

**PCA Case No. 2020-11**

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

**- and -**

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

**- between -**

**BACILIO AMORRORTU (USA)**

**(the “Claimant”)**

**- and -**

**THE REPUBLIC OF PERU**

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

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

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## GLOSSARY OF SELECTED TERMS

Baspetrol SAC	A company organized under the laws of Peru; also referred to as <b><i>Baspetrol</i></b>
Block III	One of the hydrocarbon blocks in the Talara Basin that was awarded to Amorrortu in the 1990s and later to Graña y Montero
Block IV	One of the hydrocarbon blocks in the Talara Basin that was awarded to Amorrortu in the 1990s and later to Graña y Montero
Claimant	Bacilio Amorrortu, also referred to as <b><i>Amorrortu</i></b> or the <b><i>Claimant</i></b>
Corruption Scheme	The series of corrupt arrangements involving Graña y Montero and the Peruvian Government mostly regarding award of oil contracts
Graña y Montero Petrolera	The subsidiary company of Grana y Montero, S.A.A., also referred to as <b><i>GMP</i></b>
Graña y Montero, S.A.A.	The parent company of <b><i>GMP</i></b> . A company organized under the laws of Peru, also known as <b><i>Graña y Montero</i></b>
Notice of Arbitration	Amorrortu’s submissions of his claims to arbitration pursuant to the United States-Peru Trade Promotion Agreement, served onto Peru on February 13, 2020; referred to as the <b><i>Notice of Arbitration</i></b> or <b><i>NOA</i></b>
Notice of Intent	Amorrortu’s notice of intent to submit his claims to arbitration, served onto Peru on September 24, 2019; referred to as the <b><i>Notice of Intent</i></b> or <b><i>NOI</i></b>
Odebrecht	Norberto Odebrecht. A company organized under the laws of Brazil
Perupetro's Direct Negotiation Rules	A set of established Rules and Procedures governing the process of direct negotiation of contracts with Perupetro
PetroPeru	The state-owned oil company in Peru, Predecessor company of PeruPetro
Respondent	The Republic of Peru; referred to as <b><i>Peru</i></b> or <b><i>Respondent</i></b>
The Baspetrol Proposal	The proposal prepared by Baspetrol to initiate direct negotiation to operate Blocks III and IV, also referred to as the <b><i>Baspetrol Proposal</i></b> or the <b><i>Proposal</i></b>
The Direct Negotiation Commission	The commission appointed by Perupetro to negotiate direct contracts with oil companies

The International Bidding Process	The public bidding processes involving international bidding process numbers PERUPETRO-001-2014-LOT III and PERUPETRO-002-2014-LOT IV
Treaty	United States-Peru Trade Promotion Agreement, February 2009, also referred to as the <b>Treaty</b> or the <b>Agreement</b> or the <b>USPTPA</b>

## LIST OF SELECTED ACRONYMS

CER – 1 [Quiroga]	First Expert Report of Anibal Quiroga, September 9, 2020
CER – 2 [Quiroga]	Second Expert Report of Anibal Quiroga, April 26, 2021
CER – 3 [Quiroga]	Third Expert Report of Anibal Quiroga, June 21, 2021
CWS – 1 [Amorrortu]	First Sworn Witness Statement of Bacilio Amorrortu September 10, 2020
FET	Fair and Equitable Treatment
IBA	The International Bar Association
ICC	The International Chamber of Commerce
MEF	The Peruvian Ministry of Economy and Finance
MEM	The Peruvian Ministry of Energy and Mines
NOA	The Claimant's Notice of Arbitration dated February 13, 2020
NOI	The Claimant's Notice of Intent to commence this arbitration against Peru dated September 19, 2019
RER-2	Second Expert Report of Carlos Raul Jose Vizquerra Perez Albela, May 24, 2021
USPTPA	The United States-Peru Trade Promotion Agreement which entered into force on February 1, 2009

## LIST OF SELECTED KEY INDIVIDUALS

Bacilio Amorrortu	Referred to as <b>Amorrortu</b> or the <b>Claimant</b>
Nadine Heredia Alarcón de Humala	First Lady of Peru from 2011 to 2016; also referred to as <b>Nadine Heredia</b>
Luis Enrique Ortigas	President of PeruPetro in 2013; also referred to as <b>Ortigas</b>
Anibal Quiroga-Leon	Claimant's Expert; also referred to as <b>Expert Quiroga</b>
Isabel Tafur	Chief Administrator of PeruPetro in 2014; also referred to as <b>Tafur</b>

## I. INTRODUCTION

1. The question raised by Objection 1 is whether “*as a matter of law,*” the claim submitted by Amorrortu is “*a claim for which an award in favor of the claimant may be made under Article 10.26.*” In his Answer to Peru’s Submission on Preliminary Objections (the **Answer to Peru’s Submissions**), Bacilio Amorrortu (**Amorrortu** or the **Claimant**) made clear that the answer to this question is an unequivocal **yes**. Amorrortu has alleged facts and proffered evidence establishing that Peru violated its obligations under the United States-Peru Trade Promotion Agreement (the **USPTPA** or the **Treaty**) when it aborted the direct negotiation process (the **Direct Negotiation Process**) initiated by Amorrortu on behalf of Baspetro **and** launched a fraudulent public bidding process as part of a massive corruption scheme (the **Corruption Scheme**) directed by the First Lady of Peru, Nadine Heredia.<sup>1</sup>

