

PCA Case No. 2020-11

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

- and -

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

- between -

BACILIO AMORRORTU (USA)

(the “Claimant”)

- and –

THE REPUBLIC OF PERU

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

Claimant’s Post Hearing Brief

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I. INTRODUCTION

Bacilio Amorrortu (*Bacilio Amorrortu* or the *Claimant*) commenced this arbitration to denounce the pervasive corruption that frustrated his investment in Peru. In his Statement of Claim, Amorrortu made clear that the President of Peru, the First Lady, and PeruPetro orchestrated a scheme to award Blocks III and IV (*Block III* and *Block IV*, together the *Blocks*) of the Talara Basin to Graña y Montero under a façade of legitimacy. This scheme had two major phases that are relevant to this case: (i) a rigged international public bidding process (the *International Public Bidding Process*) designed to anoint Graña y Montero as the only qualified bidder, and (ii) the illegitimate suspension of the direct negotiation process (the *Direct Negotiation Process*) that Amorrortu had commenced through his company Baspetro. Both of these phases were infested with corruption.

Peru's exercise of its discretion to contract in furtherance of a corruption scheme is by definition a violation of the Fair and Equitable Treatment to which Amorrortu was entitled under the United States-Peru Trade Promotion Agreement (the *USPTA* or the *Treaty*). Therefore, Amorrortu's claim is "a claim for which an award in favor of the claimant may be made under Article 10.26."¹

At the preliminary objections hearing on August 9, 2021 (the *Preliminary Objections Hearing*), Peru (the *Republic of Peru* or *Peru* or the *State*) tacitly admitted that this was the case. Peru did not deny that a state that uses its discretion to contract in a corrupt, arbitrary, and capricious manner violates its Fair and Equitable Treatment obligations. This is fatal to Objection 1 because Amorrortu's factual allegations of corruption, which extended to all aspects of the rigged process that resulted in a choreographed award to Graña y Montero must be assumed to be true.

¹ USPTA Investment Chapter (*CLA-1*), Art. 10.20(4).

Amorrortu has the right under the USPTPA to present evidence to this Tribunal that, in the absence of corruption, he would have obtained the contract to operate and exploit Blocks III and IV.

Peru claims that Amorrortu failed to comply with a number of qualification requirements of the Direct Negotiation Process. But this argument misses the mark because PeruPetro failed to comply with its obligation (i) to respond to Amorrortu's Direct Negotiation proposal (the *Baspetrol Proposal*), and (ii) to give Amorrortu the opportunity to cure any purported deficiency of the Baspetrol Proposal. Indeed, the Baspetrol Proposal was simply shelved in a clear violation of Peru's own domestic law, all in furtherance of the corrupt scheme to award the contracts to Graña y Montero.

Objection 4 is equally improper and frivolous. As explained during the Preliminary Objections Hearing, this case is not *Renco I*². In *Renco I*, the jurisdiction of the tribunal was never invoked by Peru. Here, Peru availed itself of the jurisdiction of the Tribunal when it successfully requested this Tribunal to compel Amorrortu to disclose information about the funding of this case. Critically, this request was made just a few days after Amorrortu accepted Peru's offer of arbitration by submitting his Statement of Claim, and Peru did absolutely nothing to contest the jurisdiction of this Tribunal after this critical date. Further, unlike in *Renco I*, this Tribunal is vested with the inherent power to control the timeframe for the acceptance of Peru's offer to arbitrate; and therefore, this Tribunal can allow Amorrortu to supplement his waiver, to the extent a supplemental waiver is necessary. The inherent power to set the date for the submission of the Statement of Claim establishes by corollary the power to set the date for any necessary amendment.

² *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).

Therefore, Objections 1 and 4 must both be denied, and Amorrortu should be awarded its fees and costs under Article 10.20(6).³ Specific answers to the Tribunal’s post-hearing questions are set forth below.

II. FIRST OBJECTION – STATEMENT OF CLAIM DISCLOSES NO CAUSE OF ACTION

A. MULTIPLE CLAIMS ARE MADE

- 1) *If, as the Respondent argues, the Claimant’s proposal for Direct Negotiation dated May 28, 2014 was non-compliant with GFCN 008 (Exhibit CLA-044) is the Tribunal nevertheless seized of claims based on alleged corruption in manipulating (i) the direct negotiation process, and (ii) the public tender process? In other words, if the corruption claims are to be taken as alleged, must the Article 10.20.4 application be dismissed?*

1. Absolutely **yes. Corruption permeates every issue in this case**, and specifically, corruption infested the two phases of the rigged process that concluded with the award of the contracts for Blocks III and IV to Graña y Montero. Peru violated the USPTPA’s Fair and Equitable Treatment obligations when it exercised its discretion to contract an oil company to service and operate Blocks III and IV in furtherance of a corruption scheme. That claim stands irrespective of whether a direct negotiation process was ever commenced.

2. 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.*”⁴ *EDF* makes clear that the exercise of a state’s discretion to contract in furtherance of corruption is a violation of the FET. Indeed, allegations of corruption “*raise an issue of international public policy, which the Tribunal must address ex officio.*”⁵

³ USPTPA Investment Chapter (CLA-1), Art. 10.20(6).

⁴ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, (Rovine, Derains, Bernardini), (CLA-4), ¶ 221; Statement of Claim, 11 September 2020, ¶¶ 121, 315; Claimant’s Rejoinder on Peru’s Preliminary Objections, 21 June 2021, ¶ 19.

⁵ *Infinito Gold Ltd v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, (Kaufmann-Kohler, Hanotiau, Stern), (CLA-111), ¶ 178.

3. 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.*”⁶ As its Legislative History confirms, this anti-corruption promise in the Preamble permeates the entire Treaty to the point that Section B of Chapter 19 is titled “Anti-Corruption.”

4. At the Preliminary Objections Hearing, Peru suggested that “*the issue of corruption is not relevant to the questions presented in this preliminary objection.*”⁷ But that argument ignores the essence of Amorrortu’s claim for breach of the Fair and Equitable Treatment obligations. Corruption is at the heart of the rigged International Public Bidding Process, and corruption is at the heart of the aborted Direct Negotiation Process. The argument that corruption is not relevant to Objection 1 is further confirmation that Objection 1 is focused on Amorrortu’s claim for damages, not on whether Amorrortu’s claim is a claim for which an award can be issued under Article 10.26.

5. Peru also suggested that “*Amorrortu ha[d] presented no credible evidence*” of corruption as to Blocks III and IV.⁸ This is another argument that simply ignores the factual

⁶ USPTPA Preamble (CLA-2) and USPTPA Chapter Nineteen (CLA-42), Art. 19.7; Statement of Claim, 11 September 2021, ¶¶ 327-328; Claimant’s Rejoinder on Peru’s Preliminary Objections, 21 June 2021, ¶ 21.

⁷ Transcript, Preliminary Objections Hearing, p. 20, lines 7-9 (Figueroa). Indeed, when questioned about whether he had factored in his expert analysis the allegations of corruption made by Claimant, Peru’s expert, Carlos Raúl Vizquerra answered that he “*was not aware of that. That [that] was not considered in [his] analysis.*” See *id.*, p. 138, lines 24-25 – p. 139, lines 1-5 (Vizquerra).

⁸ Transcript, Preliminary Objections Hearing, p. 20, lines 4-5 (Figueroa).

allegations at issue in this arbitration, all of which must be assumed as true. The evidence of corruption here is simply overwhelming. As pled in the Statement of Claim, Graña y Montero's records confirm that its 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 The dates of these meetings correspond to critical developments in the corrupt public bidding process.

