therein, on the presentation “in a complete manner” of all the documents required.²⁸
- Mr. Amorrortu does not dispute that it never received a formal communication by PeruPetro setting forth a commencement date of negotiations and requesting the designation of representative who will participate in the negotiation.²⁹
- Mr. Amorrortu himself alleges that Mr. Ortigas informed him that PeruPetro’s Board of Directors had rejected his proposal.³⁰
- Mr. Amorrortu himself alleges and demonstrates that on August 20, 2014, PeruPetro informed him that it would proceed with a public tender of Blocks III and IV and invited him to participate, which he in fact did.³¹

11. Each of these fundamental points, nearly all of which are gleaned from the documents Mr. Amorrortu has presented in this arbitration are undisputed by Claimant. As discussed below, they fatally undermine Mr. Amorrortu’s claim that any direct negotiation commenced and that he ever received or maintained any “bundle of rights.” Before discussing this, however, Peru addresses Mr. Amorrortu’s concession that he was never entitled, as a matter of law, to a contract.

B. If Mr. Amorrortu was not entitled to a Contract, his claim necessarily fails

12. In his Answer to Peru’s 10.20.4 Objection, Claimant clarifies that he never claimed that the direct negotiation process guaranteed, as a matter of law, the execution of contracts to operate Blocks II and IV.³² Mr. Amorrortu’s legal expert, Mr. Quiroga, further concedes, as he must, that, as a matter of law, PeruPetro is under no legal obligation to enter into a contract as a

²⁷ Proposal from Baspetro SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West (27 May 2014) (C-11).

²⁸ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 14 (CLA-3).

²⁹ First Vizquerra Expert Report, ¶ 44 (RER-1); Peru’s Submission on Preliminary Objections (15 March 2021), ¶¶ 40, 48.

³⁰ Claimant’s Answer, ¶ 40.

³¹ *Id.*, ¶ 42; *see also* Letter from PeruPetro, S.A. to Bacilio Amorrortu (20 August 2014) (C-13).

³² Claimant’s Answer, ¶ 8.

result of a direct negotiation, even where one has commenced.³³ This is because, ultimately, PeruPetro enjoys the discretion to conclude such contracts as it so determines. Thus, as a matter of law, PeruPetro can decide to terminate a direct negotiation without celebrating a contract, or to open up a public tender and choose to contract with another company.³⁴

13. In a futile attempt to get around this legal reality, Claimant alleges that, as a matter of fact, he would have obtained such a contract because “in most if not all cases,” direct negotiations conclude with the execution of the contract.³⁵ As noted before, this is a conclusory assertion unsupported by factual allegations (and thus need not be taken as true). Moreover, the allegation is inconsistent with the undisputed fact that Mr. Amorrorto was informed that his proposal was rejected.³⁶ Thus, the theory that Mr. Amorrorto’s direct negotiation *would have*

³³ Second Expert Report of Aníbal Quiroga León (26 April 2021) (“**Second Quiroga Expert Report**”), ¶ 58 (**CER-2**). *See also* 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. [E]l otorgamiento de Calificación no generará derecho alguno sobre el área de Contrato.”), First 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.”).

³⁴ *See* First Vizquerra Expert Report, ¶ 9 (**RER-1**); *see also* 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* First Quiroga Expert Report, ¶ 89 (**CER-1**) (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 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 [...]”).

³⁵ Claimant’s Answer, ¶ 8.

³⁶ Claimant’s Memorial (11 September 2020), ¶ 83. As discussed further below, even assuming *arguendo* that a negotiation process had formerly begun with the presentation of the Baspetro Proposal (which, of course, it did not), Claimant’s own allegations, taken as true, indicate that this proposal was rejected and he was instead invited to a public tender. *Id.*, ¶ 85; Letter from PeruPetro, S.A. to Bacilio Amorrorto (20 August 2014) (**C-13**). Thus Mr. Amorrorto’s claim fails in any event. Further, as Dr. Vizquerra also indicates, the 20 August 2014 communication from PeruPetro, inviting Mr. Amorrorto to the public tender is properly construed as PeruPetro’s formal response to Baspetro’s statement of interest, in which the proposal is not accepted, and Baspetro is instead invited to a public

certainly led to a contract does not hold water. Putting both of those points to one side, Claimant’s attempt to convert a fundamental element of his claim into a factual issue must fail on the basis of law.

14. *First*, as a matter of law, PeruPetro always retains the discretion to refuse to enter into a contract in a direct negotiation. Thus, factual allegations about prior direct negotiations are legally irrelevant. It does not matter if, hypothetically, PeruPetro engaged in 100 prior direct negotiations and in all 100 instances entered into a contract,³⁷ because as a matter of law PeruPetro always retains the right to refuse a contract on the very next occasion. Mr. Amorrortu knew this and he, as with any other petroleum company, runs the risk of that refusal, precisely because the law expressly indicates that a contract is not guaranteed.³⁸

15. *Second*, the viability of Mr. Amorrortu’s claim depends upon not only his allegations of treaty breach, but also his damages claim. The USPTPA expressly requires a claim to include not only an alleged breach of a treaty obligation but also that “claimant has incurred loss or damage by reason of, or arising out, that breach.”³⁹ Article 10.26 of the USTPA, furthermore, envisions final awards as including a determination of damages.⁴⁰ This is consistent with international law, which requires a claim to demonstrate not only a breach, but harm as well. In its *Factory at Chorzow* decision, the Permanent Court of International Justice (PCIJ) clearly

tender. See Second Expert Report of Carlos Raúl José Vizquerra Pérez Albela (24 May 2021) (“**Second Vizquerra Expert Report**”), ¶ 27 (**RER-2**).

³⁷ Of course, this is not the case, and Mr. Amorrortu has alleged that only two direct negotiations occurred and resulted in a contract over the past 30 years. See First Witness Statement of Bacilio Amorrortu (10 September 2020), ¶ 86 (**CWS-1**).

³⁸ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 2 (**CLA-3**).

³⁹ USPTPA, Investment Chapter (12 April 2006), Art. 10.16.1(a) (**CLA-1**) (“the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that respondent has breached (A) and obligation under section A [...] and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach.”).

⁴⁰ *Id.*, Art. 10.26.1 (**CLA-1**).

established that: “[r]eparation [...] is the indispensable complement of a failure to apply a convention.”⁴¹

16. This principle of international law has been endorsed with a heightened emphasis in investment arbitration. As the Tribunal in *Merrill v Canadá* observed:

[I]n the case of conduct that is said to constitute a breach of the standards applicable to investment protection, the primary obligation is quite clearly inseparable from the existence of damage. Indeed, a finding of liability without a finding of damage would be difficult to explain in the context of investment law arbitration and would indeed be contrary to some of its fundamental tenets.⁴²

17. Accordingly, the tribunal dismissed the claim for breach of Minimum Standard of Treatment, as it found no possible damages to an assumed breach to that commitment. It considered that a favorable decision for a claim of breach of Minimum Standard of Treatment could only arise if “if there is an act in breach of an international legal obligation, attributable to the Respondent that also results in damages.”⁴³ Similarly, in *Waste Management v. Mexico*, the tribunal drew a necessary link between breach and harm by stating that the “minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant.”⁴⁴

18. Accordingly, Mr. Amorrortu’s claim necessarily encompasses and includes his claim for damages, which must have a basis as a matter of law in order to survive an Article 10.20.4 Objection. In that regard, Mr. Amorrortu does not aver generalized or undefined damages, but rather is very specific. In his Statement of Claim, Mr. Amorrortu asserts that “[b]y opening Blocks III and IV to public bidding without even considering the Baspetro proposal, PeruPetro eliminated

⁴¹ *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction)*, Judgment 8, 1927, P.C.I.J. Series A, No. 9 (1927), p. 21 (**RLA-42**) (emphasis added).

⁴² *See Merrill & Ring Forestry LP v. Government of Canada*, UNCITRAL, case administered by ICSID, Award (31 March 2010) (Orrego Vicuña, Dam, Rowley), ¶ 245 (**RLA-43**) (emphasis added).

⁴³ *Id.*, ¶ 246 (emphasis added).

⁴⁴ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (Crawford, Civiletti, Magallón Gómez), ¶ 98 (**CLA-28**) (emphasis added).

revenues Baspetro would have earned as an investor and operator of Blocks III and IV.⁴⁵ Mr. Amorrortu also claims that he “properly commenced the Direct Negotiation Process and was deprived of the opportunity to complete the direct negotiation and profit from the contracts to which it was entitled.”⁴⁶ Thus, Mr Amorrortu indicates “the fair market value of the contracts to operate Blocks III and IV is the appropriate measure of damages.”⁴⁷

19. Having now conceded that he did not have a right, as a matter of law, to a contract, and in light of PeruPetro’s discretion to refuse to enter into a contract even after a direct negotiation has begun, an award favorable to Mr. Amorrortu’s claim, as asserted, is simply not possible. Claimant has admitted that he was never entitled to a contract and thus is not entitled to the damages he seeks. This is fatal to an integral and necessary part of his claim.