2. Peru’s corrupt acts constitute a violation of the protections of the USPTPA because Peru’s exercise of its power to contract in furtherance of corruption and to the prejudice of a protected investor is, by definition, a breach of the Fair and Equitable Treatment (**FET**) and Peru’s own laws. Critically, the USPTPA has a series of anti-corruption commitments and promises that created Amorrortu’s reasonable expectations that the Baspetro proposal (the **Baspetro Proposal**) was to be considered in a process free of corruption. Amorrortu contributed to the enactment of these anti-corruption provisions when he denounced the rampant corruption in Peru during the Treaty ratification process. The USPTPA’s anti-corruption provisions,

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<sup>1</sup> Amorrortu’s Answer to Peru’s Submission, 26 April 2021, ¶¶ 64-90.

which purported to be the strongest in any bilateral treaty, addressed Amorrortu's concerns.<sup>2</sup>

3. In its Reply on Preliminary Objections (***Peru's Reply*** or ***Reply***), Peru completely ignores the corruption that is at the heart of Amorrortu's claims and that betrayed his reasonable expectations as an investor. The Tribunal would be hard pressed to find any argument addressing this massive Corruption Scheme in either Objection 1 or Peru's Reply. Nor does Peru deny that its anti-corruption commitments in the USPTPA gave rise to Amorrortu's reasonable expectations. Instead, Peru argues that the abrupt termination of Amorrortu's Direct Negotiation Process cannot be the basis for a treaty claim because the Direct Negotiation Process does not guarantee, as a matter of law, the execution of a contract.

4. This argument is patently frivolous because it ignores that (1) Peru's exercise of its power to contract in furtherance of corruption and to the detriment of a protected investor is a violation of the FET protections of the USPTPA, irrespective of whether the Direct Negotiation Process was commenced and (2) after the direct negotiation process is commenced, Peruvian law prevents Peru from aborting this process to further a corruption scheme. These two principles of law are fatal to Objection 1. As Amorrortu explained in his Answer to Peru's Submission, his rights under the Direct Negotiation Process and the certainty that this process would have resulted in a contract to operate and service Blocks III and IV in the absence of corruption is relevant to his entitlement to damages, but has little bearing in the Article 10.20(4) analysis.

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<sup>2</sup> First Sworn Witness Statement of Bacilio Amorrortu (**CWS-1[AMORRORTU]**), 10 September 2020, ¶ 32.



5. Peru seeks to turn this argument on its head in its Reply and now argues that Amorrortu's entitlement to damages is within the scope of Article 10.20(4) because Amorrortu does not have a claim for which an award can be rendered without damages. But Peru conveniently ignores that it cannot question the factual premises of Amorrortu's claim for damages under Article 10.20(4). Amorrortu's factual allegations must be assumed as true under Article 10.20(4), including the allegations proffered in support of the conclusion that the Direct Negotiation that Amorrortu commenced would have resulted in a contract in the absence of corruption. Specifically, Amorrortu has alleged that (1) PeruPetro's empirical evidence establishes that the commencement of the Direct Negotiation Process by a company that had previously operated and serviced the subject oil blocks has in every occasion concluded in the execution of a contract<sup>3</sup>; (2) that Amorrortu submitted the Baspetro Proposal at the request of PeruPetro; (3) that PeruPetro shelved this Proposal in perpetuation of a Corruption Scheme designed to benefit Graña y Montero (***Graña y Montero***) as had been arranged with the office of the First Lady of Peru; (4) that PeruPetro did not respond to the Baspetro Proposal until it launched the corrupt international public bidding process (the ***International Public Bidding Process***); and (5) that in the absence of corruption, Amorrortu, through Baspetro, would have obtained the contracts to operate and service Blocks III and IV. These facts are more than sufficient to support a claim for which an award of damages can be made. As such, Objection 1 fails.

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<sup>3</sup> Indeed, Peru has not identified any instance in which a direct negotiation process commenced by a company with experience operating and servicing the subject block has not resulted in the execution of a contract.

6. Amorrortu is a protected investor with an investment in an enterprise – Baspetrol – which was frustrated by Peru’s Corruption Scheme to favor Graña y Montero. Peru’s effort to attack the factual underpinnings of Amorrortu’s claims for damages is premature and impermissible under Article 10.20(4).