6. Indeed, Peru's own expert, Carlos Raúl Vizquerra (*Expert Vizquerra*) admitted that the First Lady influenced the process to award government contracts during the Humala administration.¹⁰

7. Peru has not (and cannot) deny that:

- a. The President of Peru, together with his advisers, concocted a plan to award government contracts to Graña y Montero through a rigged International Public Bidding Process in which Graña y Montero was the only qualified bidder;
- b. Graña y Montero paid millions of dollars in bribes to obtain any government contract it requested;
- c. The vast majority of contracts awarded during this period to Graña y Montero were awarded consistent with this corruption scheme: (1) a facially legitimate public bidding process where (2) all competitors of Graña y Montero failed to qualify and (3) Graña y Montero was the only qualified bidder;
- d. Amorrortu, through Baspetro, commenced the Direct Negotiation Process before the International Public Bidding had been announced or decided;
- e. PeruPetro, contrary to its own practices and procedures, decided to open Blocks III and IV for the International Public Bidding Process without evaluating the Baspetro Proposal;
- f. The two other companies interested in participating in the International Public Bidding Process for Blocks III and IV were disqualified;
- g. Graña y Montero did not comply with the qualification requirements for the International Public Bidding Process;
- h. The qualification requirements were amended to allow Graña y Montero to qualify;

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

¹⁰ Transcript, Preliminary Objections Hearing, p. 141, lines 7-25 – p. 142, lines 1-3 (Vizquerra).

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

j. Graña y Montero failed to comply with its contractual commitments, and that PeruPetro has ignored these violations.

8. Therefore, Peru cannot seriously contend that Amorrortu’s allegations that the International Public Bidding Process was a corrupt fiction created to give the selection of Graña y Montero apparent legitimacy is not supported by the evidence. Nor can Peru deny that the abrupt suspension of the Direct Negotiation Process commenced by Amorrortu was motivated by corruption. Given this evidence of corruption, this Tribunal has jurisdiction to adjudicate Amorrortu’s claims irrespective of whether the Baspetro Proposal dated May 28, 2014 was non-compliant with GFCN 008 (Exhibit CLA-044).

9. Indeed, the purported failures to comply with PeruPetro’s administrative procedures and regulations have been waived, as PeruPetro never responded to the Baspetro Proposal and never gave Amorrortu an opportunity to cure.

2) *Is declaratory relief an available remedy with respect to the Claimant’s claims regarding direct negotiation and/or the public tender?*

10. Yes. “*Declaratory relief is a common form of relief in international tribunals in state-to-state cases . . .*”¹¹ Albeit less common, declaratory relief is also a remedy in investor-state

¹¹ *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, (Lew, Levy, McRae), (CLA-112), ¶ 148, (emphasis added). See, e.g. *Northern Cameroons Case*, Cameroon v. United Kingdom, Judgment of 2 December 1963, (CLA-113), p. 37 (“*That the Court may, in an appropriate case, make a declaratory judgment is indisputable*”); *Case Concerning Certain German Interests in Polish Upper Silesia*, Germany v. Poland, PCIJ (Merits) 1926, (CLA-114), ¶ 52 (“*[T]here is nothing to prevent the Court’s giving judgment on the question whether or not [...] Poland is acting in conformity with its obligations towards Germany under the Geneva Convention*”); *Haya de la Torre Case*, Colombia v. Peru, Judgment of 13 June 1951, (CLA-115), p. 16; *Asylum Case*, Colombia v. Peru, Judgment of 20 November 1950, (CLA-116), pp. 18, 26 (where the Court stated that making a declaration with respect to an alleged breach of the Havana Convention was part of the Court’s judicial duty to resolve the existing legal dispute between the Parties).

cases. As the *Quiborax v. Bolivia*¹² award noted “[t]he fact that some types of satisfaction are not available [in investor-State cases] does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 of the ILC Articles, if appropriate. Moreover, this is also a power inherent to the Tribunal’s mandate to resolve the dispute.”¹³ The *Quiborax* tribunal further reasoned that although declaratory relief may be treated as a form of satisfaction, it is not necessarily linked to the remedy of satisfaction.¹⁴ Rather, the determination by a tribunal that a conduct is unlawful may be preliminary to a decision on any form of reparation, or it may be the only remedy sought by a party.¹⁵

11. This case falls under the types of cases where declaratory relief is part of the relief requested. Amorrortu is asking the Tribunal (i) to declare that Peru violated the Fair and Equitable Treatment obligations when it awarded Blocks III and IV to Graña y Montero in furtherance of a corruption scheme **and** (ii) to compensate Claimant for the losses caused by this breach. Therefore, declaratory relief is an available remedy in this action. A declaration that Peru has violated its Fair and Equitable obligations under the USPTPA is a preliminary decision to the compensatory damages to which Amorrortu is entitled.¹⁶

12. Article 10.16(1)(a) is not to the contrary. Article 10.16(1)(a)(ii) sets forth the requirements to submit a claim to arbitration under the Treaty. But it does not limit the Tribunal’s

¹² *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, (Lalonde, Stern, Kaufmann-Kohler), (CLA-117), ¶¶ 560-562.

¹³ *Id.* ¶ 560.

¹⁴ *Id.* at ¶ 560; Commentary to the ILC Articles, Article 37, ¶ 6.

¹⁵ *Id.* ¶ 6.

¹⁶ Critically, declaratory relief in itself will not redress the damage caused to Amorrortu by the rampant corruption that prevented him from participating in a transparent and good faith Direct Negotiation Process and the International Public Bidding Process. To render an award consisting only of a declaratory relief will not afford the Claimant a concrete redress, rather a purely theoretical satisfaction.

authority to grant any relief it deems justified and appropriate based on the claims submitted to arbitration.

B. THE ESTOPPEL ISSUE

1) *The Tribunal invites submissions on the Respondent's argument that there can be no estoppel even if CEO Ortigas did make such a proposal, because a company official cannot waive compliance with legal requirements that were entrenched in regulations and of which Mr. Amorrortu had notice*

13. As alleged in the Statement of Claim, the President of PeruPetro, Luis Ortigas (**Ortigas**), instructed Amorrortu to prepare a proposal for direct negotiation for the operation of Blocks III and IV and submit it within five days.

14. This instruction, which presupposes the availability of Blocks III and IV, does not violate any entrenched procedure of PeruPetro. On the contrary, this instruction is within the scope of Ortigas' authority.

15. Ortigas, as President and the highest executive of PeruPetro, had a Power of Attorney from Peru to manage Peru's resources and to bind Peru in the management of those resources. Amorrortu's expert, Aníbal Quiroga León (**Expert Quiroga**) made this clear at the Preliminary Objections Hearing. Expert Quiroga explained that: "*Mr. Ortigas has a Power of Attorney for the State to manage the State's resources, and he is the now the CEO of PeruPetro. PeruPetro issues an instruction. There is no authority above him that could contradict him. If you recall the communication that I read of May 28, Amorrortu says, within the time and date that you indicated—that is, Ortigas even said, you have up to May 28, by 9:00 a.m., and he said 'I'm sending the communication at 8:20' so there couldn't be any more specificity. So, here it is said that – just the regulation and the laws, I am a public official. But if the public officials representing the State are representatives of the State and they commit the State in the management of the*

resources because they are going to interpret things one way or the other, whether they work with corporations or individuals."¹⁷

16. PeruPetro was created by Law No. 26221 in 1993.¹⁸ As stated on PeruPetro's own website, PeruPetro is a **state company**, which **on behalf of Peru**, is in charge of promoting, negotiating, signing and supervising contracts for the exploration and exploitation of hydrocarbons in Peru.¹⁹ PeruPetro, as well as its President or CEO Ortigas, is, therefore, empowered by the law of Peru to exercise, on behalf of Peru, elements of governmental authority. Ortigas had the authority to invite Amorrortu to submit a direct negotiation proposal for Blocks III and IV. Indeed, inviting oil companies to invest in the Talara Basin was part of his duties as President of PeruPetro.

17. Peru argues that Ortigas could not request Amorrortu to submit a direct negotiation proposal for blocks that were already committed to a public bidding process. However, at the time Ortigas asked Amorrortu to submit the Baspetro Proposal, PeruPetro had not even approved the terms and conditions of the International Public Bidding Process. Expert Vizquerra conceded this much in cross-examination.²⁰ The terms were not approved until June 30, 2014,²¹ that is, almost a month after Ortigas had represented to Amorrortu that the Blocks were available, and that Amorrortu should prepare and file the Baspetro Proposal with PeruPetro.

