

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

— and —

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

— between —

BACILIO AMORRORTU

Claimant,

v.

THE REPUBLIC OF PERU,

Respondent.

**RESPONDENT’S POST-HEARING BRIEF
ON PERU’S PRELIMINARY OBJECTIONS**

10 September 2021

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I. INTRODUCTION

1. In accordance with the Tribunal's Letter dated 19 August 2021, and the Tribunal's communication of 27 August 2021, the Republic of Peru ("Peru", "the Republic", or "Respondent") hereby presents its Post-Hearing Brief in connection with its Preliminary and Jurisdictional Objections to the claim asserted by Claimant Bacilio Amorrortu ("Claimant" or "Amorrortu"). **Part II** of this Post-Hearing Brief summarizes Peru's positions as presented throughout this proceeding and demonstrates why both of Peru's objections must be sustained by the Tribunal. **Part III** responds to the Tribunal's specific questions a presented in its Letter of 19 August 2021.

II. PERU'S OBJECTIONS MUST BE SUSTAINED AND CLAIMANT'S CLAIMS DISMISSED IN ITS ENTIRETY

2. Despite Claimant's best efforts to muddle the issues before this Tribunal, he cannot escape the frivolity of his claims and the fact that he has failed to obtain Peru's consent to this arbitration. As a result the only legally proper conclusion for this Tribunal is to sustain both of Peru's objections and dismiss Amorrortu's claim in its entirety.

A. Objection 1: Amorrortu has failed, as a matter of law, to present a claim for which an award may be made in favor of Claimant

3. In his Rejoinder on Peru's Preliminary Objections, and at the Hearing on Preliminary Objections of 9 August 2021 (the "Hearing"), Amorrortu engaged in a misguided and impermissible effort of modifying his claim in order to create factual issues that he hopes will induce this Tribunal to reject Peru's Article 10.2.4 objection. Peru respectfully warns the Tribunal not to be confused or fooled by these efforts.

1. Amorrortu's Claim as Asserted is Based Exclusively on the Alleged Interruption of the Alleged Direct Negotiation Process

4. As asserted in his Notice of Arbitration and Statement of Claim, Amorrortu's claim was exclusively tied to the alleged infringement of his alleged right to a direct negotiation process, and the bundle of rights concomitant thereto:

- "Peru breached the minimum standard of treatment set forth in Article 10.5 in the sense that it aborted the direct negotiation process with Baspetrol to give the contract to Graña y Montero based on corrupt motives."¹
- "Peru failed to comply with [the Fair and Equitable Treatment ("FET") standard] when it implemented a corrupt scheme to deprive Amorrortu of his substantive right to resume his operation of Block III (and IV) through direct negotiation."²

¹ Notice of Arbitration (13 February 2020), ¶ 75 (emphasis added).

² Claimant's Memorial (11 September 2020), ¶ 304 (emphasis added).

- “[G]iven that Peru has provided no basis for abruptly and arbitrarily (without any notice or reason) abandoning the direct negotiation process with Amorrortu, Peru breached its obligations under the USPTPA.”³
- “Amorrortu’s reasonable expectations matured when he formally commenced the Direct Negotiation Process. At that point, Amorrortu was set apart from other investors and Baspetro became an oil company vested with all the rights of an oil company qualified to negotiate with PeruPetro pursuant to the certification of qualification rules that has commenced a Direct Negotiation Process. Instead of following with this process, PeruPetro decided to open the International Public Bidding Process in which Baspetro had to be qualified with all other competing companies, even though Baspetro had already been qualified.”⁴
- “In this case, there is no question that in the absence of corruption, Baspetro would have completed the Direct Negotiation Process and would have executed the contracts to operate Blocks III and IV.”⁵

5. Peru highlighted this exclusive focus on the direct negotiation in its Submission on Preliminary Objections.⁶ Notably, in his Answer to the Submission, Amorrortu did not deny that his claim was premised on the interrupting of the direct negotiation process. Nor did Amorrortu articulate any argument that his claim was also premised on conduct relating to the public tender. Instead, Amorrortu doubled down, clarifying that:

Amorrortu’s claims are based on the undisputable fact that (i) he invested in Baspetro [...] and (ii) that Amorrortu, through Baspetro, acquired all of the rights appurtenant or concomitant to the direct negotiation process under Peruvian law.⁷

Indeed, the only “bundle of rights” Amorrortu asserts relates to the direct negotiation process.

6. Certainly, Claimant asserts allegations concerning the public tender. Specifically, Amorrortu claimed that PeruPetro made certain modifications to the bidding rules and requirements which were “ostensibly neutral” but were meant to favor Graña & Montero.⁸ However, as noted in the excerpts above, conduct related to the public tender is at most an ancillary factual allegation. It is the means by which the public negotiation process was interrupted, but not the breach itself.⁹

³ Claimant’s Memorial (11 September 2020), ¶ 150.