7. While the arguments in Objection 1 are premature, the arguments in Objection 4 are too late. In his Answer to Peru’s Submissions, Amorrortu established that Peru is estopped from challenging its consent to this arbitration proceedings, as Peru requested and obtained substantive relief from this Tribunal without raising the Tribunal’s purported lack of jurisdiction based on Peru’s purported failure to consent. In its Reply, Peru does not deny that it requested an order from this Tribunal on September 25, 2020 without making any objection to the Tribunal’s jurisdiction based on Peru’s lack of arbitral consent.<sup>4</sup> Nor does Peru deny that the Tribunal granted this request in part on October 19, 2020<sup>5</sup> and that Amorrortu complied with the Tribunal’s order.<sup>6</sup>

8. Instead, Peru argues that this Tribunal has the inherent power to order the relief requested by Peru regarding the funding of this action.<sup>7</sup> This uncontroverted principle is not in dispute. But it misses the mark. The question here is not whether this Tribunal had inherent or explicit authority to grant Peru’s request for relief. The question is whether after invoking the Tribunal’s authority to compel information regarding the funding of this action without objecting to the Tribunal’s lack of jurisdiction based on purported lack of arbitral consent and after obtaining the

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<sup>4</sup> Peru’s Letter to Tribunal Requesting Disclosure of Third Party Funder, 25 September 2020, p. 7.

<sup>5</sup> Procedural Order No. 2, 19 October 2020.

<sup>6</sup> Claimant’s Letter to Tribunal disclosing Third Party Funder, 23 October 2020.

<sup>7</sup> Peru’s Reply on Preliminary Objections, 24 May 2021, ¶ 61.

requested relief, Peru is estopped from arguing that the Tribunal did not have jurisdiction. As established in Amorrortu's Answer to Peru's Submission, Peru is estopped from arguing that it did not consent to this arbitration.

9. Peru's insistence on its right to invoke this Tribunal's inherent power begs the question as to why this inherent power does not extend to Amorrortu's alternative request to amend its waiver, which Peru now claims he could have done at any point prior to filing his Statement of Claim.

10. Peru's intrinsically inconsistent positions confirm that Objection 4 is nothing more than a bad faith attempt to weaponize the decision in *Renco*.<sup>8</sup> That is exactly what Peru did in *Renco II*<sup>9</sup> in complete dereliction of the mandate of the *Renco* tribunal.<sup>10</sup> And that is what Peru is trying to do here. This Tribunal should put an end to the abusive pattern of conduct that Peru has followed in past arbitrations where it delayed the assertion of the purported lack of consent argument to maximize the prejudice to the claimants in bad faith.

11. With callous disregard for the consequences of its bad faith strategy, in its Reply, Peru faults Amorrortu for offering to amend the Notice of Arbitration (**NOA**) and claims that this offer undermines the estoppel argument. As this Tribunal can appreciate, Peru's frivolous arguments have derailed these proceedings and significantly increased the cost of this arbitration. Amorrortu tried — and is still trying — to avoid this delay by offering to amend its NOA and put an end to Peru's frivolous

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<sup>8</sup> *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, (Moser, Yves Fortier, Landau) (**RLA-32**) (hereinafter, **Renco 1 Partial Award**).

<sup>9</sup> *The Renco Group, Inc. v. Republic of Peru [II]*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, (Simma, Grigera Naón, Thomas), (**CLA-109**) (hereinafter, **Renco 2**).

<sup>10</sup> Amorrortu's Answer to Peru's Submission, 26 April 2021, ¶ 102.

arguments. Peru rejected Amorrortu's good faith offer and has delayed these proceedings with its frivolous arguments. To make Amorrortu whole, Peru must be ordered to pay Amorrortu his attorneys' fees and costs for its frivolous objections under Article 10.20(6) of the USPTPA.

12. In **Section II** of this Rejoinder, Amorrortu refutes Peru's argument that the lack of a legal guarantee of a contract in the Direct Negotiation Process requires the dismissal of his claims. And in **Section III**, Amorrortu addresses Peru's latest unavailing effort to reset the clock and argue that this Tribunal does not have jurisdiction after Peru requested and obtained substantive relief without objecting to this Tribunal's jurisdiction for Peru's purported lack of consent.

## **II. OBJECTION 1 FAILS: PERU CANNOT USE ITS DISCRETION TO CONTRACT TO FURTHER A CORRUPTION SCHEME**

13. This dispute is about corruption and its impact on the reasonable expectations of an investor protected by the USPTPA. Corruption permeates every issue in this case. Before Amorrortu invested in Peru, he was concerned about the rampant corruption in the country. Amorrortu's concerns about Peru's corruption were assuaged by the USPTPA's anti-corruption commitments.<sup>11</sup> Peru violated its anti-corruption promises. Indeed, Peru's First Lady, Nadine Heredia, orchestrated a Corruption Scheme to grant multiple government contracts to Graña y Montero. The massive corruption scheme that culminated in the adjudication of the contracts to operate Blocks III and IV to Graña y Montero frustrated Amorrortu's investment in Baspetro and violated his rights under the USPTPA.

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<sup>11</sup> Claimant's Statement of Claim, 11 September 2020, ¶ 333.