18. In April of 2014, PeruPetro's Board of Directors allegedly determined to conduct a selection process for Blocks III and IV. However, a selection process is not inconsistent with the

¹⁷ Transcript, Preliminary Objections Hearing, p. 196, lines 3-18 (Quiroga).

¹⁸ PeruPetro, *¿Quienes Somos?*

https://www.perupetro.com.pe/wps/portal/corporativo/PerupetroSite/perupetro%20s.a./quienes%20somos!/ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfljo8zi_YxcTTw8TAy93AN8LQwCTUJcvEKADF8DE_1wsAIDHMDRQD8Kj34fA6h-HAoCjczw6Xf1NsGvH2RBFDHux2MBJe4HWRCFP3jC9aMIKYnC54ZAH3MCCoBhGJxarF-QGwoEEQaZAemKABjhqVw!/dz/d5/L2dBISEvZ0FBIS9nQSEh/ (last accessed on 2 September 2021).

¹⁹ *Id.*

²⁰ Transcript, Preliminary Objections Hearing, p. 161, lines 7-25 – p. 162, lines 8-9 (Vizquerra)

²¹ PeruPetro Board Agreement No. 071-2014, 30 June 2014, (C-36).

Direct Negotiation Process. After all, a direct negotiation process is one of the two selection processes authorized by law for contracts granting rights over Peru's oil fields.²² Peru has failed to cite any authority suggesting that a mere declaration by the Board of Directors of PeruPetro of its intention to commence a selection process for Blocks III and IV renders these blocks unavailable for direct negotiation and divests Ortigas of his authority to request the submission of a direct negotiation proposal. The fact is that nothing in PeruPetro's internal regulations prevented Ortigas from instructing Amorrortu to submit a direct negotiation proposal. Therefore, Ortigas' instructions, statements, and implicit promises to Amorrortu were made within Ortigas' scope of authority and bind Peru.

- 2) *The Tribunal invites submission on the Claimant's argument that as a result of the "instruction" of CEO Ortigas the expectations of Mr. Amorrortu that his proposal for direct negotiation and his subsequent bid in the public tender would be processed in a fair and non-corrupt manner were reasonable and legitimate, and their rejection violated FET*

19. Amorrortu had the reasonable expectation that the Baspetro Proposal that he submitted at the request and in reliance of statements made by Ortigas would be considered in good faith in a process free of corruption and consistent with Peru's Fair and Equitable Treatment obligations.

20. The elements of a claim of reasonable expectations are well established. In the context of Ortigas' representations Amorrortu has to prove that (i) Peru made a promise or assurance; (ii) Amorrortu relied on that promise or assurance as a matter of fact; and (iii) such reliance was reasonable.²³ As the *Micula* tribunal explained: "[t]here must be a promise, assurance or representation attributable to a competent organ or representative of the state, which

²² Peru's Submission on Preliminary Objections, 15 March 2021, ¶ 40.

²³ *Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, (Alexandrov, Abi-Saab, Levy), (CLA-75), ¶ 668.

may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability. It is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance. The element of reasonableness cannot be separated from the promise, assurance or representation, in particular if the promise is not contained in a contract or is otherwise stated explicitly. Whether a state has created a legitimate expectation in an investor is thus a factual assessment which must be undertaken in consideration of all the surrounding circumstances.”²⁴ “The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.”²⁵

21. Here, there is no question that Peru is bound by Ortigas’ representations and the promises that he directly and indirectly made when he instructed Amorrortu to submit a direct negotiation proposal. Peru is a juridical person, as such, the threshold question is whether the acts by Ortigas instructing Amorrortu to assemble the Baspetro Proposal for Blocks III and IV, the subsequent receipt of the Baspetro Proposal by PeruPetro, the failure by PeruPetro to provide any observations to the Baspetro Proposal (which created reasonable expectations in Amorrortu that a good faith direct negotiation process with PeruPetro had begun), can be attributed to Peru. The answer is **absolutely yes**.

22. An initial step into answering this question can be readily found in the USPTPA itself. Indeed, Article 10.1.2 of the USPTPA states, in relevant part that:

²⁴ *Id.* ¶ 669.

²⁵ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, (Gomez-Pinzon, Jan van den Berg, Kaufmann-Kohler), (CLA-22), ¶ 340.

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

(USPTPA Chapter Ten (CLA- 1), Art. 10.1.2).

23. In analyzing Article 1503(2) of NAFTA, which is similar to Article 10.1.2 USPTPA, the *Windstream v. Canada* tribunal found that under NAFTA, the conduct of persons or entities such as state enterprises, which are not formal organs of the state, can only be attributable to the state if the person or entity in question is exercising governmental authority in the particular instance. The *Windstream v. Canada* tribunal further reasoned that, Article 1503(2) of NAFTA “is consistent with Article 5 of the ILC Articles, which further specifies that ‘[t]he conduct of a person or entity which is not an organ of the State . . . but which is empowered by the law of the State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.’ In other words, the conduct of persons or entities such as State enterprises which are not formal organs of the State can only be attributable to the State if the person or entity in question is exercising governmental authority in the particular instance.”²⁶

24. When Ortigas instructed Amorrortu to present the Baspetro Proposal, he was exercising the discretion and governmental authority vested in him as president of PeruPetro. Therefore, any promises or statements made by Ortigas are, in all practical sense, promises or statements made by Peru.

²⁶ *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, (Bishop, Cremades, Heiskanen), (CLA-118), ¶ 233.

25. Here, there is no question that Amorrortu relied on these promises and statements, returned to his base of operation in Houston, and submitted the Baspetro Proposal as instructed.

26. Amorrortu's expectations based on Ortigas' promises and statements were reasonable. After all, the representations were made by the highest authority of PeruPetro in a subject within the scope of his duties. Even if Ortigas was somehow acting outside of the scope of his authority and contrary to the decisions of the Board of Directors of PeruPetro, Amorrortu had no reason to know that this was the case, as the terms for the International Public Bidding Process had not been determined, let alone announced. A simple reference to a selection process in the *whereas* section of a document about the temporary extension of the contract with Interoil is patently insufficient to constitute constructive notice to Amorrortu that Ortigas was purportedly acting in violation of the decision of the Board of PeruPetro, particularly because as explained above a direct negotiation process is consistent with the selection process adopted by the Board of Directors.

27. Given that Ortigas' representations and statements were within the scope of his authority, the expectations of Amorrortu that the Baspetro Proposal for Direct Negotiation and his subsequent bid in the public tender would be processed in a fair and non-corrupt manner were reasonable and legitimate, and their rejection violated FET.

C. THE 28 MAY 2014 BASPETROL PROPOSAL

1) *What is the textual basis for the proposition that failure to respond within 10 days results at most in administrative action against officials? The text of Article 14 of the Qualification Regulations (GFCN-006 – Exhibit CLA 003) seems silent on the point*

28. There is no textual basis for Respondent's proposition that the only consequence of its failure to respond to Amorrortu within ten (10) days is the administrative liability of the involved PeruPetro officials.

29. PeruPetro's Qualifications Regulations, GFCN-006, does not corroborate this creative assertion.²⁷ Without a textual basis to support such a proposition, the government official may be liable, but more importantly for this case, PeruPetro loses the right to contest the qualification of the Baspetro Proposal as a direct consequence of its administrative silence. As observed on PeruPetro's own flow chart, Step 4 of the Oil Company Qualification Process requires a review of the documents submitted along with the letter of proposal, with the next steps to be determined based upon the documentation received. If the documentations is insufficient, for whatever reason, PeruPetro has the outright and clear obligation to send a letter, signed by the General Management, notifying the applicant and granting the same a maximum of 30 calendar days, to be counted beginning on the date of receipt of the communication, to present the missing documents or to supplement the documents already shared, pursuant to Article 10 of the Qualification Procedures.²⁸ Evidently, PeruPetro failed to do so.