20. This is sufficient to dismiss Mr. Amorrortu’s claim under Article 10.20.4, and Peru respectfully suggest that the Tribunal’s analysis can end there. However, even if Mr. Amorrortu were permitted to convert what is a legal element of his claim into a factual issue (which Peru respectfully suggests would be inappropriate), Claimant’s claim would still fail. As discussed below, Mr. Amorrortu cannot prove as a matter of law, that he was entitled to a direct negotiation in the first place. Furthermore, even if such direct negotiation had begun, he obtained no particular enforceable rights therefrom.

C. Mr. Amorrortu never acquired a “Bundle of Rights”

21. The cornerstone of Mr. Amorrortu’s claim continues to be the alleged start of direct negotiations with PeruPetro to operate Blocks III and IV, and the “bundle of rights” he supposedly acquired therefrom.⁴⁸ Indeed, in his Answer to Peru’s objection, Mr. Amorrortu reiterates that that the basis of his claim is that “when [he], through Baspetro, commenced the direct negotiation

⁴⁵ Claimant’s Memorial (11 September 2020), ¶ 387.

⁴⁶ *Id.*, ¶ 398.

⁴⁷ *Id.*, ¶ 389.

⁴⁸ *See* Peru’s Submission on Preliminary Objections (15 March 2021), ¶¶ 7-9; Notice of Dispute (19 September 2019), § VI.a; Notice of Arbitration (13 February 2020), § V.A, ¶ 75; Claimant’s Memorial (11 September 2020), § V.C. ¶¶ 150, 304, 409.

process, Amorrortu acquired a number of substantive rights.”⁴⁹ Yet, under no scenario did Mr. Amorrortu ever obtain any such rights.⁵⁰ Hence, his claim simply cannot prevail.

22. In its Submission on Preliminary Objection, Peru demonstrated the following:

- i. Even according to Mr. Amorrortu’s own allegations, no direct negotiation ever took place between him and PeruPetro; rather the facts adduced demonstrate PeruPetro’s repeated announcement that it intended to submit Blocks III and IV to a public tender⁵¹;
- ii. Mr. Amorrortu never had a right to a direct negotiation because the Baspetro Proposal by itself did not commence the direct negotiation process and Mr. Amorrortu did not satisfy the preconditions to commence direct negotiation⁵².

23. Mr. Amorrortu fails to address Peru’s argument that his own allegations do not support his claim and thus, this critical point remains undisputed. These facts as alleged by Claimant clearly indicate that Mr. Amorrortu was informed as early 2013 (almost a year before he presented his proposal), that Block III would be submitted to a public tender, and this intention was reiterated by PeruPetro on several occasions. Those facts also demonstrate that the Baspetro Proposal never formally requested a qualification certification or submitted the documents for such a request to be evaluated. Mr. Amorrortu thus could not have satisfied a necessary prerequisite for the commencement of direct negotiations. Finally, those documents also demonstrate that Mr. Amorrortu was informed of a rejection of the Baspetro Proposal and that he ultimately was invited to participate, and did participate in the public tender. These facts, undisputed and taken as true, fatally undermine Mr. Amorrortu’s claim. Based on this alone, his claim should be dismissed under Article 10.20.4.

24. But, should the Tribunal proceed in its analysis, Mr. Amorrortu’s claim to an alleged bundle of rights relating to a direct negotiation process is unfounded for the reasons set forth below.

⁴⁹ Claimant’s Answer, ¶ 89; *see also id.*, ¶ 8, 22, 65.v.

⁵⁰ Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 4.

⁵¹ *See id.*, ¶¶ 27-33.

⁵² *See id.*, ¶¶ 26-61.

1. Claimant did not Satisfy the Preconditions to a Direct Negotiation

25. Claimant continues to misconstrue PeruPetro’s Rules and Procedures for the Direct Negotiation of Contract (**CLA-44**) (“Rules and Procedures” or “Procedure GFCN-008”) as depicting “phases” of a “process” that begins with the presentation of a letter of interest or proposal by an interested company. This is completely inaccurate as a matter of law.

26. The issue is not merely a minor quibble about the characterization of steps as “phases” as Claimant suggests.⁵³ It is a fundamental misconception and erroneous presentation of Procedure GFCN-008 as equivalent to the direct negotiation procedure. As Peru made clear in its Submission on Preliminary Objections, Procedure GFCN-008 consists of a list of action items to aid PeruPetro officials, along with a series of flowcharts that visualize that list.⁵⁴ As Dr. Vizquerra, Peru’s legal expert explains, Procedure GFCN-008 is an internal directive or regulation directed specifically to PeruPetro officials.⁵⁵ It does not establish rights enforceable by third parties and it is legally subordinate the Hydrocarbon Law and its Regulation:⁵⁶

[P]rocedure [GFCN-008] establishes and elaborates the pertinent aspects of the legal rules that it considers necessary to incorporate [...] [This Procedure] cannot contradict nor prevail over [said] legal rules that serve as legal basis of its elaboration.⁵⁷

27. Thus, Procedure GFCN-008 and the direct negotiation process are two separate things. As Dr. Vizquerra explains:

⁵³ Claimant’s Answer, ¶ 79.

⁵⁴ *Id.*, ¶ 38. The fact that certain steps appear in a particular flowchart does not necessarily denote a “phase,” and as Peru has observed the term “phase” is found nowhere in Procedure GFCN-008. Indeed, as can be seen in Exhibit CLA-44, there are in fact six flowcharts, not three, which undermines Claimant’s representation that there are “three phases.” The existence of flowcharts evinces only an attempt to create an easy reference guide for PeruPetro officials. PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), [PDF] pp. 11-16 (**CLA-44**).

⁵⁵ Second Vizquerra Expert Report, ¶ 3 (**RER-2**).

⁵⁶ *Id.*, ¶¶ 4, 24, 65.

⁵⁷ *Id.*, ¶ 24 (Free Translation by the Republic of Peru: Spanish original text reads: “procedimiento plasma y desarrolla los aspectos pertinentes de las normas legales positivas que considera necesarias incorporar en su procedimiento. En el presente caso, estas normas legales positivas, en ejercicio de las atribuciones que tales normas positivas le otorgan a Perupetro, son la Ley Orgánica de Hidrocarburos y el Reglamento. Es decir, el Procedimiento GFCN-008 no puede contravenir ni prevalecer por sobre las normas que sirven de base legal para su elaboración.”).

[S]tarting Procedure GFCN-008 does not imply, under any concept, that a direct negotiation has started. Pursuant to Procedure GFCN-008, the mere expression of interest [by an interested company] of engaging in direct negotiations, results in PeruPetro conducting internal activities to determine if such request can move forward, once it complies with all the essential steps contemplated in the legal framework as well as [PeruPetro's] instruments of internal management, to a negotiation of the terms and conditions of an eventual contract.⁵⁸

28. The Hydrocarbon Law and its Regulation are what defines the commencement of the direct negotiation process, and these clearly establish preconditions, which include ensuring that the areas are available for direct negotiation and that the interested company is certified as qualified.⁵⁹ Thus, as matter of law, the mere presentation of the Baspetro's Proposal cannot commenced the direct negotiation process. This process could not commence until the preconditions established by law were satisfied.

29. Mr. Amorrortu concedes that these preconditions exist and must be satisfied.⁶⁰ However, contrary to his unfounded assertions, he and Baspetro never satisfied critical preconditions.

⁵⁸ *Id.*, ¶ 21 (Free Translation by the Republic of Peru: Spanish original text reads: “[D]ar inicio al Procedimiento GFCN-008 no implica bajo ningún concepto que se ha dado inicio a la negociación directa. De acuerdo con las actividades del propio Procedimiento GFCN-008, la sola expresión de interés de sostener una negociación directa lo que genera es que Perupetro realice actividades internas para determinar si dicha solicitud puede prosperar para que, una vez cumplidas las etapas previas esenciales tanto las contempladas en el marco legal aplicable como en sus instrumentos de gestión internos, se dé inicio a la negociación de los términos y condiciones del eventual contrato de licencia.”).

⁵⁹ According to Peru's Organic Hydrocarbons Law No. 26221 of 1993, at least four preconditions must be met for a direct negotiation to commence. *First*, under Article 11, “PeruPetro formally confirms its discretionary decision to engage in a direct negotiation by sending a written communication to the interested company setting forth the commencement date of negotiations and requesting that the interested company designate the representatives who will participate in the negotiation.” “*Second*, as set forth in PeruPetro's Rules and Procedure, before any direct negotiation can commence, a determination [is] made as to whether the relevant oil block is available for such procedure.” “*Third*, [under] both the Regulation on the Qualification of Petroleum Companies and PeruPetro's Rules and Procedure [...] the company requesting the negotiation must obtain a certification that is a qualified oil company.” And “[f]ourth, 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. [In fact,] PeruPetro's Rules and Procedure establish [...] situations where a direct negotiation is terminated without a contract.” Peru's Submission on Preliminary Objections, ¶¶ 40-44.