14. These facts were alleged in detail in Amorrortu's Notice of Intent to File Arbitration (**NOI**), Notice of Arbitration (**NOA**), Statement of Claim, and Answer to Peru's Submissions.<sup>12</sup> In each of these filings, Amorrortu made clear that the Corruption Scheme that frustrated his legitimate expectations was a violation of the USPTPA because (1) Peru's exercise of its power to contract in furtherance of a corruption scheme is a violation of the FET obligations and Peru's own laws and (2) the USPTPA created reasonable expectations that the Baspetro Proposal would be considered without the influence of corruption. Amorrortu has also made clear that his damages include the profits he would have realized if he had received the contract to operate the Blocks because, empirically, a company that had successfully operated and serviced the oil blocks in the past, and commences a process of direct negotiation, is awarded that contract, and Graña y Montero was the only participant in the corrupt International Bidding Process.

15. In its Reply, Peru continues to argue that if Amorrortu was not entitled to a contract as a matter of law, his claims necessarily fail. Peru's argument has two distinct parts. *First*, Peru argues that the Direct Negotiation Process did not guarantee the execution of a contract as a matter of law. *Second*, Peru claims that "the viability of Amorrortu's claim depends upon not only his allegations of treaty breach, but also his damages claim" and because Amorrortu was not entitled to a contract, he is not entitled to damages.<sup>13</sup>

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<sup>12</sup> Claimant's Notice of Intent, 19 September 2020, ¶¶ 43-52; Claimant's Notice of Arbitration, 13 February 2020 ¶¶ 36-49; Claimant's Statement of Claim, 11 September 2020, ¶¶ 97-169; Amorrortu's Answer to Peru's Submission, 26 April 2021, ¶¶ 85-90.

<sup>13</sup> Peru's Reply on Preliminary Objections, 24 May 2021, ¶¶ 14-15.

16. Both of these arguments are frivolous and must be summarily rejected. **Subsection II(A)** addresses Peru's argument that the Direct Negotiation Process does not guarantee as a matter of law the execution of a contract, and **Subsection II(B)** focuses on the issue of damages.

**A. AMORRORTU'S CLAIMS DO NOT DEPEND ON THE GUARANTEE OF A CONTRACT IN THE DIRECT NEGOTIATION PROCESS**

17. In its Reply, Peru argues that Amorrortu's claims fail because the Direct Negotiation Process does not guarantee the execution of a contract as a matter of law. This argument fails because PeruPetro cannot exercise its power to contract to further a Corruption Scheme to the prejudice of a protected investor like Amorrortu. A state's exercise of its power to contract in furtherance of corruption and to the prejudice of a protected investor is by definition a breach of the USPTPA's FET clause. Second, an oil company that submits a proposal for direct negotiation has a bundle of protected rights under Peruvian law that prevent PeruPetro from arbitrarily and capriciously terminating a direct negotiation process. Peru ignored these two principles of law, which are addressed in more detail below.

***i. Violation of Fair and Equitable Treatment Clause***

18. In its Submission on Preliminary Objections, Peru ignores that the neuralgic premise of this dispute is that Peru violated the USPTPA's FET obligations when it exercised its discretion to contract an oil company to service and operate Blocks III and IV to further a corruption scheme. That premise stands irrespective of whether a direct negotiation process was ever commenced.

19. As the Tribunal in *EDF v. Romania* noted, corruption "*is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well*

*as a violation of international public policy.*"<sup>14</sup> In *EDF*, a case in which the claimant contended that the government's corruption resulted in the claimant's loss of holdings in Romania, corruption took the form of a request for a bribe. Here, corruption took the form of the abrupt termination of a direct negotiation process to launch a rigged public bidding process designed to benefit Graña y Montero as part of a massive corruption scheme orchestrated by Peru's First Lady.<sup>15</sup> But the conclusion is the same and the principle applies with equal force: the exercise of a state's discretion to contract in furtherance of corruption is a violation of the FET.

20. That principle is particularly applicable in this case, as the USPTPA explicitly confirms the promise of the subscribing state to fight the plague of corruption. The USPTPA reflects the commitment of Peru and the United States to fight corruption in all its forms to enhance and protect foreign investors and their investments. The objectives of the USPTPA are set forth in the Preamble, as the Legislative History of the USPTPA confirms. In the Preamble, Peru and the United States agree to "*prevent and combat corruption, including bribery, in international trade and investment.*"<sup>16</sup> As its Legislative History confirms, this anti-corruption promise in the Preamble permeates the entire Treaty. Section B of Chapter 19 is titled "Anti-Corruption". In this anti-corruption section, "[t]he Parties affirm their commitment to prevent and

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<sup>14</sup> *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**CLA-4**) , ¶ 221.

<sup>15</sup> Claimant's Statement of Claim, 11 September 2020, ¶ 11 (The evidence of corruption is overwhelming, and more evidence continues to surface in the ongoing corruption investigation conducted by Peru's prosecutors. Indeed, on August 31, 2020, media reports of the investigation indicated that Graña y Montero's records confirm that executives met with the First Lady of Peru in April of 2014, October 2014, and February 2015 to discuss "*businesses*" and "*Blocks III and IV*" of the Talara Basin 9).