30. On the other hand, if the documents were sufficient, and here it is important to remember that Amorrortu submitted the Baspetro Proposal, which was personally requested by Ortigas from Amorrortu, PeruPetro had 10 business days to evaluate the competency of the Baspetro Proposal and issue the qualification.²⁹ Peru cannot dispute that (i) PeruPetro officials had actual knowledge of the Baspetro Proposal, and (ii) that PeruPetro failed to follow their own

²⁷ Second Expert Report of Anibal Quiroga, 26 April 2021, (CER – 2 [Quiroga]), ¶ 3 (explaining the effect of the textual meaning of Art. 14 of the Regulation for Qualification of Oil Companies, August 18, 2004: “*The comprehensive and systematic interpretation of Article 14 of the Regulation of Qualification of Oil Companies, in accordance with the basic principles of legal interpretation, and not the biased and partial comments made in [Respondent’s] Expert Report, truly reveals that said provision must be understood in the following sense: [i]f within ten (10) days of filing the application, there are no remarks, errors, omissions or requests for information formulated by the competent authority, it will be bound to grant the qualification of the applicant company. This constitutes an express obligation that the competent authority infringed, given that, despite the fact that Mr. Amorrortu, in his capacity as owner of BASPETROL S.A.C., submitted his request for direct negotiation on Blocks III and IV, and did not receive a timely response, nor has it obtained any response to date.*”).

²⁸ PeruPetro Procedure GFCN-006, (CLA-3) Qualification of Oil Companies, p. 6.

²⁹ See *id.*

Qualification Procedures to the detriment of Claimant and to the unlawful benefit of Graña y Montero. This failure in essence prevents PeruPetro from denying Baspetro the required qualification to subscribe the contracts for Blocks III and IV.

2) *What is to preclude both “administrative liability” for officials and acquisition by a Claimant of entitlement to have the application considered on its merits?*

31. Nothing precludes both administrative liability for PeruPetro officials and Claimant’s right and entitlement to have the Proposal, **which was personally requested by Ortigas**, considered on its merits. As recognized by the Tribunal, Claimant submitted a 16 page Proposal to PeruPetro. This Proposal was submitted as a result of a request by Ortigas. Peru can establish and investigate administrative liability as part of PeruPetro’s internal processes to prevent such a situation from occurring again in the future. However, Peru’s procedures under domestic law to punish its officials has no bearing on Claimant’s rights under the USPTPA.

32. The failure of PeruPetro to comply with its administrative requirements and complete the Direct Negotiation Process that Amorrortu had commenced has serious consequences that are fundamental to Amorrortu’s claim that in the absence of corruption, Baspetro would have received the contracts for Blocks III and IV.

D. WAS THE CORPORATE “QUALIFICATION” A CONDITION PRECEDENT OR CONDITION SUBSEQUENT TO DIRECT NEGOTIATION?

1) *The Tribunal invites submissions on whether a failure by the Claimant to satisfy particular regulatory requirements (e.g. the Respondent says Perupetro never exercised its discretion to start direct negotiations) is fatal to a claim that the process was in any event “rigged” to exclude Baspetro in favour of Graña y Montero. Is it true that “corruption unravels all”?*

33. But for PeruPetro’s corruption, Amorrortu would have been given the statutorily required opportunity to cure any purported deficiency in the Baspetro Proposal and ultimately

would have been awarded the contracts to operate Blocks III and IV.³⁰ Here, **corruption unravels all.**

34. As alleged in the Statement of Claim, Graña y Montero has admitted that the President of Peru, together with his advisers, concocted a plan to award government contracts to Graña y Montero through rigged public bidding processes in which Graña y Montero was the only qualified bidder.³¹ This corruption scheme permeated the entire public bidding process from its inception to its end, to the point that “*during the government of Ollanta Humala Tasso, the companies of the Graña y Montero Group had the privilege that the Bidding Rules were designed in a fraudulent manner . . . avoiding all kind of competition. [When] other bidders were present, they were discriminated against, with no response or with responses with no support or with apparent support.*”³² Graña y Montero paid millions of dollars in bribes to obtain any government contract it requested pursuant to this plan. Not surprisingly, 60% of these contracts were awarded with Graña y Montero as the sole qualified bidder.³³ These contracts were awarded to Graña y Montero consistent with the pre-conceived phases of the Corruption Scheme:³⁴ (1) a facially legitimate public bidding process where (2) all competitors of Graña y Montero fail to qualify and (3) Graña y Montero is the only qualified bidder.³⁵

35. In the case of Blocks III and IV, the entire process was plagued with irregularities, all of which confirm that these contracts were part of the Corruption Scheme. Indeed, PeruPetro

³⁰ Claimant’s Statement of Claim, 11 September 2020, ¶¶ 75, 88, 157, 164.

³¹ *Id.* ¶ 265.

³² *Id.*

³³ *Id.* ¶ 265.

³⁴ As explained by doctor Francisco Durand, Ph.D. (**Dr. Durand**), “*Graña y Montero, as a group, and Jose Graña as CEO, developed a corruption scheme [(the **Corruption Scheme**)], which was considerably dependent on Graña y Montero’s ability to exercise undue influence on the government.*” See First Expert Report of Doctor Jose Francisco Durand, Ph.D., 9 September 2020 (**CER – I [Durand]**), ¶ 41.

³⁵ Claimant’s Statement of Claim, 11 September 2020, ¶¶ 269, 270.

amended the Bidding Rules to allow Graña y Montero to qualify.³⁶ Peru cannot deny that José Graña Miró Quesada met with First Lady Nadine Heredia, ‘NdH’, prior to the publication of the Terms and Conditions.³⁷ Peru cannot deny that the Rules of the International Public Bid No. PERUPETRO-001-2014 to Grant the License Contract for the Exploitation of Hydrocarbons in Block III were illegally modified, when an official, identified as Oscar Miró Quesada Rivera, intervened in them, with no competence to receive comments and propose changes.³⁸ Peru cannot deny that the modifications to the Rules of the International Public Tender No. PERUPETRO-001-2014 to Grant the License Contract for the Exploitation of Hydrocarbons in Block III, favored the bidder Graña y Montero S.A.A.³⁹ The agenda of some of the executives of Graña y Montero have all but confirmed that Blocks III and IV were part of the Corruption Scheme and indeed were the subject of discussions between Nadine Heredia and the executives of Graña y Montero.⁴⁰

36. The architects of the Corruption Scheme had to deal with the Direct Negotiation Process that Amorrortu, through Baspetro, had commenced. And what did they do? They shelved the Baspetro Proposal, and aborted the process. There was no justification to abort the Direct Negotiation Process with Amorrortu when Baspetro was led by Amorrortu with his history of success in the Talara Basin. Critically, PeruPetro did not deny or reject the Direct Negotiation Proposal in all likelihood because doing so would have prolonged the process, as Amorrortu was

³⁶ *Id.* ¶ 271.

³⁷ *Id.* ¶ 272.

³⁸ *Id.* ¶ 272.

³⁹ *Id.*

⁴⁰ *Id.* ¶ 273. As explained by Dr. Durand, the agenda of Jose Graña confirms that on April 28, 2014, he met with Nadine Heredia to discuss “*business*.” This meeting takes place approximately a month before PeruPetro shelved Baspetro’s Direct Negotiation Proposal to conduct a rigged public bidding process. Further, there was another meeting on February 10, 2015 explicitly to discuss “Blocks III and IV” two months after Graña y Montero had purportedly won the bid for the Blocks as the only qualified company and two months before the execution of the contract to operate the Blocks, in which PeruPetro surprisingly, and acting against its own interest, ceded its 25% ownership in the operate to Graña y Montero. See G. Castañeda Palomino, *Gasoducto del Sur case: the prosecutor’s office has an agenda with the meetings of José Graña, Jorge Barata and Nadine Heredia*, 31 August 2020 (C-34).

entitled to the opportunity to cure and appeal any administrative decision. Any alleged or perceived “*failure*” by Claimant to “*satisfy particular regulatory requirements*” cannot be said to be fatal to Claimant’s contention that the processes at issue were rigged in favor of Graña y Montero because (a) PeruPetro had an obligation to reject or communicate to Amorrortu any issues concerning the Baspetro Proposal for qualification within 10 (ten) days, and in failing to do so, allowed for the confirmation that there were no issues with said Proposal, consequently being bound to grant qualification and certification regarding same, (b) to date, Amorrortu has not received a response to the Baspetro Proposal to obtain the exploitation license for Blocks III and IV, inclusive of requested documents,⁴¹ on May 28, 2014,⁴² and (c) Graña y Montero was a noncompliant entity whose directors have since confessed of paying bribes to the Peruvian government for alleged “*contributions to political campaign.*”⁴³ Therefore, corruption unravels all here. Corruption deprived Amorrortu of the opportunity to cure any purported deficiency in the Baspetro Proposal and to ultimately receive the contracts for Blocks III and IV.