⁶⁰ Claimant's Answer, ¶ 64.

a. Blocks III and IV were not available for direct negotiation

30. The Parties are in agreement that “PeruPetro [has] the discretion to assign contracts for the operation of Peru’s oil fields by a process of direct negotiation.”⁶¹ Mr. Amorrortu, however, seems not to understand the implications of this. Specifically, if the decision to conduct a direct negotiation is subject to the discretion of PeruPetro then, of course, PeruPetro can decide not to use this procedure to assign contracts. That is exactly what happened in this case.⁶²

31. Mr. Amorrortu ignores the following facts, adduced from documents he himself submitted with his Statement of Claim:

[O]n August 12, 2013, Mr. Ortigas informed Mr. Amorrortu that Block III was not available for direct negotiation. 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. Notably, Mr. Ortigas did not say that Block III would ever be adjudicated by direct negotiation.⁶³

32. Therefore, the first prerequisite for a direct negotiation, PeruPetro’s decision to make the areas available for direct negotiation, as opposed to public tender, never occurred.

33. Mr. Amorrortu argues that both Blocks III and IV were available for direct negotiations since, allegedly, “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.”⁶⁴ Mr. Amorrortu also attempts to place a significant amount of weight on his allegation

⁶¹ *Id.*, ¶ 66. 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* First Quiroga Expert Report, ¶ 89 (**CER-1**) (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.”).

⁶² *See* Peru’s Submission on Preliminary Objections (15 March 2021), ¶¶ 46-49.

⁶³ *Id.*, ¶ 16 (emphasis added); *see also id.*, ¶ 28; Claimant’s Memorial (11 September 2020), ¶¶ 8, 46, 53.

⁶⁴ Claimant’s Answer, ¶ 74.

that PeruPetro requested the Baspetro Proposal “not once, but twice,” referring to Mr. Ortega’s alleged request of May 22, 2014, and Ms. Tafur’s request for a copy on July 16, 2014.⁶⁵

34. Yet the exhibits presented by Mr. Amorrortu clearly demonstrate that Mr. Ortigas informed Mr. Amorrortu, as early as August 2013, that the areas were not available and that the InterOil temporary contract extension, which was publicly available, expressly indicated that PeruPetro needed time to organize a public tender.⁶⁶ Indeed, following Ms. Tafur’s request for a copy of Mr. Amorrortu’s proposal, PeruPetro reiterated that the Blocks were subject to a public tender.⁶⁷

35. Accordingly, the Blocks were never available for direct negotiation and all of Mr. Amorrortu’s own allegations and submitted facts, if anything, demonstrate that PeruPetro had long intended, and ultimately did, place the Blocks to public tender.

b. Baspetro had no certification of qualification

36. Mr. Amorrortu alleges that “PeruPetro’s Rules and Procedures for the Direct Negotiation of Contracts makes [...] clear [that] [t]he direct negotiation process is commenced with the submission of a proposal for direct negotiation [...]”⁶⁸ Mr. Amorrortu is referencing Procedure GFCN-008, which, as Peru has already explained, is an internal directive that does not define the direct negotiation process as established under the Hydrocarbons Law and applicable Regulations. As clearly established by Peruvian law, “[a]ll Oil Companies must be duly qualified by PERUPETRO S.A. to start the negotiation of a Contract.”⁶⁹ Mr. Amorrortu does not dispute

⁶⁵ Claimant’s Answer, ¶ 76.

⁶⁶ *Id.*, ¶ 76; Claimant’s Memorial (11 September 2020), ¶¶ 73, 84.

⁶⁷ See Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 30 (“Mr. Amorrortu’s own allegations demonstrate that PeruPetro moved forward with its previously stated plans to submit the oil blocks to a public tender process.”); see also *id.*, ¶ 22; Second Vizquerra Expert Report, ¶¶ 22, 32 (**RER-2**); Letter from PeruPetro, S.A. to Bacilio Amorrortu (20 August 2014) (**C-13**); Claimant’s Memorial (11 September 2020), ¶ 85; see also First Witness Statement of Bacilio Amorrortu (10 September 2020), ¶ 91 (**CWS-1**).

⁶⁸ Claimant’s Answer, ¶ 71.

⁶⁹ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 2 (**CLA-3**) (emphasis added) (Free Translation by the Republic of Peru) (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), pp. 5-10 (**CLA-44**).

this and acknowledges that “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.”⁷⁰ However, Mr. Amorrortu never received such qualification certification, and indeed, he never submitted the required documentation for such a certification to be processed.

37. As Peru demonstrated, the evaluation for granting a certificate of qualification is its own process, with its own preconditions⁷¹ One such precondition, as Mr. Vizquerra demonstrates, is confirmation of availability of relevant Blocks.⁷² As previously discussed, in light of PeruPetro’s repeatedly expressed intent to subject the Blocks to a public tender, these were never available for direct negotiations. Hence, no evaluation for granting a certificate of qualification could have commenced.

38. Even assuming the availability of the Blocks, the same conclusion stands. Once an area is confirmed to be available, the process to consider granting a certificate of qualification is triggered upon a request for such certification (which is different than a request for direct negotiation),⁷³ and presentation of all required materials set out in the Regulation on

⁷⁰ Claimant’s Answer, ¶¶ 78-79 (emphasis added); *see also* Claimant’s Memorial (11 September 2020), ¶ 201 (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.”); Second Vizquerra Expert Report, ¶ 11 (**RER-2**); First Quiroga Expert Report, ¶ 91 (**CER-1**) (Free Translation by the Republic of Peru: “Article 2 of the Regulation on Qualification of Oil Companies establishes as a prerequisite to the beginning of the negotiation of a contract with PeruPetro to obtain the qualification as an oil company before said 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.”).

⁷¹ Peru’s Submission on Preliminary Objections (15 March 2021), ¶¶ 51-61.

⁷² *See* Second Vizquerra Expert Report, ¶¶ 14, 22 (**RER-2**).

⁷³ *See* 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: “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 a Contract or to associate with an Oil Company that is party to a pending Contract.”) (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.”); Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 58.

Qualification.⁷⁴ Specifically, as Peru has demonstrated, Baspetro was required to submit the following information/documentation to be considered for qualification:

- 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. 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 capable operator to conduct the exploration and exploitation activities.⁷⁵

39. Mr. Amorrortu does not dispute the existence of these legal requirements. Moreover, even a cursory examination of the Baspetro Proposal demonstrates that no request for a certification was made, and that the required documents were not provided.⁷⁶ Mr. Amorrortu

⁷⁴ See Peru's Submission on Preliminary Objections (15 March 2021), ¶ 55; 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: "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.***") (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).

⁷⁵ Peru's Submission on Preliminary Objections (15 March 2021), ¶ 52; 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 First Vizquerra Expert Report, ¶ 16, notes 4, 5 (**RER-1**); see also First Quiroga Expert Report, ¶¶ 94-95 (**CER-1**).

⁷⁶ See Claimant's Answer, ¶¶ 32-38.

does not allege that any documentation in addition to the Baspetro Proposal was submitted to PeruPetro.

40. Since the certification of qualification process was never commenced, the 10-business day period set forth in the Regulation for Qualification for PeruPetro to evaluate the request for certification was never triggered. And without having satisfied the condition necessary even to be considered for a certification, Baspetro could not have proceeded to a direct negotiation.

41. Mr. Amorrortu fails to address this fundamental point. Instead, Claimant wrongly assumes that the 10-business day timeframe for a response from PeruPetro commenced when he submitted the Baspetro Proposal on May 28, 2014. Furthermore, Claimant asserts that because PeruPetro did not respond to the alleged “request” for certification within that timeframe, the legal fiction of “administrative silence” applies, and that “in the absence of an express observation, error, omission or request for additional information made by the competent authority” the certification “must” be granted.⁷⁷ Yet, Mr. Amorrortu mischaracterizes his own legal expert’s opinion. While Dr. Quiroga references a systematic interpretation of administrative laws which provide for application of administrative silence (both negative and affirmative), he also expressly recognizes their lack of direct application to the “undoubtedly civil” context of PeruPetro’s license contracts.⁷⁸ In other words, as Dr. Vizquerra, Peru’s legal expert explained in his first report, the concept of administrative silence does not apply to PeruPetro’s civil contracts, and its silence cannot be deemed an implicit acceptance or conferral of a certificate.⁷⁹ Conceding (as he must) this critical point, PeruPetro’s legal expert now argues that, because PeruPetro failed to provide comments, observations or requests for information relating to the Baspetro Proposal within the 10-business-

⁷⁷ *Id.*, ¶ 82.

⁷⁸ Second Quiroga Expert Report, ¶ 11 (CER-2).

⁷⁹ Claimant’s Memorial (11 September 2020), ¶ 196; Claimant’s Answer, ¶¶ 82-83. Indeed, if administrative silence were applicable (*quad non*), Peruvian law would dictate the application of negative administrative silence, meaning that its failure to respond meant a rejection of the request for certification. Second Vizquerra Expert Report, note 15 (RER-2); *see also* First Vizquerra Expert Report, ¶ 29 (RER-1).

day period, PeruPetro was obligated to grant the certification. This extreme position, however, is without legal merit.