<sup>16</sup> **USPTPA, (CLA-2)**, Preamble.

*combat corruption, including bribery, in international trade and investment.*"<sup>17</sup> The Parties further commit to *"promoting, facilitating, and supporting international cooperation in the prevention and fight against corruption."*<sup>18</sup> To this end, the Parties reaffirm their existing rights and obligations under the 1996 Inter-American Convention Against Corruption and agreed to implement measures to prevent and combat corruption consistent with the 2003 United Nations Convention against Corruption.<sup>19</sup> Article 19.9, which is titled *"Anti-Corruption Measures"* states that each Party shall adopt or maintain the necessary legislative or other measures to penalize corruption in matters affecting international trade or investment.<sup>20</sup> Each Party further agreed to *"ensure that enterprises shall be subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions"*<sup>21</sup> for corrupt offenses in international arbitration.

21. As the Legislative History confirms, *"Chapter Nine builds on the anticorruption provisions of Chapter Nineteen, including by requiring each Party to maintain procedures to declare suppliers that have engaged in fraudulent or other illegal actions in relation to procurement ineligible for participation in the Party's procurement."*<sup>22</sup> Indeed, the USPTPA was approved by Congress in part precisely because the *"strong anti-corruption procedures"*<sup>23</sup> that were included in the

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<sup>17</sup> USPTPA Chapter Nineteen (**CLA-42**), Art. 19.7.

<sup>18</sup> USPTPA Chapter Nineteen (**CLA-42**), Art. 19.7.

<sup>19</sup> USPTPA Chapter Nineteen (**CLA-42**), Art. 19.8.

<sup>20</sup> USPTPA Chapter Nineteen (**CLA-42**), Art. 19.9.

<sup>21</sup> USPTPA Chapter Nineteen (**CLA-42**), Art. 19.9.

<sup>22</sup> The United States-Peru Trade Promotion Agreement Implementation Act, Summary of the Agreement, December 14, 2017, (**CLA-76**), p. 11.

<sup>23</sup> United States-Peru Trade Promotion Agreement, S. Hrg 109-995 Before the Committee on Finance, 109 Cong. (2006) (**CLA-77**), p. 7.



Agreement, which was supposed to establish "*a secure, predictable legal framework for U.S. investors in Peru.*"<sup>24</sup> Throughout the years, U.S. investors had been undermined by the rampant corruption and arbitrariness in Peru, and a number of United States Senators were concerned about corruption in Peru.<sup>25</sup> Amorrortu himself testified in front of the Senate Committee and denounced the atrocities that Peru had committed against him and his investments. His concerns were assuaged by the Treaty's corruption protections.<sup>26</sup>

22. Therefore, when he formed Baspetro, Amorrortu had the reasonable expectation that Peru was going to live up to its promise and comply with its anti-corruption obligations. Instead of complying with its obligations, Peru launched a plan to hide its corrupt practices behind a facade of legitimacy. This massive Corruption Scheme violates the USPTA irrespective of whether the Direct Negotiation Process was ever commenced and irrespective of whether a contract to operate and service Blocks III and IV was guaranteed.

***ii. Violation of Peruvian Law***

23. The massive Corruption Scheme is also a violation of Peruvian law. As Amorrortu has made clear, the records of PeruPetro do not identify any instance in which a company that had successfully operated and serviced an oil block and had commenced a direct negotiation process was not awarded the contract. This empirical fact, which Peru has not been able to deny and indeed seems to concede<sup>27</sup>

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<sup>24</sup> United States-Peru Trade Promotion Agreement, S. Hrg 109-995 Before the Committee on Finance, 109 Cong. (2006) (**CLA-77**), p. 7

<sup>25</sup> Claimant's Statement of Claim, 11 September 2020, ¶ 332.

<sup>26</sup> Claimant's Statement of Claim, 11 September 2020, ¶ 333.

<sup>27</sup> Peru's Reply on Preliminary Objections, 24 May 2021, ¶ 14.

is the reason why as a matter of fact, Amorrortu can demonstrate that the Direct Negotiation Process would have culminated with the execution of a contract in the absence of corruption. But even as a matter of law, Peru errs when it argues that the Direct Negotiation Process is discretionary.

24. As Expert Quiroga explains, hydrocarbon exploitation contracts, as legal contracts governed by the rules of private law, must be negotiated, and executed according to the rules imposed by the principle of good faith understood as loyalty in the negotiation of the contract and as correction in the behavior on the concluded contract, in accordance with Article 1362 of the Civil Code.<sup>28</sup>

25. Further, PeruPetro must perform this direct negotiation process in compliance with the requirements that govern a negotiation process with the government. Specifically, the principle of impartiality, provided for in Article IV, subsection 1, numeral 1.5, of the General Administrative Procedure Law, imposes on the government entities the duty to perform their duties dispensing equal treatment and without discrimination or favoritism.<sup>29</sup>

26. The principle of procedural conduct, regulated by Article IV, subsection 1, numeral 1.8, of the Law of General Administrative Procedure, requires the government to carry out its actions and adopt its decisions strictly respecting the rights and legitimate interests of the administered and of third parties, within a framework of strict compliance with the principle of good faith.<sup>30</sup>

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<sup>28</sup> First Expert Report of Anibal Quiroga, 9 September 2020, **(CER – 1 [Quiroga])**, ¶ 17.