37. Under a plain and simple reading of the Regulations of Qualification of Oil Companies, Articles 9, 10, and 14, the Administrative Authority had to evaluate the requirements for qualification and communicate any pertinent observations within a *maximum* of ten (10) days of the filing of the Baspetro Proposal to Amorrortu. Without any shared observations,

⁴¹ Critically, the documents that made up Amorrortu’s proposal for Direct Negotiation submitted on May 28, 2014, where personally and specifically requested and delineated by Mr. Ortigas Cuneo, Chairman of the Board of Directors of PeruPetro. Thus, the documents submitted as part of the proposal were not lacking in compliance, but were instead direct responses and documents addressing PeruPetro’s request vis-à-vis Mr. Ortigas Cuneo. See Rejoinder to Defendant’s Reply Report of Anibal Quiroga, 21 Junio 2021, (CER – 3 [Quiroga]), ¶ 37.

⁴² The only response received was an invitation to participate in International Public Tender No. PERUPETRO-001-2014-LOTE III and in International Public Tender PERUPETRO-001-2014-Lote IV. In fact, as conceded by the General Manager of PeruPetro S.A., Ms. Isabel Mercedes Tafur Marín, the Notice of the International Bidding for Lots III and IV was given on July 14, 2014, after Baspetro’s proposal for direct negotiation was submitted on May 28, 2014. See Letter No. GGRL-CONT-GFCN-0125-2014, and CER – 3 [Quiroga], ¶ 5.

⁴³ CER – 2 [Quiroga], ¶ 49.

Amorrortu's Baspetro Proposal had the right to obtain the qualification and the Authority was under obligation to grant it.⁴⁴ Therefore, any perceived or alleged "*failures*" by Claimant to satisfy particular regulatory requirements had to be expressly communicated to Claimant pursuant to Article 14 of the Regulation, which obviously did not happen here. Indeed, Graña y Montero was impermissibly favored notwithstanding their noncompliance with technical requirements which had been duly and fully satisfied by Amorrortu in the Baspetro Proposal.⁴⁵

38. PeruPetro's complete silence and abject failure to provide notice of any error, omission or to request additional information leads to the conclusion that Peru adopted an arbitrary, capricious and unjustified refusal to grant Baspetro the qualification to continue with the Direct Negotiation Process for the granting of a license for the exploitation of Blocks III and IV.⁴⁶ Indeed, PeruPetro's inexplicable administrative silence confirms Claimant's allegations that the Direct Negotiation Process was unlawfully rigged by corruption with the intent to exclude Baspetro in favor of Graña y Montero from the very beginning and for no justifiable reason. Corruptions does indeed unravel all.⁴⁷

39. Further, PeruPetro's own guidelines establish that the qualification requirement is not a condition precedent to start the Direct Negotiation Process. As Expert Quiroga explained at the Preliminary Objections Hearing, qualification is a step that is subsumed within the direct negotiation process and that must be satisfied in parallel or concurrently with other steps in the flow chart in PeruPetro's own Rules and Procedures.⁴⁸

⁴⁴ Regulations for the Qualification of Oil Companies, August 18, 2004, CLA-3.

⁴⁵ CER – 2 [Quiroga], ¶ 49.

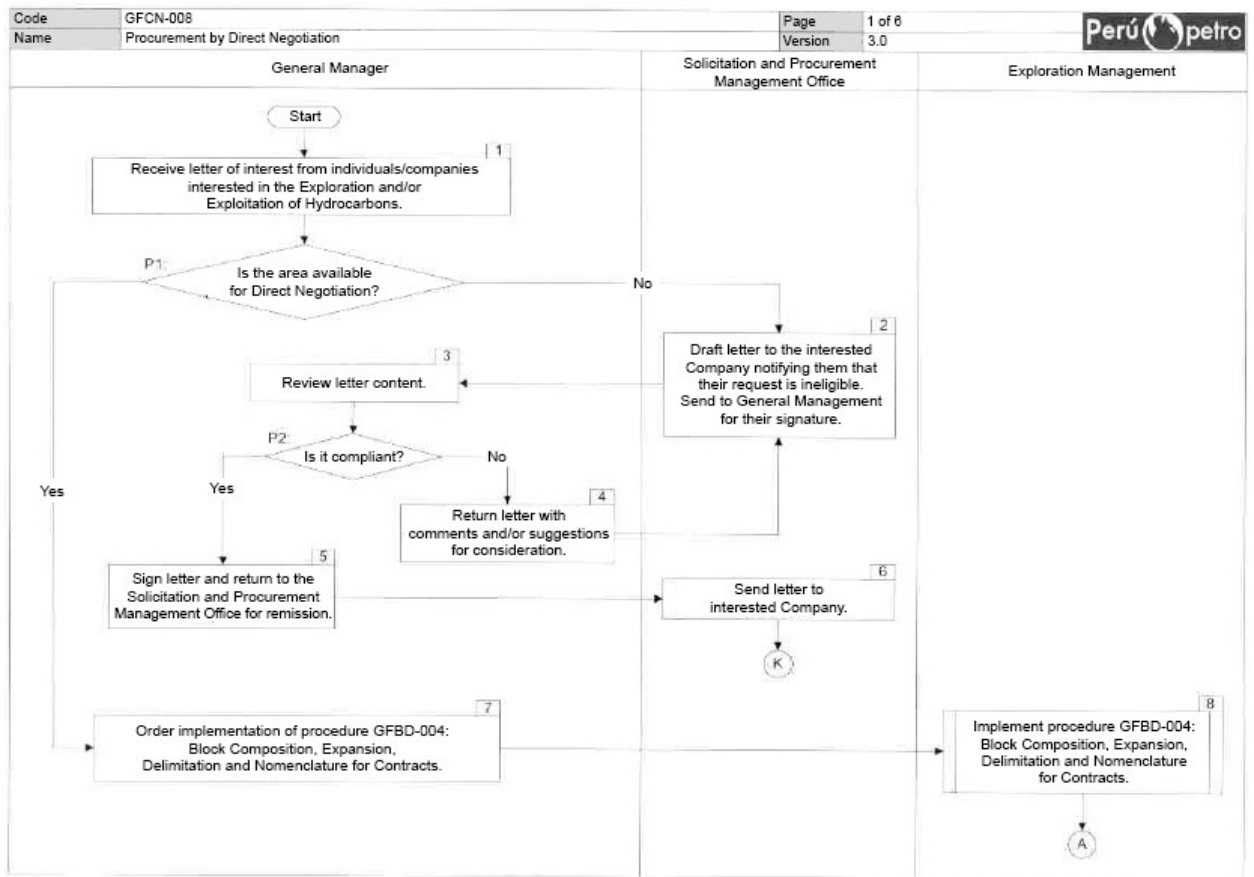
⁴⁶ *Id.* ¶ 22.

⁴⁷ *Id.* ¶¶ 19-21 (quoting the Regulation, Art. 14) ("*PeruPetro S.A. is bound to grant the Qualification of the Petroleum Company, within ten (10) working days from the receipt of the application.*").