42. First, the language of Article 14 of the Regulation for Qualification expressly conditions any “obligation” to certify on the presentation by the interested company of all the required documentation.

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.⁸⁰

43. This never occurred in this case, and thus no obligation was ever incurred. It should be noted that the requirement for the presentation of documents is not accompanied by any requirement on the part of PeruPetro to notify the applicant of the deficiency. Accordingly, no obligation exists to even begin evaluating the request for certification unless and until the interested company on its own initiative presents the documents in full.⁸¹

44. Second, even assuming (*quod non*) that somehow an obligation was created (notwithstanding the clear lack of the required documents), Article 14 also expressly limits any consequence of a breach of the obligation to “administrative responsibility of the officials.”⁸² That

⁸⁰ 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).

⁸¹ Incredibly, Dr. Quiroga’s analysis depends on his having to reformulate the express words of Article 14 in way that best suits his argument. See Second Quiroga Expert Report, ¶ 21 (CER-2). Yet this act of rewriting, labelled facetiously by Quiroga as an “integral interpretation” is inappropriate and unsupported by law. In the end, Article 14 of the regulation is drafted as it is, and must be interpreted in accordance with its express language and formulation.

⁸² 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: “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, under administrative liability of its officials, only if the Oil Company presents the documents mentioned in said Articles, in a complete manner [...].”) (Spanish original text reads: “PERUPETRO S.A. se encuentra obligada a otorgar la Calificación de la Empresa Petrolera, dentro de los diez (10) días hábiles de recibida la solicitud a que se refieren los Artículos 5 ó 6 del presente Reglamento, según corresponda, bajo responsabilidad Administrativa de sus funcionarios, siempre y cuando la Empresa Petrolera presente los documentos mencionados en dichos Artículos de manera completa [...].”) (emphasis added).

is, the penalty for failing to certify a company is directed exclusively at the official, who would be penalized accordingly. The Regulation for Qualification thus excludes a separate right of action for the company, and it most certainly does not require that the certification be deemed granted.⁸³

45. Accordingly, a critical precondition to commencing the direct negotiation process was never obtained by Amorrortu, as a matter of law, and, thus, he never obtained any rights deriving therefrom.

46. Furthermore, it is worth noting again that a certification of qualification is only one prerequisite to commence the direct negotiation process. As shown by Peru, and undisputed by Mr. Amorrortu, the direct negotiation is a formal procedure, that commences upon a formal written notification by PeruPetro both establishing the date of commencement of the process and requesting the designation of a representative.⁸⁴ There is no allegation, that this formal communication was ever delivered to Mr. Amorrortu.

2. Direct negotiations do not give rise to a Bundle of Rights alleged by Mr. Amorrortu

47. As seen, the cornerstone of Mr. Amorrortu's claim is the commencement of the direct negotiation process, as this, supposedly, provided him with a "bundle" of "substantive rights", that Peru allegedly breached. However, even if the direct negotiation process commenced, this did not confer any rights to Mr. Amorrortu.

48. The start of a direct negotiation does not provide the rights Mr. Amorrortu's claims it does. Mr. Amorrortu defines the bundle of rights derived from a direct negotiation as "the exclusive technical evaluation and the community analysis of a direct negotiation proposal before any competing company is invited to participate in the process."⁸⁵ Yet according to Procedure

⁸³ First Vizquerra Expert Report, ¶ 30 (**RER-1**).

⁸⁴ See *id.*, ¶ 44 (**RER-1**); Second Vizquerra Expert Report, ¶ 57 (**RER-2**); see also Peru's Submission on Preliminary Objections (15 March 2021), ¶ 40 ("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."); see also First Vizquerra Expert Report, ¶ 44 (**RER-1**).

⁸⁵ See for instance, Claimant's Answer, ¶ 8; *id.*, ¶ 23 ("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

GFCN-008, once a company has received a certificate of qualification, the very next step is publication of the Block's availability for procurement for a period of 30 days.⁸⁶ In the event that any third party expresses interest, PeruPetro must open a public tender, and the direct negotiation ends.⁸⁷ Only if no third party expresses interest, or if the company presents the winning bid, does the direct negotiation process continue on to the evaluation of the interested party's proposal.

49. In other words, Mr. Amorrortu would have found himself in the same situation through the direct negotiation process, as was ultimately the case: presenting a bid as part of a public tender. Mr. Amorrortu's supposed bundle of rights thus does not exist, and accordingly his claim lacks legal merit.

3. Even if Direct Negotiations give rise to a Bundle of Rights, Mr. Amorrortu's own allegations indicate that such rights were respected

50. Finally, even assuming arguendo that commencement of a direct negotiation gives rise to a right to a narrow window of exclusivity, Mr. Amorrortu's own factual allegations demonstrate that such rights were vindicated. As noted above, upon receiving a certification of qualification, PeruPetro must publicize the availability of the Block for procurement and open a public tender if any third party indicates an interest. Thus, to the extent a direct negotiation offers any limited advantage, it is the ability to present a proposal and qualification materials on an advanced basis to PeruPetro.⁸⁸ As Mr. Amorrortu alleges, he was given the opportunity to do precisely that.⁸⁹

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

⁸⁶ PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 3 (CLA-44).

⁸⁷ *Id.*, p. 3.

⁸⁸ Mr. Amorrortu also suggests that he could have participated in community outreach processes and that this also provided some sort of advantage. *See* Claimant's Answer, ¶ 8. Yet, nothing in the relevant protocols gives the interested companies the right to participate in this community outreach. *See* Procedure GFRC-001, Citizen Participation Upon Initiation of the Process of Direct Negotiation, Solicitation, or Site Modification (11 June 2014) (RLA-48) and Procedure GFRC-010, Execution of the Preliminary Consultation Process (6 November 2012) (RLA-44). Rather this is a process coordinated by PeruPetro directly and involves general discussions of potential impacts on the community that subsequently must be taken into account by the eventual contractor after a contract has been signed. Second Viquera Expert Report, note 4 (RER-2).

⁸⁹ Claimant's Memorial (11 September 2020), ¶¶ 73-74, *et seq*; Claimant's Answer, ¶¶ 3, 5-6.

51. Moreover, GFCN-008 indicates that the very next step after a proposal is received is a determination of whether the area is available for direct negotiation.⁹⁰ In the event it is not, a communication must be sent to the interested company informing it of that fact and terminating the direct negotiation.⁹¹

52. As recognized by Mr. Amorrortu, PeruPetro gave due response to such a Proposal, specifically, by indicating that the Blocks sought by the Baspetro Proposal were subject to a public tender (hence, unavailable to direct negotiation).⁹² Thus, even assuming that the submission of the Baspetro Proposal started a direct negotiation and assuming further that this provided Mr. Amorrortu with a “bundle of rights” (*quod non*), Peru never breached such rights. Mr. Amorrortu was given the opportunity to present a proposal, and PeruPetro gave a formal response to this Proposal.

53. Accordingly, under any scenario, Mr. Amorrortu’s claim lacks any legal basis, and must be dismissed in accordance with Article 10.20.4.⁹³

* * *

54. For the reasons set forth above, Mr. Amorrortu’s asserted claim is without legal merit. Mr. Amorrortu claim must demonstrate not only a breach, but an injury as well, and Mr. Amorrortu has premised his injury exclusively on an entitlement of an eventual contract. Yet Mr. Amorrortu concedes, as he must, that he was never entitled as a matter of law to that contract and

⁹⁰ PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 1 (**CLA-44**).

⁹¹ *Id.*, p. 1; *see also* Second Vizquerra Expert Report, ¶ 24 (**RER-2**).

⁹² Claimant’s Memorial (11 September 2020), ¶ 85; Letter from PeruPetro, S.A. to Bacilio Amorrortu (20 August 2014) (**C-13**); *see also* First Witness Statement of Bacilio Amorrortu (10 September 2020), ¶ 91 (**CWS-1**).

⁹³ In his Answer to Peru’s Submission, Mr. Amorrortu engages in an argument as to why reasonable expectations relating to pre-investment activity are protected by the USPTPA. Claimant’s Answer, ¶ 9. Mr. Amorrortu, however, fundamentally misunderstands Peru’s argument. Peru argued in its Submission on Preliminary Objections that because Claimant as a matter of law did not commence a direct negotiation or have any rights thereunder, including any right to a contract, then all he asserts is an unfounded expectation or hope that is not protected under international law. Peru’s Submission on Preliminary Objections (15 March 2021), ¶¶ 66-67. Mr. Amorrortu’s argument concerning the definition of investor under the Treaty is therefore inapposite. Ultimately, as discussed above, Mr. Amorrortu never obtained any rights capable of protection under international law or the USPTPA.

that PeruPetro had the discretion under law to refuse a contract. Moreover, the facts alleged and taken as true indicate that his proposal was rejected by PeruPetro.

55. Even if Mr. Amorrortu's fatal concession were ignored, his claim fails because as a matter of law Amorrortu did not satisfy the preconditions to commence a direct negotiation process. Accordingly no supposed bundle of rights to exclusivity were obtained.