<sup>29</sup> CER – 1 [Quiroga], ¶ 19.

<sup>30</sup> CER – 1 [Quiroga], ¶ 20.

27. The principle of predictability, enshrined in Article IV, subsection 1, numeral 1.15, of the Law of General Administrative Procedure, grants certainty to the administered with respect to the knowledge of the administrative legal norms, to the performance of certain administrative powers and regulatory changes.<sup>31</sup>

28. PeruPetro violated its well-defined process to evaluate a direct negotiation. Indeed, in its Reply, Peru goes as far as minimizing the importance and accuracy of PeruPetro's own procedural guidelines. That Peru is willing to go to the extent of reneging its own procedural guidelines further confirms the viability of Amorrortu's claims.

**B. AMORRORTU HAS ESTABLISHED THE DAMAGES SUFFERED AS A RESULT OF PERU'S CORRUPTION**

29. To be clear, the rights appurtenant to the Direct Negotiation Process are a significant component of Amorrortu's claimed damages in this case. Peru regurgitates the same arguments it had made in its prior submissions with respect to the Direct Negotiation Process. But these arguments fail.

30. Peru first argues again that Baspetro was not certified. However, as Expert Quiroga explains, Baspetro is a certified oil company and this certification was obtained due to an administrative silence on the part of PeruPetro.<sup>32</sup> Indeed, the Regulation of Qualification of Oil Companies gives PeruPetro 10 days to evaluate and to grant the certification.<sup>33</sup> The 10-day period begins to run from the date the oil company submits its request<sup>34</sup>. This 10-day *"is a guarantee to not wait indefinitely*

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<sup>31</sup> CER – 1 [Quiroga], ¶ 21.

<sup>32</sup> Third Expert Report of Anibal Quiroga, 21 June 2021 (CER – 3 [Quiroga]), ¶¶ 10 – 18.

<sup>33</sup> CER – 3 [Quiroga], ¶ 3.

<sup>34</sup> CER – 3 [Quiroga], ¶ 3.

for a decision of the Administrative Authority.”<sup>35</sup> Accordingly, within this 10-day period, “[t]he Administrative Authority has the obligation to evaluate the qualification request and to formulate the observations it deems pertinent . . . ; otherwise, it generates a right of the oil company to obtain the qualification and the obligation of the authority to grant it.”<sup>36</sup> The 10-day period expired without any observation by PeruPetro. At that point, Baspetro is deemed to be certified for all practical purposes.<sup>37</sup>

31. Peru also argues that Amorrortu abandoned any Direct Negotiation Process (or knew that no Direct Negotiation Process was ever commenced), because Amorrortu decided to participate in the corrupt International Bidding Process of Blocks III and IV.<sup>38</sup> Hand in hand with Peru’s strategy of not wanting to address the evident Corruption Scheme that infringed Amorrortu’s rights covered under the Treaty, Peru’s expert goes on to state that it is evident that Amorrortu knew that the Blocks were not available for a direct negotiation process because Amorrortu participated in the International Public Bidding, and he did not oppose the bidding process.<sup>39</sup> This argument could not be further from the truth.

32. *First*, Amorrortu has made clear, in several occasions, that he opposed the corrupt International Bidding Process. Indeed, in his NOA, Amorrortu states how, in a letter to PeruPetro, he described how this International Bidding Process was evidently discriminatory towards him and Baspetro.<sup>40</sup> In another letter sent to

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<sup>35</sup> CER – 3 [*Quiroga*], ¶ 3.

<sup>36</sup> CER – 3 [*Quiroga*], ¶ 4.

<sup>37</sup> CER – 3 [*Quiroga*], ¶ 13.

<sup>38</sup> Peru’s Reply on Preliminary Objections, 24 May 2021, ¶ 23.

<sup>39</sup> Peru’s Reply on Preliminary Objections, 24 May 2021, ¶ 23. Vizquerra Expert Report, **RER-2**, ¶ 49.

<sup>40</sup> Claimant’s Notice of Arbitration, 13 February 2020, ¶ 34.

PeruPetro, Amorrortu described how this irregular bidding process would affect the communities of Talara and the Vichayal District.<sup>41</sup> Therefore, Peru cannot seriously argue that Amorrortu did not object to the International Bidding Process. At the time, Amorrortu did not know that the International Bidding Process was not simply illegal and discriminatory, but that it was part of a massive corruption scheme. But Amorrortu objected to this process based on the limited information he had at the time.