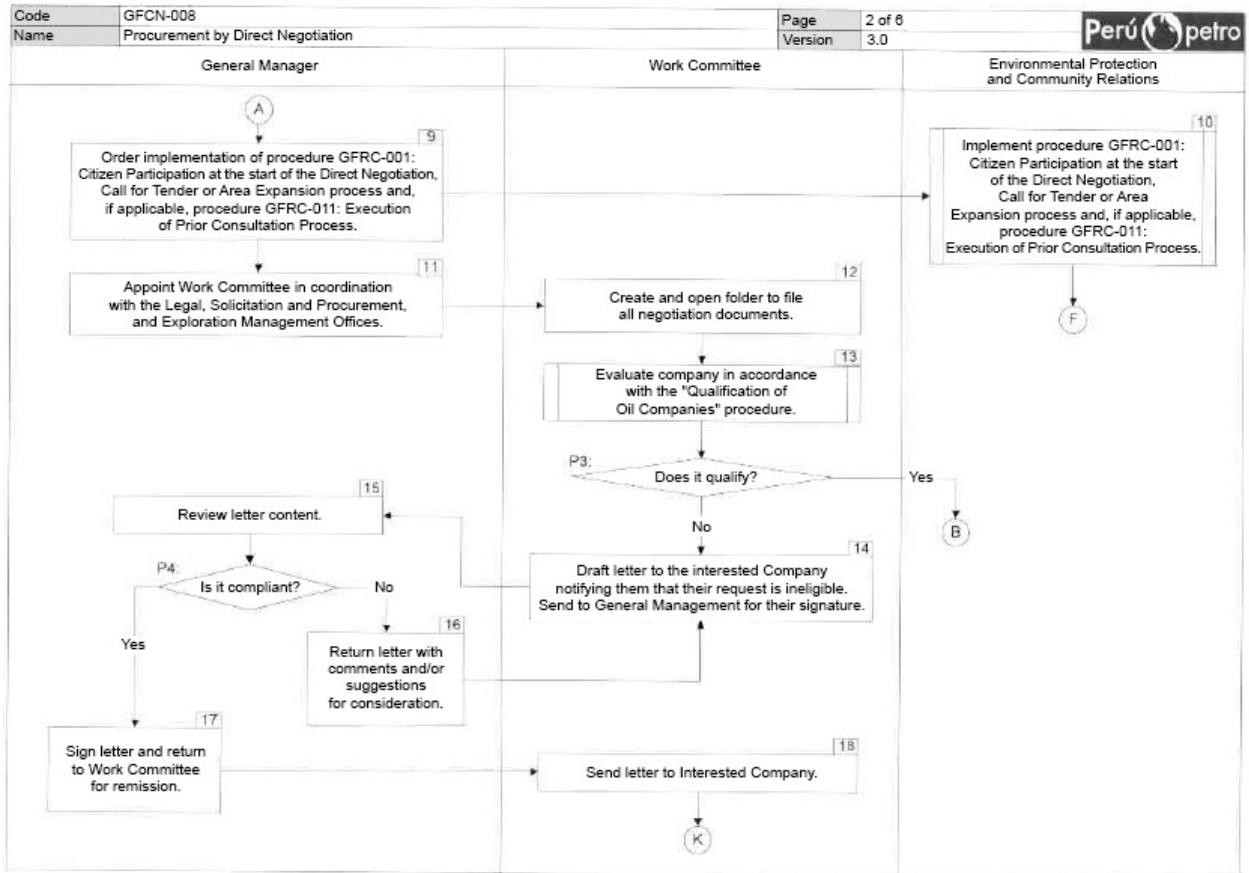
⁴⁸ Transcript, Preliminary Objections Hearing, p. 179, line 25, - p. 180, lines 1-25 (Quiroga).

40. As explained in the Statement of Claim, PeruPetro’s Rules and Procedures for the Direct Negotiation of Contracts that were in place in 2014 establish three distinct decisional phases in the direct negotiation process.

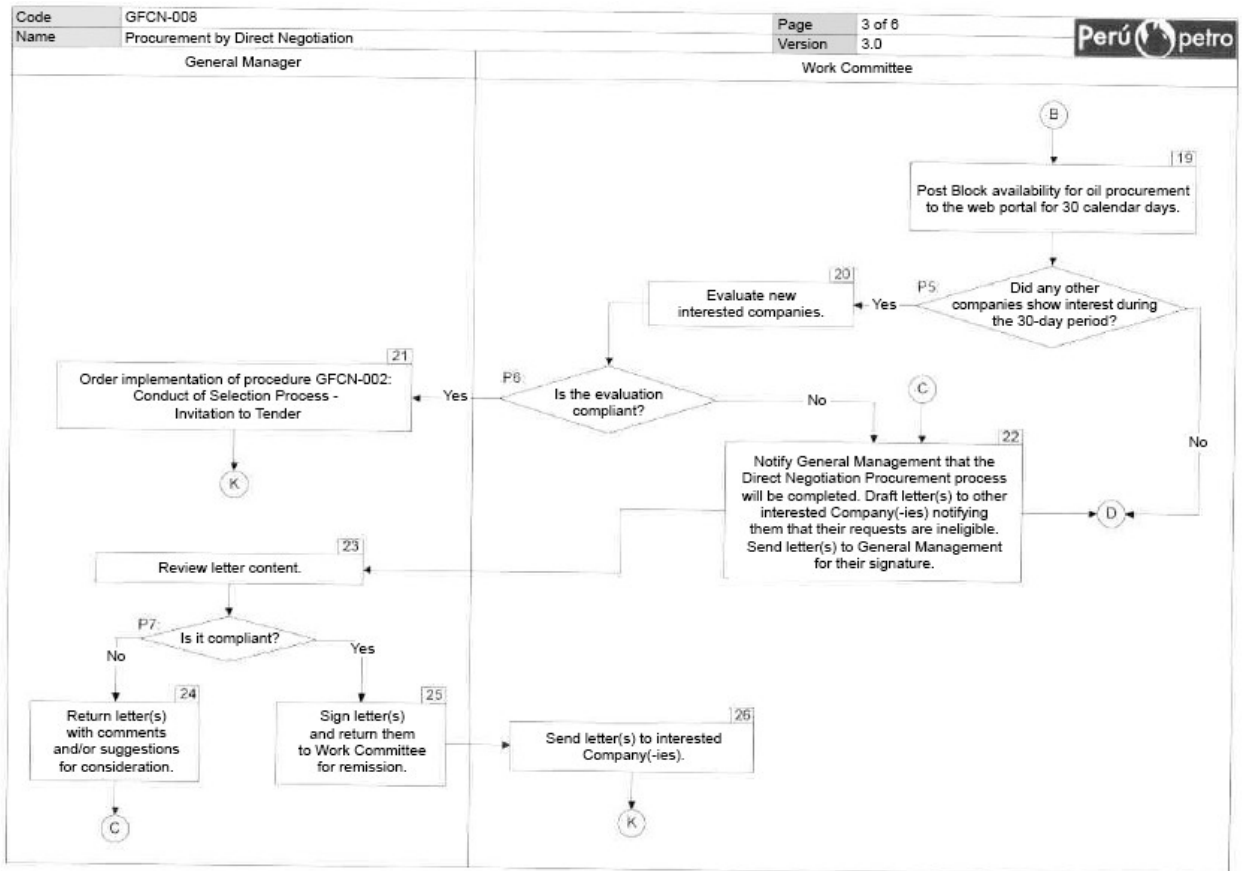
41. An initial phase in which the commission appointed by PeruPetro to negotiate direct contracts with oil companies determines the availability of the subject project as illustrated in the following chart:



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



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



44. Peru cannot seriously dispute that these steps are part of the direct negotiation process or procedure established in PeruPetro’s Rules and Procedures for the Direct Negotiation of Contracts and that the procedure starts with the submission of the proposal. Indeed, Expert Vizquerra admitted this point on cross examination.⁴⁹

45. Nor can Peru deny that the qualification process is Step No. 13 in the second phase. Therefore, qualification cannot be a condition precedent. Qualification is part of the Direct

⁴⁹ Transcript, Preliminary Objections Hearing, p. 154, lines 11-25,- p. 155, lines 1-25 (Vizquerra).