56. Even assuming that presentation of the Baspetro Proposal was legally sufficient to commence the direct negotiation process and that Baspetro should be deemed to have been granted a certification of qualification, Mr. Amorrortu's claim fails. The very next step in the direct negotiation process would have been publicly inviting third parties to demonstrate interest in Blocks III and IV, and, if such interest was demonstrated, commencement of a public tender. Therefore, the direct negotiation process as a matter of law does not confer the bundle of rights alleged by Claimant.

57. Finally, even assuming that the presentation of the Baspetro Proposal was legally sufficient to commence the direct negotiation process and that Baspetro should be deemed to have been granted a certification of qualification, and that this conferred a limited right of exclusivity prior to the invitation of third parties, Mr. Amorrortu's claim fails. Relevant protocols indicate that at most Mr. Amorrortu would have had the opportunity to present the Baspetro Proposal and receive a response by PeruPetro. The facts alleged by Claimant, taken as true, demonstrate that this was done. PeruPetro received the Baspetro proposal and provided a formal response indicating that the areas were subject to a public tender.

58. Thus, on every possible level, Mr. Amorrortu's claim is shown to be legally unfounded. As a result, Mr. Amorrortu's claim as submitted, it is not a claim for which an award in favor the claimant may be made, and it should therefore be dismissed.

III. PERU'S THIRD-PARTY FUNDING (TPF) REQUEST DOES NOT ESTOP IT FROM OBJECTING TO THE TRIBUNAL'S JURISDICTION

59. In a desperate attempt to salvage its case, Claimant argues that Peru is estopped from objecting to the Tribunal's jurisdiction because it "availed itself of the jurisdiction of this Tribunal [by] request[ing] an order compelling Amorrortu to state whether a third-party funder

was financing this arbitration” (“Peru’s TPF Request”).⁹⁴ Claimant’s reliance on the doctrine of estoppel to bar Peru of its legitimate right to contest the Tribunal’s jurisdiction is misguided. Peru’s TPF request cannot be construed as consent to jurisdiction, let alone to support an estoppel from raising jurisdictional objections.

60. *First*, Peru timely submitted its jurisdictional objections. Article 23(2) of the UNCITRAL Rules establishes that “A plea that the arbitral tribunal does not have jurisdiction *shall be raised no later than in the statement of defence* [...]”⁹⁵ Peru chose to do so earlier in its Notice of Intent of 9 December 2020. Indeed, as Claimant himself recognizes, Peru had “reserv[ed] the right to argue lack of jurisdiction ‘*ratione voluntatis, ratione personae, ratione materiae, and ratione temporis*’ in the Response to Amorrortu’s NOA [Notice of Arbitration]”.⁹⁶ This is fatal to Claimant’s estoppel argument. This is not a case where Peru waited “nearly three years” after the arbitration had begun to assert its lack of consent.⁹⁷ To the contrary, it did so at the first opportunity available⁹⁸ and after having reserved its right to do so in the Response to the Notice of Arbitration.⁹⁹

61. *Second*, nothing in the Treaty, the UNCITRAL Rules, or arbitral decisions suggests that a party is barred from objecting to the jurisdiction of an arbitral tribunal by participating in the proceedings. To the contrary, and as an example, Article 23(2) states that “A party is not precluded from raising [jurisdictional objections] by the fact that it has appointed, or participated in the appointment of, an arbitrator.” There is no reason to treat Peru’s TPF request differently. As the tribunal in the *Muhammet Çap v. Turkmenistan* case recognized, the authority to order disclosure on third-party funding is an “inherent power” that the Tribunal may exercise “where

⁹⁴ Claimant’s Answer, ¶ 94.

⁹⁵ UNCITRAL Rules, Art. 23(2).

⁹⁶ Claimant’s Answer, ¶ 98.

⁹⁷ Peru, of course, objects to the characterization by Claimant that it acted in bad faith or in any way abused the process in *Renco I*. Regardless of the accuracy of Claimant’s allegations as to what occurred in *Renco I*, the relevant point here is that in this arbitration Peru has acted in a reasonable and timely manner in asserting its objections.

⁹⁸ Peru’s Notice of Intent to Submit Preliminary Objections (9 December 2020); see USPTPA Investment Chapter (12 April 2006), Art. 10.20(4) (CLA-1).

⁹⁹ Peru’s Response to Claimant’s Notice of Arbitration (21 March 2020), ¶ 5.

necessary to preserve the rights of the parties and the integrity of the process.”¹⁰⁰ The integrity of the arbitral process is separate and independent from the Tribunal’s jurisdiction to decide the merits of the dispute. Indeed, as part of the arbitral process, parties must engage with, and request from, the tribunal a host of matters before a respondent must even formally present any jurisdictional objections (*i.e.* the date of submission of its Statement of Defense). This includes participation in the first procedural conference,¹⁰¹ establishment of the procedural calendar,¹⁰² and, potentially, emergency submissions.¹⁰³ Nothing in the Treaty or UNCITRAL Rules requires the Respondent to assert, or even reserve,¹⁰⁴ its rights to make jurisdictional objections before taking part in these steps necessary for the orderly conduct of arbitral proceeding. These preliminary actions and decisions taken by a tribunal can be seen as part of the inherent powers of the tribunal to be able to ensure an orderly and fair process, similar in nature to *competence-competence*.¹⁰⁵

¹⁰⁰ *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June 2015) (Lew, Boisson de Chazournes, Hanotiau), ¶ 6 (**RLA-49**). A general consensus favoring disclosure of the existence and identity of third party funders has developed in the arbitration community, with most rules being amended to require such disclosure. See ICSID, Proposals for Amendment of the ICSID Rules - Working Paper (2 August 2018) (**RLA-50**); ICSID, Proposals for Amendment of the ICSID Rules, Working Paper #4, Vol. 1 (February 2020) (**RLA-54**); ICC, 2021 Arbitration Rules (1 January 2021), Art. 11(7) (**RLA-55**) (“In order to assist prospective arbitrators and arbitrators in complying with their duties [...] each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.”); see also United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (A/CN.9/1004)* (23 October 2019), ¶ 89 (**RLA-51**) (“[i]t was generally felt that the existence of third-party funding and the identity of the third-party funder should be disclosed at an early stage of the proceedings or as soon as the funding agreement was concluded.”). This information, as the Tribunal found, is important for purposes of conflicts of interest. Procedural Order No. 2 (19 October 2020), ¶ 8.

¹⁰¹ See UNCITRAL Arbitration Rules, Art. 17(2). See also ICSID Rules, Art. 13(1); ICC, 2021 Arbitration Rules (1 January 2021), Art. 24(1) (**RLA-55**).

¹⁰² See UNCITRAL Arbitration Rules, Art. 17(2). See also ICSID Rules, Art. 26; ICC, 2021 Arbitration Rules (1 January 2021), Art. 24(2) (**RLA-55**).

¹⁰³ See ICC, 2021 Arbitration Rules (1 January 2021), Art. 29 (**RLA-55**).

¹⁰⁴ In fact, according to the UNCITRAL Rules, the response to the notice of arbitration “*may* also include [...] (a) [a]ny plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction.” It follows that if the respondent party is not even required to include its objections to jurisdiction in the response to the notice of arbitration, *a fortiori*, it is not required to reserve its rights at that stage. See UNCITRAL Arbitration Rules, Art. 4(2).

¹⁰⁵ See *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June 2015) (Lew, Boisson de Chazournes, Hanotiau), ¶ 6 (**RLA-49**). See also, C. Brown, *Inherent Powers in International Adjudication*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* (2013), [PDF] p. 5 (**RLA-45**) (“[i]n pursuance of their inherent powers, international courts have on many occasions exercised powers not expressly conferred on them.”).

Accordingly the Tribunal is empowered to take these decisions even if it subsequently determines that it lacks jurisdiction.¹⁰⁶

62. Arbitral jurisprudence supports this view. Countless tribunals have decided on preliminary motions or remedies sought by respondent States and subsequently on their jurisdiction without considering such motions or remedies as an acceptance of their jurisdiction. For example, in *Manuel García Armas et al. v. Venezuela*, notwithstanding Venezuela's Request on Security for Costs, the arbitral tribunal ruled on Venezuela's objections to jurisdiction and ultimately upheld them.¹⁰⁷ Likewise, in *Dirk Herzig v. Turkmenistan*, notwithstanding the State's request for security for costs, the tribunal upheld the respondent's objections to jurisdiction.¹⁰⁸ Also, in *Detroit International Bridge Company v. Government of Canada*, notwithstanding respondent's prior submission on the place of arbitration, the tribunal still considered Canada's objections to jurisdiction, including that of the claimant's defective waiver.¹⁰⁹ None of the tribunals

¹⁰⁶ As Peru noted in its Submission on Preliminary Objections, another such special power, or *competence specialis*, specifically granted to the Tribunal by the USPTPA is the duty to decide Peru's Article 10.20.4 Preliminary Objection. See Peru's Submission on Preliminary Objections (15 March 2021), ¶¶ 98-111. Indeed, this Tribunal is mandated to make a determination about the merits of the case in light of the *competence specialis* conferred upon it by Article 10.20.4 USPTPA, which is in line with the Tribunal's "inherent powers to make orders [...] where necessary to preserve the rights of the parties and the integrity of the process." *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June 2015) (Lew, Boisson de Chazournes, Hanotiau), ¶ 6 (RLA-49). Article 10.20.4 USPTPA would be deprived of its *effet utile* if this Tribunal rendered a decision on Objection 4 but failed to decide on Objection 1. See Peru's Submission on Preliminary Objections (15 March 2021), ¶ 106. Notably, Claimant expresses no opinion as to Peru's arguments on this matter nor objects to Peru's request. See Claimant's Answer, note 115. Contrary to Claimant's assertion, however, and as already established above, and in Peru's Submission on Preliminary Objections, the express language of the USPTPA necessarily means that the Tribunal's adjudication as to Peru's Article 10.20.4 Objection does not imply that Peru has consented to this arbitration, nor does it preclude a finding that Tribunal lacks jurisdiction. See Peru's Submission on Preliminary Objections (15 March 2021), ¶¶ 98-111. Accordingly, Peru reiterates its request that the Tribunal issue a decision as to Peru's Objection 1 regardless of its determination as to Peru's defective waiver.