33. *Second*, even if Amorrortu [had not] opposed the corrupt bidding process, which he did, Expert Quiroga explains that "[t]here is no document or indication that the participation of BASPETROL S.A.C. has been conditioned in [the International Bidding Process] to the abandonment of the direct negotiation process or that Mr. Amorrortu himself, as owner of BASPETROL S.A.C. had renounced to it"<sup>42</sup>; therefore, it is not possible to establish a renunciation by Amorrortu of the Direct Negotiation Process initiated on May 28, 2014.

34. Peru's expert insists in qualifying the Baspetro Proposal as some sort of offer without any expert explanation.<sup>43</sup> This point has been repeatedly explained by Expert Quiroga. Indeed, the Baspetro Proposal is not a letter of intent nor a general offer.<sup>44</sup> The Baspetro Proposal complied with all the "[r]equirements demanded in the Regulation of Qualification of Oil Companies."<sup>45</sup>

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<sup>41</sup> Claimant's Notice of Arbitration, 13 February 2020, ¶ 34.

<sup>42</sup> CER – 3 [Quiroga], ¶ 37.

<sup>43</sup> Vizquerra Expert Report, **RER-2**, ¶ 21.

<sup>44</sup> CER – 3 [Quiroga], ¶ 20

<sup>45</sup> CER – 3 [Quiroga], ¶ 31.

35. To sum up, Baspetrol obtained the required certification, Amorrortu never renounced to his right to the Direct Negotiation Process, and the Baspetrol Proposal complied with all the requirements to begin the Direct Negotiation Process.

### **III. OBJECTION 4 FAILS: PERU IS ESTOPPED FROM ARGUING THAT IT DID NOT CONSENT TO THIS ARBITRATION**

36. In its Reply, Peru argues that it timely submitted its jurisdictional objections and that nothing in the UNCITRAL Rules or arbitral decisions suggest that a party is barred from objecting to the jurisdiction of an arbitral tribunal by participating in the proceedings. These two arguments can be easily rejected, as Amorrortu is not arguing that Peru is barred from objecting to this Tribunal's lack of jurisdiction based on a purported lack of consent by the UNCITRAL Rules or by the procedure set forth in the USPTPA. Peru is estopped from objecting to this Tribunal's jurisdiction by its own decision to seek - and obtain - substantive relief from this Tribunal without making any objection with respect to its consent to arbitrate. Why did Peru choose to seek substantive relief from this Tribunal before objecting to its consent to submit to arbitration? There could be multiple strategic reasons to explain this decision. Suffice it to say that Peru's course of action is consistent with the bad faith strategy it has implemented in *Renco I*, where it intentionally delayed the assertion of the purported lack of consent to maximize the prejudice to claimants. In any event, in this case, Peru took its bad faith strategy a step further and obtained substantive relief from the Tribunal before objecting to the Tribunal's lack of jurisdiction based on a purported lack of consent. After availing itself of this Tribunal's jurisdiction, Peru cannot now object to the purported lack of jurisdiction.

37. In its Reply, Peru seems to admit that the doctrine of equitable estoppel bars a party from taking a position inconsistent with a prior statement or conduct when

(i) there is a clear and unequivocal statement or conduct; (ii) there is reliance on that statement or conduct by one party, and (iii) detriment to the party invoking the estoppel or advantage to the party who made the statement.<sup>46</sup> Nor does Peru deny that equitable estoppel applies to statements or conduct in litigation or arbitration under the theory of judicial estoppel. Peru claims that none of the three elements of judicial estoppel are satisfied here. That argument is meritless.

38. With respect to the first element clear and unequivocal conduct, Peru claims that “Peru had reserved its rights, thus Peru’s TPF Request does not count as a ‘clear and unequivocal statement of conduct.’”<sup>47</sup> In making this argument, Peru does not even cite the request dated September 25, 2020 where Peru asked the Tribunal to order Amorrortu “to disclose the names of any funder(s) with whom Mr. Amorrortu or [his ] legal representatives may have entered or plan to enter into an agreement in relation to the case; [t]o confirm that the funding agreement includes payment of an adverse cost award; [t]o provide copies of the relevant provision from the funding agreement[s] relating to (i) cost awards, (ii) aspects of the conduct, termination, or settlement of the present arbitration that require funder approval.”<sup>48</sup> The reason Peru did not cite any portion of this request in its argument is because this letter is a clear and unambiguous request for this Tribunal to grant the relief requested by Peru. Nothing in this letter raises or even mentions any form of special jurisdiction or objection to the arbitral consent that could remotely be construed as depriving this Tribunal of the authority to grant the requested relief.

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<sup>46</sup> Peru’s Reply on Preliminary Objections, 24 May 2021, ¶ 63.

<sup>47</sup> Peru’s Reply on Preliminary Objections, 24 May 2021, ¶ 63.

<sup>48</sup> Peru’s Letter to Tribunal Requesting Disclosure of Third Party Funder, 25 September 2020, p. 7.