Negotiation Process. Without a doubt, qualification is a fundamental step in the process without which the Direct Negotiation Process cannot be consummated. **But it is not a condition precedent.**

46. More importantly, PeruPetro shelved the Baspetro Proposal before the procedure contemplated by its own regulations to address any perceived deficiency in the Proposal was completed. PeruPetro never responded to Amorrortu regarding the Baspetro Proposal, nor did PeruPetro ever give Amorrortu the statutorily required opportunity to cure any purported defect. The Baspetro Proposal was met with a callous administrative silence. And that administrative silence bars PeruPetro from contending that Baspetro was not duly qualified to complete the Direct Negotiation Process and execute the contracts for Blocks III and IV.

47. As Expert Quiroga explained in his reports and at the Preliminary Objections Hearing, the “*legal fiction*” of the administrative silence applies to this type of processes by a “*systematic interpretation*” of the articles of the Law No. 27444, by a series of applicable norms. These are, the Peruvian Constitution, Articles 62 and 66, and the Law of General Administrative Procedure by operation of the concession process and the Preliminary Title, Section I(8); the Consolidated Text of the Hydrocarbon Law, Articles 10(a) and 12; and, the Civil Code by operation of article 1357.⁵⁰ The administrative silence is “*a legal fiction intended to protect those administered against a Public Administration that is not very diligent or unjustifiably reluctant in the exercise of its functions.*”⁵¹

48. This doctrine applies in the process of qualification of an oil company within the direct negotiation process, because “*in the absence of an express observation, error, omission or*

⁵⁰ CER – 2 [Quiroga], ¶ 11.

⁵¹ *Id.* ¶ 18 (Free Translation by Claimant Bacilio Amorrortu: Spanish original text reads “. . . silencio administrativo es una ficción jurídica destinada que protege a los administrados frente a una Administración Pública poco diligente o injustificadamente renuente en el ejercicio de sus funciones.”).

*request for additional information made by the competent authority, it must grant the certification.”*⁵²

49. Having failed to raise any issue with respect to Baspetro’s qualifications and having deprived Amorrortu of the opportunity to appeal such decisions, Peru cannot now contend that Baspetro was not a qualified oil company through which Amorrortu commenced the Direct Negotiation Process. Peruvian law simply does not allow Peru to benefit from its own failure to comply with its administrative rules, particularly in this case in which as established in Claimant’s Statement of Claim, Baspetro was led by a team of professionals that had successfully operated Block III and other blocks in the Talara Basin.

2) *Does this issue need to be explored by fact witnesses with “hands on” experience of the PeruPetro process rather than textual interpretation of the regulations?*

50. Yes. Amorrortu has the right to present evidence to show how he was deprived of the opportunity to cure the purported flaws in the Baspetro Proposal in a manner inconsistent with the practices of PeruPetro. Amorrortu has the right to present witnesses confirming that the Direct Negotiation Process was simply abandoned. And Amorrortu has the right to present evidence confirming that in the absence of corruption, his company, Baspetro, would have been granted the contracts.

51. Respondent’s fact intensive objection is based on the false premise that Amorrortu did not commence a Direct Negotiation Process with PeruPetro. This argument is belied by Amorrortu’s factual allegations and PeruPetro’s own Rules and Procedures for the Direct Negotiation Process.⁵³ Amorrortu has the procedural right to present such evidence to the

⁵² CER – 2 [Quiroga], ¶ 22 (Free Translation by Claimant Bacilio Amorrortu: Spanish original text reads: “*ante la falta de una observación expresa, error, omisión o solicitud de información adicional formulada por la autoridad competente, esta se encuentra en la obligación de otorgar dicha calificación.*”).

⁵³ See, e.g., Claimant’s Answer to Peru’s Preliminary Objections, ¶¶ 2-10.

Tribunal, including evidence of Amorrortu’s extensive successful experience in the Talara Basin region in connection with the Baspetro Proposal.⁵⁴

E. THE “RIGHT TO A CONTRACT” ISSUE

1) *Is the Respondent’s position one of fact or of law (where the Tribunal need not take the pleading as correct)?*

52. Respondent’s position presents a question of fact, that goes to the quantum of the case and **not** to its viability. Respondent’s contention is focused on Claimant’s alleged lack of entitlement to damages because he purportedly did not commence a Direct Negotiation Process.

53. Critically, Amorrortu has never claimed that the Direct Negotiation Process guarantees, **as a matter of law**, the execution of the contracts to operate Blocks III and IV. Amorrortu’s claims are based on the undisputable fact that (i) he invested in Baspetro as an “enterprise” with the reasonable expectation to have the Baspetro Proposal considered by Peru and its agencies in a process free of corruption, and (ii) that Amorrortu, through Baspetro, acquired all of the rights appurtenant or concomitant to the Direct Negotiation Process under Peruvian law. Specifically, the Direct Negotiation Process guarantees the exclusive technical evaluation and the community analysis of a direct negotiation proposal before any competing company is invited to participate in the process. This substantive right to an exclusive analysis has significant value. The Direct Negotiation Process gives oil companies a competitive advantage that is practically and factually insurmountable and that, in most if not all cases, concludes with the execution of the contract, particularly in the case of a company that has the experience and success of Amorrortu in the Talara Basin.⁵⁵ This issue is evidently a factual issue that is inappropriate in the context of a preliminary objection.

⁵⁴ Claimant’s Statement of Claim, 11 September 2020, ¶¶ 75, 88, 157, 164.

⁵⁵ *Id.* ¶ 194.

2) *Is this a matter of quantum rather than jurisdiction to hear the claim?*

54. Respondent's contention, as referenced above, presents an issue of quantum. The fact that Amorrortu commenced the Direct Negotiation Process does not pertain to the viability of Amorrortu's claims. This fact pertains to Amorrortu's ability to establish that in the absence of corruption, Baspetrol would have received the contracts for Blocks III and IV. This argument is based in large part on the track record of success of companies that have successfully operated oil blocks in the past and have commenced a direct negotiation process. In other words, the well-established likelihood that the Direct Negotiation Process would conclude in the execution of a contract is an issue that pertains to the damages that Amorrortu has suffered and that has very little bearing on the viability of Amorrortu's claims. Therefore, Objection 1 must be overruled.

3) *If declaratory relief is an available remedy with respect to the Claimant's claims regarding Direct Negotiation and/or the public tender (see A.I.ii. above), would this be a basis to discount the Respondent's submission that the Article 10.20.4 application must be granted because no damages could be awarded in any event*

55. Correct. Even if Peru could successfully establish that Amorrortu did not properly commence the Direct Negotiation Process, Objection 1 would still fail because this Tribunal had the ability to declare that Peru's corruption violated its FET obligations under the USPTPA and the Tribunal would still have to make a determination as how to make Amorrortu whole for the damages he has suffered as a result of this Treaty violation. But the fact that the Tribunal is empowered to declare the breach of the Treaty for Peru's exercise of its discretion to contract in furtherance of a corruption scheme is by definition fatal to any claim that Amorrortu has not stated a claim for which an award in his favor may be made under Article 10.26.

III. THE FAILURE OF MR. AMORRORTU TO WAIVE “ANY” OTHER RECOURSE AGAINST PERU

- 1) *The Tribunal invites the Parties’ submissions on whether the Respondent’s letter of September 25, 2020 and subsequent receipt of compelled information does or does not constitute consent to the arbitration and to the constitution of the Tribunal.*

56. Peru consented to this arbitration on September 25, 2020, when it requested substantive relief from this Tribunal, without raising the Tribunal’s purported lack of jurisdiction. As such, Peru is **estopped** from challenging its consent to this arbitration.

57. Amorrortu accepted Peru’s arbitration offer when he filed his Statement of Claim on September 11, 2020 – the date established by this Tribunal.⁵⁶ The chronology of Peru’s procedural conduct after this date is particularly revealing.