¹⁰⁷ *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction (13 December 2019) (Nunes Pinto, Gómez-Pinzón, Torres Bernárdez), ¶ 752 (RLA-53).

¹⁰⁸ See ICSID, Case Details of *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrienanlagen GmbH v. Turkmenistan* (ICSID Case No. ARB/18/35), available at <https://icsid-archive.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/35> (last accessed 21 May 2021) (R-6).

¹⁰⁹ See *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Canada's Submission on Place of Arbitration (15 January 2013) (Derains, Chertoff, Lowe) (RLA-46); *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Canada's Statement on Jurisdiction and Admissibility (22 February 2013) (Derains, Chertoff, Lowe) (RLA-47).

considered the States' request for a preliminary remedy as consent to jurisdiction or constituting grounds for estoppel.

63. *Third*, contrary to Claimant's contention, none of the three elements of the doctrine of estoppel are not present here. As Claimant admits,¹¹⁰ estoppel requires 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."¹¹¹ As established above, Peru had reserved its rights, thus Peru's TPF Request does not count as a "clear and unequivocal statement or conduct".¹¹² Claimant has also failed to show how it relied on the alleged "statement or conduct", except to suggest, incredibly, that Mr. Amorrortu would have flouted the Tribunal's order to disclose his third-party funder had it more clearly understood Peru's reservation on jurisdiction.¹¹³ But even if, *quod non*, Peru's TPF Request could count as a "clear and unequivocal statement or conduct" on which Claimant relied, Claimant was incapable of showing any detriment from having relied on Peru's conduct. As the

¹¹⁰ Claimant's Answer, ¶ 95.

¹¹¹ *Id.*, ¶ 95, citing *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011) (Kaplan, Beechey, Landau), ¶ 261 (**CLA-107**). It is important to note that besides the recitation of the three elements of estoppel, the Decision on Jurisdiction in *Cambodia Power Company v. Kingdom of Cambodia* is inapposite. The tribunal in that case addressed, and ultimately rejected, an estoppel argument in the context of a purported Article 25(1) designation, which is not at issue in this proceeding. Nowhere in that case, nor indeed in any other cited by Claimant, did the Tribunal decide that a respondent State was estopped from objecting to jurisdiction because it made preliminary procedural requests prior to the deadline to assert such jurisdictional objections. *See id.*, ¶¶ 260-268.

¹¹² It is worth noting that Peru's TPF Request was necessitated only because Claimant refused to voluntarily disclose the existence and identity of his funder when Peru requested it directly from Claimant. *See* Peru's TPF Request (25 September 2020), p. 2. Amorrortu's estoppel argument, coupled with his prior conduct in refusing to disclose the TPF information, thus would essentially function as an unjust procedural trap. If Claimant is correct that Peru could not request an order from the Tribunal to disclose the TPF without foreclosing a jurisdictional objection, then by refusing to voluntarily disclose the TPF information, Peru was left with an impossible choice. It would either have had to accept the lack of disclosure, thus leaving it without a procedural remedy (and prejudicing the integrity of arbitral proceeding) or waive its jurisdictional objections. Such a position violates all notions of due process and cannot be countenanced.

¹¹³ *See* Claimant's Answer, ¶ 99 ("This tribunal granted Peru's motion in part on October 19, 2020, and Amorrortu, relying on Peru availing to its consent to jurisdiction of this Tribunal, complied with the Tribunal's order.") Of course, as already stated, Peru had already made an express reservation of rights to argue that the Tribunal lacked jurisdiction, so any supposed reliance that Peru had consented to jurisdiction would have been unreasonable. Such reliance is also belied by the fact that when Peru presented its waiver objection, Mr. Amorrortu's first reaction was to seek Peru's consent to secure his defective waiver. *See*, Peru's Submission on Preliminary Objections (15 March 2021), ¶ 70. At no point did Claimant assert or suggest that Peru had already consented to jurisdiction and was otherwise estopped from presenting a jurisdictional objection. It is clear that this is a last ditch effort only now presented with his Answer to Peru's Submission on Preliminary Objection, which lacks any basis.

Oded Besserglik v. Republic of Mozambique tribunal observed, “[w]ithout prejudice or detriment, the specific protections of legitimate and settled expectations, provided by the doctrine of estoppel, are not triggered.”¹¹⁴ Instead of showing detriment or prejudice, Claimant points to the opposite direction by noting that it was “Peru [who] benefitted from Amorrortu’s reliance, as it now has the name and identity of Amorrortu’s funder.”¹¹⁵ Peru’s benefit from Amorrortu’s disclosure, if any, is irrelevant and does not support an estoppel in this case.¹¹⁶

64. For the reasons stated above, Claimant’s argument that Peru is estopped from arguing that it did not consent to this arbitration must fail.

IV. THE TRIBUNAL LACKS JURISDICTION AS MR. AMORRORTU FAILED TO SUBMIT A VALID WAIVER IN A TIMELY FASHION UNDER ARTICLE 10.18.2 USPTPA

65. Since Peru raised its preliminary objections to the Tribunal, Mr. Amorrortu’s response has been scattered and internally inconsistent. When Peru notified the Tribunal of its intent to submit preliminary objections, including a jurisdictional objection due to an invalid waiver, Claimant requested Peru’s consent to cure his defective waiver. As Peru did not consent to such a cure, Mr. Amorrortu then argued that the waiver objection was formalistic and based its counter-argument on NAFTA cases that were not applicable to this dispute. Notwithstanding this, Mr. Amorrortu filed an Application for leave to amend his Notice of Arbitration, thereby implicitly admitting the defectiveness of his waiver. In his latest submission, Mr. Amorrortu attempts to substantiate the validity of his waiver, while at the same time seeking to cure it.

66. Peru’s position with respect to Mr. Amorrortu’s waiver has remained consistent. The USPTPA unequivocally requires Claimant to submit an unqualified and signed waiver with the Notice of Arbitration (**Subsection A**). Without the timely submission of a valid waiver, Peru has not consented to this arbitration. Notwithstanding Claimant’s belated attempt to modify his

¹¹⁴ *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award (28 October 2019) (Ali Khan, Fortier, von Wobeser), ¶ 422 (**RLA-52**).

¹¹⁵ Claimant’s Answer, ¶ 99.

¹¹⁶ As noted earlier, the disclosure of the existence and identity of third-party funding is considered best practice by the international arbitration community and has been formally adopted by several rules. The “benefit” of such disclosure was not that of Peru alone, but also of the Tribunal (which could ensure that there were no conflicts), and of the arbitral process as a whole.

waiver, including by the inappropriate submission of a new waiver via witness declaration, Mr. Amorrortu cannot cure his defective waiver without Peru's consent (**Subsection B**).

A. It Is Undisputed that the USPTPA Requires the Claimant to Submit an Unqualified and Signed Waiver with the Notice of Arbitration

67. To commence this arbitration, Mr. Amorrortu had to comply with the requirements of the USPTPA. Claimant was required to file a signed waiver along with his Notice of Arbitration that includes unqualified language. Mr. Amorrortu, however, failed to submit a valid waiver.

1. Mr. Amorrortu failed to file a separate signed waiver to accompany his Notice of Arbitration

68. In its Submission on Preliminary Objections, Peru explained in detail how Article 10.18.2 requires that Claimant's Notice of Arbitration be "accompanied" by a written waiver, as a separate document signed by Mr. Amorrortu.¹¹⁷ In his Answer, Claimant argues that there is no separate document requirement and asks the Tribunal to favor an "unrestricted use of the word 'accompanied' in Article 10.18.2(b) to comprehensively and broadly include all its diverse forms and meanings." Observing that "accompany" can also mean to be "present or occur at the same time," Claimant argues that merely including (conditional) waiver language in a Statement of Claim signed by counsel should be sufficient to meet the requirement of the USPTPA.¹¹⁸ Claimant's position, however, seeks to stretch the meaning of express Treaty language so as to make the waiver a mere formality devoid of substantive purpose.