39. To argue that the request is not clear and unambiguous, Peru has to go back to a vague and inchoate statement in its response to the NOA, which was filed almost six months before the request – on March 21, 2020 and which generally reserved the right to argue lack of jurisdiction “*ratione voluntatis, ratione personae, ratione materiae, and ratione temporis.*”<sup>49</sup> But of course Peru never objected to its arbitral consent prior to making the request. As such, the request is clear and ambiguous conduct where Peru avails itself of the arbitral authority of this Tribunal.

40. As to the second element (reliance), Peru argues that Amorrortu’s reliance argument is not credible. Peru takes issue and claims that “*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.*” The cursory manner in which Peru addresses this argument confirms its weakness. Peru cannot dispute that Amorrortu relied on Peru’s decision to avail itself of the Tribunal’s jurisdiction and complied with the Tribunal’s order. What Amorrortu had done if Peru had objected to its arbitral consent before making its request for relief is irrelevant. However, among other strategic options available to Amorrortu, he could have requested the Tribunal to adjudicate Peru’s objection before ruling on the request. Amorrortu complied with this Tribunal’s order without any question or objection because Peru never raised or questioned this Tribunal’s ability to adjudicate its request.

41. Peru’s argument as to third element (prejudice to Amorrortu or advantage to Peru) is intrinsically contradictory. Peru recognizes that the third element is satisfied

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<sup>49</sup> Peru’s Reply to Amorrortu’s Notice of Arbitration, 21 March 2020, ¶ 5.



with evidence of “*detriment to the party invoking the estoppel **or an advantage to the party who made the statement.**”<sup>50</sup> But in arguing that Amorrortu has failed to comply with the third element Peru ignores the second disjunctive component of this element and argues that “*Claimant was incapable of showing any detriment from having relied on Peru’s conduct.*”<sup>51</sup> Peru goes on to argue that “*Peru’s benefit from Amorrortu’s disclosure, if any, is irrelevant and does not support an estoppel in this case.*”<sup>52</sup> Of course, that is not the law. As Peru had recognized just a few sentences before the third element, that element is satisfied with evidence of detriment to the party invoking estoppel or benefit to the other party. Here, there is no question that Peru has obtained a significant benefit, which as Peru acknowledges it had been seeking from the inception of this dispute.<sup>53</sup> But of course, this benefit to Peru is in itself detrimental to Amorrortu’s strategy and as Amorrortu, in reliance of Peru’s conduct, gave to Peru the information that he had refused in the past.<sup>54</sup>*

42. As such, Objection 4 fails because Peru is estopped from arguing that the very same Tribunal that was asked by Peru to grant the relief solicited in the request without any objection to its arbitral consent and that granted said relief does not have Peru’s arbitral consent.

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<sup>50</sup> Peru’s Reply on Preliminary Objections, 24 May 2021, ¶ 63 (emphasis added).

<sup>51</sup> Peru’s Reply on Preliminary Objections, 24 May 2021, ¶ 63.

<sup>52</sup> Peru’s Reply on Preliminary Objections, 24 May 2021, ¶ 63.

<sup>53</sup> Peru’s Reply on Preliminary Objections, 24 May 2021, ¶ 63, fn. 112.

<sup>54</sup> Peru cites a number of arbitral decisions to show that arbitral tribunals have granted preliminary relief before adjudicating the respondent’s preliminary objections. But a close review of these authorities reveals that these decisions are not helpful to Peru. For example, in *Manuel Garcia Armas v. Venezuela*, the respondent had fully briefed the jurisdictional objections before it requested security for costs. That is very different from the situation here where Peru obtained relief from the Tribunal and did not even raise its lack of consent objections until long after it obtained the requested relief.

43. In the alternative, Objection 4 should be rejected on the grounds that Amorrortu's waiver was valid and/or that Amorrortu has cured its purported defective waiver. As explained in his Answer to Peru's Preliminary Objections, Amorrortu's waiver complied with the requirements of Article 10.18.2(b), and even if this waiver were defective, Amorrortu has – or should be allowed – to cure this purported defect. Amorrortu acknowledges that this position is contrary to the holding of *Renco I* – the very same decision that Peru has abused and weaponized in complete dereliction of the mandate of the tribunal – and respectfully disagrees with this portion of the holding of *Renco I*.

44. In another inconsistency in Peru's arguments, Peru argues in its Reply that Amorrortu "*may have been able to amend his arbitration and cure his defective waiver prior to the submission of his Statement of Claim*".<sup>55</sup> But Peru does not explain why Amorrortu would not be allowed to withdraw its Statement of Claim and submit the requested waiver. Nor does Peru explain how the Tribunal can adjudicate whether Amorrortu has a claim for which an award can be issued but cannot even consider Amorrortu's alternative motion for leave to amend. These internal contradictions confirm that Objection 4 fails and that Peru's attempt to weaponize and abuse the holding of *Renco I* is contrary to law.

#### **IV. PRAYER FOR RELIEF**

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

- 1) reject Objections 1 and 4;

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<sup>55</sup> Peru's Reply on Preliminary Objections, 24 May 2021, ¶ 92.

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

DATE: June 21, 2021

By: /s/ Francisco A. Rodriguez  
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