58. By letter dated September 25, 2020, Peru requested that the Tribunal order Amorrortu “*[t]o disclose the names of any funder(s) with whom Mr. Amorrortu or [his] legal representatives may have entered or plan to enter into an agreement in relation to this case; To confirm that the funding arrangement includes payment of an adverse cost award; To provide copies of the relevant provision from the funding agreement(s) relating to (i) cost awards, and (ii) aspects of the conduct, termination, or settlement of the present arbitration that require funder approval.*”⁵⁷

59. By letter dated October 2, 2020, Amorrortu (i) confirmed “*that he is relying on the assistance of a third party to pay for the costs of these proceedings;*” (ii) offered to disclose the identity of the funder to the Tribunal and to Peru if this information was deemed necessary by the

⁵⁶ See USPTPA Investment Chapter (CLA-1), Art. 10.17(2) (establishing that the consent to arbitrate **and** the submission of a claim to arbitration shall satisfy the requirements of an agreement to arbitrate); Article 10.16(4)(d) (stating that a claim is deemed submitted to arbitration upon the filing of the notice of arbitration and the statement of claim).

⁵⁷ Peru’s Letter to Tribunal Requesting Disclosure of Third Party Funder, 25 September 2020, p. 7.

Tribunal; and (iii) requested that the Tribunal dismiss the Respondent’s request that it disclose certain terms of the funding agreement.⁵⁸

60. By letter dated October 6, 2020, Peru commented on Amorrortu’s letter of October 2, 2020 and reiterated its request, as set out in its letter of September 25, 2020.⁵⁹

61. In none of these communications, Peru made any reference to its purported lack of consent to arbitrate. Quite the contrary, Peru acted and participated in the arbitration without any limitation. On October 19, 2020, the Tribunal issued Procedural Order No. 2 (**PO2**) holding that “*the identity of the third party funder should be disclosed both to the Tribunal and to the Respondent.*”⁶⁰ Amorrortu immediately complied with the Tribunal’s order, and again Peru never suggested any issue with respect to its lack of consent.

62. On these facts, Peru is estopped from now arguing that it has not consented to this arbitration. The doctrine of estoppel (the ***Doctrine of Estoppel***) applies when a party has relied on the statement or conduct of the other either to its detriment or to the other’s advantage.⁶¹ Estoppel requires the presence of the following three elements: (i) a clear and unequivocal statement or conduct; (ii) reliance on that statement or conduct by one party; and (iii) detriment to the party invoking the estoppel or an advantage to the party who made the statement.⁶²

63. The Doctrine of Estoppel applies with equal force to statement or conduct in arbitration. In that context, the Doctrine is usually referred to as judicial estoppel and applies “*to prevent a State contesting [in a judicial or arbitral forum] a situation contrary to a clear and unequivocal [statement or conduct] made by [the State] to another [party]*” causing the other party

⁵⁸ Claimant’s Letter to Tribunal Regarding Third Party Funder, 2 October, 2020, p. 2.

⁵⁹ Peru’s Letter to Tribunal Requesting Disclosure of Third Party Funder, 25 September 2020.

⁶⁰ Procedural Order No. 2, 19 October 2020.

⁶¹ *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment 15 June 1962 (CLA-119), ¶ 3(v).

⁶² *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, (Kaplan, Beechey, Landau), (CLA-120), ¶ 261.

to rely, to its detriment, on that statement or conduct or securing the State “*some benefit or advantage for itself.*”⁶³

64. In this case, there is no question that the three elements of the Doctrine of Estoppel are satisfied. Until December 9, 2020 Peru’s conduct in these proceedings clearly and unequivocally established Peru’s consent to this arbitration. Indeed, Peru never indicated that it had not given its consent to the arbitration in any document it filed in these proceedings after Amorrortu accepted the offer to arbitrate with the filing of its Statement of Claim on September 11, 2021.⁶⁴

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

66. This is a clear case of Estoppel. Having benefitted from the order of this Tribunal at its own request, Respondent cannot now claim that it never consented to this arbitration.

2) *If the September 25, 2020 letter constitutes consent, why should (or should not) the Tribunal accept Mr. Amorrortu’s amended waiver dated April 25, 2021?*

67. The amended waiver was submitted in the alternative and to the extent that the Tribunal found that Peru had not consented to this arbitration. If the Tribunal agrees with Amorrortu’s argument that the September 25, 2020 letter constitutes consent, then the April 25, 2021 is surplusage with very little relevant, if any, in these proceedings.

⁶³ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, (Böckstiegel, van den Berg, Brower), 30 March 2010, (CLA-121), ¶ 350.

⁶⁴ Peru’s Response to Notice of Arbitration, 21 March 2020, ¶ 5.

68. On the other hand, if the Tribunal determines that the September 25, 2020 letter does not constitute consent, then it should accept the April 25, 2021 amended waiver. Critically, in its December 9, 2020 Notice of Intent to Submit Preliminary Objections, Peru stated that “*Mr. Amorrortu failed to **cure** the defects in his waiver upon submitting the Statement of Claim...*”⁶⁵ This admission is highly significant. *First*, Peru admits that Amorrortu can cure its purported defective waiver. *Second*, and as explained during the Preliminary Objections Hearing, unlike the claimant in *Renco I*, pursuant to Article 10.16(4) of the USPTPA and the applicable UNCITRAL Arbitration Rules, Amorrortu **gave control to this Tribunal** to determine the date when the acceptance of the offer to arbitrate by both parties is accepted. As such, the Tribunal has the power to allow Claimant to cure any purported defect in his waiver.

69. Therefore, to the extent the waiver offered by Claimant may be considered defective, Amorrortu has cured the purported defect to avoid further delaying these proceedings and avoid Claimant incurring in further fees and costs.

IV. AMORRORTU IS ENTITLED TO RECOVER FEES AND COSTS

70. Peru has managed to delay these proceedings for over a year with objections that should never have been asserted. These claims are frivolous. Irrespective of whether the Direct Negotiation Process was properly commenced, Amorrortu has stated a claim upon which an award could be issued under the Treaty. Objection 1 does not even remotely undermine the foundation of Amorrortu’s claim, which is based on the uncontroverted proposition that a state that uses its discretion to contract in furtherance of a corruption scheme and to the prejudice of a protected investor breaches the FET. Objection 1 is frivolous.

⁶⁵ Peru’s Notice of Intent to Submit Preliminary Objections, 9 December 2020. (Emphasis added).

71. Similarly, Peru could not seriously argue that it had not consented to this arbitration after it invoked the jurisdiction of this Tribunal. Objection 4 is frivolous.

72. Therefore, an award of fees and costs is warranted. Article 10.20(6) of the Treaty is clear, “[w]hen it decided a respondent’s objection ... the tribunal may, if warranted, award to the prevailing disputing p[arty] reasonable costs and attorney’s fees incurred in submitting or opposing the objection.”⁶⁶ Therefore, there is no doubt that this Tribunal has the authority to award the Claimant fees and costs for defending against these frivolous objections, which have unnecessarily delayed this case to the prejudice of the Claimant.

73. Article 10.20(6) further provides that “[i]n determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous and shall provide the disputing parties a reasonable opportunity to comment.”⁶⁷

74. The process for preliminary objections was not intended to allow a state like Peru to delay the proceedings with frivolous objections that have nothing to do with whether Amorrortu has stated a claim upon which relief can be granted. The power to file preliminary objections cannot be used to delay the proceedings with frivolous objections.

75. An award of fees and costs would serve the all-important function of deterring the submission of frivolous objections filed just for the purpose of delay. In this case, Objection 1 and Objection 4 are frivolous and must be denied in their entirety with an award of fees and costs to Claimant.

Wherefore, the Claimant, Bacilio Amorrortu, respectfully requests the Tribunal to:

- 1) reject Objections 1 and 4;

⁶⁶ USPTPA Investment Chapter (CLA-1), Art. 10.20(6).

⁶⁷ *Id.*

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

DATE: September 10, 2021

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