69. The use of the word "accompany" in the USPTPA is not accidental, and differs significantly from Article 1121 of NAFTA which indicates that the "waiver required by the Article shall be in writing, shall be delivered to the disputing Party, and shall be included in the submission of a claim to arbitration."¹¹⁹ The *Renco I* tribunal recognized the significance of this change in observing:

¹¹⁷ Peru's Submission on Preliminary Objections (15 March 2021), ¶ 76.

¹¹⁸ Claimant's Answer, ¶ 111.

¹¹⁹ NAFTA, Chapter 11, Investment (1994), Art. 1121(3) (**RLA-2**) (emphasis added).

[T]he United States has amended the waiver language in its treaties, including in Article 10.18(2) of the [USPTPA] and in the DR-CAFTA to expressly state that the waiver must accompany “the notice of arbitration.”¹²⁰

70. The change is material and must be given weight. A separate document signed by the Claimant himself, affords the waiver the effect of a separate juridical instrument that, if necessary, can be presented in a separate forum as a defense to any attempt to commence a proceeding action in violation of said waiver. In this sense, the signature of the claimant is of particular importance. It is the claimant, not his counsel, who is asserting an alleged right and seeking a remedy for the breach. It is the claimant, not his counsel, who is the person that might initiate other proceedings. Indeed a claimant may very well change counsel or select different counsel for a different proceeding. Waiver language contained in a brief signed by counsel would not have the same effect or weight as a separate document signed by the claimant himself. Indeed, the best way to prove an agreement, and current and future compliance to the waiver, is to put one’s signature on it, namely “your name written by yourself, always in the same way, usually to show that something has been written or agreed by you.”¹²¹

71. A separate, signed document also reinforces the notion that the waiver is not a mere formality, but rather a substantive requirement upon which Peru’s consent to arbitration is conditioned.¹²²

72. In this sense, Mr. Amorrortu errs in his contention that the objective of Article 10.18.2(b) is “to avoid duplicative litigation and inconsistent verdicts” and that “[t]his objective is accomplished irrespective of whether the waiver is a separate form [and] [...] irrespective of

¹²⁰ *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Fortier, Landau), ¶ 141 (**RLA-32**) (emphasis added).

¹²¹ Cambridge, ‘Signature’, available at <https://dictionary.cambridge.org/us/dictionary/english/signature> (last accessed 24 February 2021) (**R-3**) (emphasis added). See also Cambridge, ‘Waiver’, available at <https://dictionary.cambridge.org/us/dictionary/english/waiver> (last accessed 21 May 2021) (**R-5**) (“**an agreement** that you do not have to pay or obey something: We had to **sign a waiver**, giving up any rights to the land in the future.”) (emphasis added).

¹²² As noted in Peru’s Submission of Preliminary Objections, USPTPA expressly identifies the waiver as a condition to consent. See USPTPA, Investment Chapter (12 April 2006), Art. 10.18 (**CLA-1**).

whether the waiver is signed by the claimant or by the claimant’s legal representative.”¹²³ Mr. Amorrortu only identifies one of the possible objectives of Article 10.182(b). He fails to recognize the primary objective expressly stated in the very title of Article 10.18: to provide the necessary condition for the Peru’s consent to arbitration. As the Renco I has recognized:

The waiver required by Article 10.18(2)(b) is intended to operate as a “one and for all” renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration [...].¹²⁴

73. Given the importance of the waiver, both for the State’s consent, and to ensure that the State will not be required to defend the same objected measures in another forum, it is only logical that it be required as a separate juridical document signed the party actually making the waiver (instead of just his counsel).¹²⁵ Indeed, a separate juridical document signed by Claimant himself, that can be presented to other juridical or arbitral authorities, also is the best way to ensure that the State can stop any potential breach of the waiver in the future.

74. The Tribunal should reject Mr. Amorrortu’s attempt to water down the substantive importance of the waiver into a mere non-consequential formality. The USPTPA very clearly and expressly requires a waiver as a separate document signed by Claimant himself. Claimant’s waiver language in his Statement of Claim signed by counsel is insufficient and does not satisfy a precondition to Peru’s consent.

¹²³ Claimant’s Answer, ¶ 114.

¹²⁴ *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Fortier, Landau), ¶ 99 (RLA-32).

¹²⁵ As Peru has observed, in arbitrations commenced under DR-CAFTA, which has similar waiver requirements as the USPTPA, claimants have consistently presented their waivers as a separate, signed document. *See* Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 79. Claimant attempts to minimize the import of these cases by arguing that none of the submissions cited “go as far as saying that a physical separate waiver signed by claimant (and not its counsel) was the exclusive and sole manner to comply with the waiver requirement.” Claimant’s Answer, ¶ 113. Mr. Amorrortu misses the point. In the cases cited, there was no need for the tribunals to announce the formal requirement of the waiver, because the claimants understood and complied with the express requirements of the treaty, and provided separate, signed waivers. The cases cited by Peru simply underscore that as arbitral practice is consistently in line with Peru’s interpretation of Article 10.18.2(b), and that most, if not all, claimants correctly understand that by inclusion of the term “accompany,” they must submit a separate, signed waiver.

2. Mr. Amorrortu is not allowed to submit a qualified waiver under the Treaty; therefore, his waiver is invalid

75. In its Submission on Preliminary Objections, Peru clearly demonstrated that a waiver is only formally compliant with the Treaty when it is not qualified or conditioned, in any way.¹²⁶ Yet, Mr. Amorrortu still considers that “there is no requirement of an absolute waiver” based on “the ordinary meaning of Article 10.18.2(b), or its objective.”¹²⁷ Mr. Amorrortu’s argument lacks any basis in the clear and express Treaty language or in relevant arbitral decisions.

76. Mr. Amorrortu’s novel argument is that Article 10.18.2(b) somehow excludes waivers of claims that are dismissed for lack of jurisdiction. He derives this argument from a tortured interpretation of Article 10.18.2(b), and from the assertion that the Treaty, in Mr. Amorrortu’s view, does not provide a “warning” similar to that provided in the treaty’s “fork in the road provision.”

77. Mr. Amorrortu’s interpretation of Article 10.18.2(b) “in the context” of Article 10.16.1(a) is nothing more than a tautological construction. By rewriting 10.18.2(b) in a manner that suits his argument, Mr. Amorrortu arrives at the conclusion he desires. As Mr. Amorrortu states:

[A] claimant 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 a claim is outside of the jurisdiction of the tribunal, does not have to provide such a waiver.¹²⁸

78. Mr. Amorrortu’s construction is, of course, devoid of logic. If a person “may not submit a claim” for whatever reason, that is the end of analysis for the purported claimant. He does not have access to the Treaty and thus need not meet any of its requirements. However, this does not mean that if the purported claimant sought to assert a claim under the Treaty anyway, that he is absolved of its expressed requirements to obtain Peru’s consent, including the requirement to

¹²⁶ Peru’s Submission on Preliminary Objections (15 March 2021), ¶¶ 82-87.

¹²⁷ Claimant’s Answer, ¶ 115 (emphasis omitted).

¹²⁸ *Id.*, ¶ 117 (emphasis omitted).

submit an unconditional waiver. Put another way, if a purported claimant doubts whether he can meet the Treaty's jurisdictional requirements, he can still submit a claim, so long as he submits an unconditional waiver, and runs the risk that his claim is dismissed with prejudice.

79. Nothing in the treaty indicates otherwise, and the fact remains that Section 10.18.2(b) of the USPTPA is not drafted as Mr. Amorrortu proposes. To the contrary, the USPTPA expressly requires a waiver of "any right" to initiate before "any" forum, "any proceeding" with respect to "any measure" that is alleged to breach the Treaty.¹²⁹ The unconditional nature of the waiver could not be any clearer. Indeed, the *Renco I* tribunal agreed, observing:

In the Tribunal's opinion, the repeated references to the word "any" in Article 10.18 demonstrate that an investor's waiver must be comprehensive: waivers qualified in any way are impermissible.¹³⁰

80. Mr. Amorrortu attempts to induce the Tribunal to believe that the *Renco I* tribunal interpretation was less unequivocal than it the was, by stating that the *Renco I* tribunal concluded that "the qualifier 'any', must be construed in the appropriate statutory context and does not automatically mean all claims."¹³¹ However, Mr. Amorrortu cites to the portion of the Decision relating to the Scope of the Respondent's Preliminary Objections. It is in that context that the *Renco I* tribunal interpreted not just the word "any", in isolation, but the phrase "any objection" in the context of Article 10.20.4 and its subordinate clauses, in order to conclude that an Article 10.20.4 preliminary objection does not encompass competence objections.¹³² That question is not at issue in this arbitration and is wholly unrelated to the issue under discussion here. When

¹²⁹ USPTPA, Investment Chapter (12 April 2006), Art. 10.18.2(b) (**CLA-1**).

¹³⁰ *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Fortier, Landau), ¶ 79 (**RLA-32**). The only exception to the waiver requirement under the USPTPA is expressly contemplated in Article 10.18.3, providing: "Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration." *Id.*, ¶ 67, citing USPTPA, Investment Chapter (12 April 2006), Art. 10.18(3) (**CLA-1**).

¹³¹ Claimant's Answer, ¶ 121.

¹³² *The Renco Group, Inc. v. Republic of Peru*, 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, Fortier, Landau), ¶ 209 (**RLA-28**).

interpreting the word “any” in the context of Article 10.18, the Tribunal was very clear: the language and context of that article indicated that qualified waivers were impermissible. The Renco I tribunal further concluded:

The waiver required by Article 10.18(2)(b) 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)**.¹³³

81. Despite the *Renco I* tribunal’s well-founded conclusions based on the clear and express language of Article 10.18.2(b), Mr. Amorrortu argues that his strained interpretation is supported by the fact that the Treaty does not include a “warning” to investors of the magnitude of an unconditional waiver. He points to Article 10.18.4(a), which contains a fork in the road clause for claims arising out of investment authorizations or investment agreement and its sub-clause (b) which provides:

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.¹³⁴

82. Mr. Amorrortu claims that this clause constitutes a warning to investors given because of the purported severity of the consequences of the fork in the road clause. Mr. Amorrortu’s argument lacks any basis whatsoever.

¹³³ *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Fortier, Landau), ¶ 99 (**RLA-32**) (emphasis added). Mr. Amorrortu acknowledges that the Renco I tribunal identified how a dismissal for lack of jurisdiction can still be inconsistent with a domestic court verdict over similar claims and thus would undermine the objective to prevent inconsistent verdicts (one of but not the only objective of Article 10.18.2(b)). Claimant’s Answer, ¶ 125. Mr. Amorrortu’s call to the Tribunal to weight the impact of “these isolated instances” of inconsistency with the supposedly “draconian forfeiture of claims outside of the arbitral jurisdiction,” is nothing more than an inappropriate invitation to rewrite the text of the USPTPA and should be rejected. Claimant’s Answer, ¶ 125.

¹³⁴ Claimant’s Answer, ¶ 119.

83. *First*, there is no legal basis in international law that requires Treaties to provide “warning” to investors as to the consequences of treaty provisions, and Claimants cites to no authority for such an extraordinary position.

84. *Second*, Mr. Amorrortu misconstrues Article 10.18.4(b) as a so-called “warning” to investors. Read in the context of Article 10.18.4 in its entirety, it is evident that sub-clause (b) merely seeks to clarify the rather convoluted text in sub-clause (a), which references four separate provisions and two different scenarios. Article 10.18.4(a) provides:

No claim may be submitted to arbitration:

(i) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or

(ii) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C),

if the claimant (for claims brought under 10.16.1(a)) or the claimant or the enterprise (for claims brought under 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.¹³⁵

85. In light of this text, which tends to obscure the operative language of the clause, sub-clause (b) merely summarizes the provision in a more straightforward manner. That this is the intent of Sub-clause (b) is further evidence by its introduction, which indicates that it is presented “[f]or greater certainty.”

86. Article 10.18.2(b) by contrast is less obscure, in that the operative language concerning the content of the waiver is clearly stated in its own paragraph. In light of its relatively more straightforward language, no “greater certainty” is required. As already established above, the requirement of the waiver and its unconditional nature is clear and express.¹³⁶ Moreover, as

¹³⁵ USPTPA, Investment Chapter (12 April 2006), Art. 10.18.4(a) (CLA-1).

¹³⁶ See *supra*, ¶¶ 75, 81.

noted above, the importance and significance of the waiver is underlined by the requirement that the waiver be “accompanied” as a separate document signed by the claimant himself.

87. Thus, Claimant’s assertion that a “warning” to investors is needed for a treaty provision to mean what it says is wholly unfounded in the law, nor is it needed given the clear and express language of Article 10.18.2(b). Mr. Amorrortu’s incorrect interpretation of the Treaty fails and should be rejected.¹³⁷

B. Mr. Amorrortu Cannot Cure his Defective Waiver Without Peru’s Consent

88. Mr. Amorrortu’s waiver is defective, both as to form and substance. As such it is invalid and Peru has not consented to this arbitration.¹³⁸ As the *Corona Material* tribunal explained when analyzing identical waiver language in DR-CAFTA:

Having regard to the ordinary meaning of the terms, read in their context and in light of the Agreement’s object and purpose, the DR-CAFTA Parties have plainly conditioned their consents to arbitration. If a claimant does not comply with the conditions and limitations established in Article 10.18, its claim cannot be submitted to arbitration.¹³⁹

89. The tribunal in *Renco I*, interpreting Article 10.18 similarly found:

Under Article 10.18, the submission of a valid waiver is a condition and limitation on Peru’s consent to arbitrate. This is a precondition to the initial existence of a valid arbitration agreement, and as such leads to a clear timing issue: if no compliant waiver is served with the notice of arbitration, Peru’s offer to arbitrate has not been

¹³⁷ As with the separate document requirement, Mr. Amorrortu attempts to support his position with what he claims to be the object and purpose of Article 10.18.4 (b), which he claims to be avoiding inconsistent verdicts. However, as already discussed, Mr. Amorrortu ignores that Article 10.18 establishes as its principal objective conditioning Peru’s consent to arbitration. As such the treaty provision should be interpreted strictly and in light of its clear and unambiguous language. Mr. Amorrortu cannot seek to rewrite the Treaty based on his interpretation of what may be one of a clause’s objective and his view that this objective can be obtained by effectively ignoring the provision itself. In any event, as Mr. Amorrortu acknowledges, the *Renco I* tribunal observed that an unconditional waiver is the best manner to avoid inconsistent verdicts, as dismissal for lack of jurisdiction could still create inconsistencies with domestic court decisions. Claimant’s Answer, ¶ 125; *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Fortier, Landau), ¶¶ 87-88 (**RLA-32**).

¹³⁸ USPTPA, Investment Chapter (12 April 2006), Art. 10.18 (**CLA-1**).

¹³⁹ *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (31 May 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 191 (**RLA-31**) (emphasis added).

accepted; there is no arbitration agreement; and the Tribunal is without any authority whatsoever.¹⁴⁰

90. Consequently, if a claimant does not submit a valid waiver in a timely fashion as required under Article 10.18.2(b), its claim cannot be submitted to arbitration. As demonstrated by Peru in its Submission on Preliminary Objections, Mr. Amorrortu had the opportunity to submit a valid waiver until the submission of his Statement of Claim.¹⁴¹ Having failed to do so, Mr. Amorrortu cannot now cure this jurisdictional defect.

91. Mr. Amorrortu is therefore flatly wrong in asserting that Peru's objection is "moot in light of Amorrortu's pending Application to Amend his NOA."¹⁴² Because Mr. Amorrortu failed to comply with the conditions to Peru's consent, this Tribunal is respectfully without any authority to grant Mr. Amorrortu's application.¹⁴³

92. Claimant's reliance on the fact that the USPTPA and the UNCITRAL Arbitral Rules both contemplate the possibility of amending a notice of arbitration is to no avail. The procedural rules' step of amending a notice of arbitration is separate and apart from the Treaty-mandated presentation of a valid waiver, on a timely basis, as a condition to Peru's consent to arbitration. While Mr. Amorrortu may have been able to amend his arbitration and cure his defective waiver prior to the submission of his Statement of Claim,¹⁴⁴ he failed to do so.

¹⁴⁰ See also *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Fortier, Landau), ¶ 158 (**RLA-32**).

¹⁴¹ See Peru's Submission on Preliminary Objections (15 March 2021), ¶ 95, note 166; Peru's Response to Claimant's Leave to Amend Notice (15 January 2021), ¶ 5.

¹⁴² Claimant's Answer, ¶ 126.

¹⁴³ *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**) ("It 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."); *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Fortier, Landau), ¶ 133 (**RLA-32**), citing Second Submission of the United States, ¶ 16 ("a tribunal itself cannot remedy an ineffective waiver.").

¹⁴⁴ In this proceeding, Mr. Amorrortu submitted his Notice of Arbitration on 13 February 2020 and his Statement of Claim (Memorial) on 11 September 2020 (although received by Peru on 12 September 2020). Claimant had nearly 7 months to submit a new and compliant waiver, but failed to do so.

Accordingly, there has been no consent by Peru to this arbitration, and Mr. Amorrortu's new application is both untimely and without a jurisdictional basis.

93. For the same reasons, Mr. Amorrortu's attempt to submit a revised waiver in the vise of a witness declaration is procedurally unacceptable and has no legal weight. Accordingly, Peru respectfully requests that the Tribunal exclude this declaration from the record.

* * *

94. 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.

V. REQUEST FOR RELIEF

95. For the foregoing reasons, the Republic of Peru respectfully requests that the 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 USPTPA in its entirety;
- b. Declare that Claimant's purported waiver submitted with his Notice of Arbitration does not comply with the USPTPA 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: May 24, 2021

Respectfully submitted



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