⁴ Claimant’s Memorial (11 September 2020), ¶¶ 223-224 (emphasis added). Besides its focus on the interruption of the direct negotiation process, as the Tribunal can discern, this argument in particular is replete with legal falsehoods concerning the qualification process.

⁵ Claimant’s Memorial (11 September 2020), ¶ 357.

⁶ Peru’s Submission on Preliminary Objections (15 March 2021), ¶¶ 7-8.

⁷ Claimant’s Answer to Peru’s Submission Pursuant to Article 10.20.4 of the Treaty and Submission on Waiver Objection under Article 23 of UNCITRAL Arbitration Rules (26 April 2021) (“**Claimant’s Answer**”), ¶ 8 (emphasis added).

⁸ Claimant’s Memorial (11 September 2020), ¶¶ 158-167. It is telling that Amorrortu’s factual allegations concerning the public tender consist of only 9 paragraphs in the entire brief, whereas the direct negotiation process is the focus of the remainder of the brief.

⁹ Indeed, the paragraph cited by the Tribunal in its Letter of 19 August is the only instance in which conduct related to the public tender is related to a breach of the FET. Claimant’s Memorial (11 September 2020), ¶ 341. Yet even there, initial

7. Perhaps the most telling allegation in this regard is Amorrortu’s statement that the appropriate date of valuation for damages, which should be set at the date of the treaty breach, “is the date PeruPetro announced the international public bidding process.”¹⁰ In other words, before any of the other alleged irregularities during the public tender process occurred. According to Amorrortu, the date of *announcement* of the public tender (July 14, 2014) “is the date that Peru’s breaches to the USPTPA led to an irreversible and substantial deprivation of the value of Amorrortu’s investment.”¹¹

8. Of course, Amorrortu’s focus on the direct negotiation process is intentional. Claimant admits that he would have an evidentiary problem for a claim based on issues relating to the public tender.¹² The purpose of this ancillary allegation regarding the public tender is evidently the need to eliminate the causal break presented by Amorrortu’s participation in the public tender and the fact that Amorrortu would be unable to demonstrate, as a matter of law, that it was guaranteed to have won the public tender, and to a contract. In other words, Amorrortu never had, nor has he ever claimed, any right to be declared the winner of the public tender and awarded a contract.

9. Thus, Amorrortu’s claim, properly understood and as asserted in his Statement of Claim is as follows:

[BREACH]: Peru disrupted the direct negotiation processes with Amorrortu (with respect to which Amorrortu claims to have had a bundle of rights vested);

[MOTIVATION/MEANS]: in order to award the contract to Graña y Montero through a “rigged” public tender (with respect to which Amorrortu alleges no rights).

10. As noted above, the alleged irregularities in public tender is not alleged as the effective breach causing damages, and thus is not the basis of the claim. As a result, there is no independent basis upon which this Tribunal can be seized of Amorrortu’s claim based on the allegation relating to the public tender alone.

conduct highlighted as the breach relates to the direct negotiation process. Moreover, a single throw-away sentence cannot plausibly constitute a claim. Notably, this throw-away line, is a mere assertion of conclusions. They do not refer to actual factual allegations, let alone legal arguments, to support it. Nor has any been provided in this arbitration, as will be discussed further below.

¹⁰ Claimant’s Memorial (11 September 2020), Section VII.B.

¹¹ Claimant’s Memorial (11 September 2020), ¶ 377.

¹² Hearing on Preliminary Objections Transcript (9 August 2021) (“**Hearing Transcript**”), pp. 86: 23 - 87: 7 (“The question is how much more difficult it would be for us to prove that, in the absence of corruption, Mr. Amorrortu would have been entitled to the Contract. And, obviously, if you agree with our Expert that the negotiations were advanced, that’s a much easier case for us. If you don’t, then we still go through the Direct Negotiation Process because there was an invitation, and that’s undisputed, and there was proposal, even if you assume, for the sake of argument, that it was defective.”).

2. Claimant's Attempt to Create a New Claim based on the Public Tender at this Stage is Improper and in Any Event Does Not Lead to a Different Result

11. In his Rejoinder and at the Hearing, Claimant attempted to pivot from his original claim to shift the focus onto his corruption allegations in general, and with respect to the public tender specifically, in order to suggest that his claim is broader than originally asserted.¹³

12. However, as Peru observed, Amorrortu's attempt to shift the focus of his allegations is an improper attempt to create factual issues in the face of Peru's Article 10.20.4 objection and confuse the Tribunal. The vacuity of this effort is evident on its face, and, moreover, confirmed by Claimant's assertions that he will "prove" these claims at a later point in this arbitration.¹⁴ These assertions are not only highly dubious, as Amorrortu himself admits, but also procedurally inappropriate.

13. In Arts. 5.2 and 5.3 of Procedural Order No. 1, this Tribunal clearly and expressly required that the parties present all evidence supporting their claim with their Statement of Claim and Statement of Defense respectively:

5.2 The Parties shall submit with their written submissions all evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein, including witness statements, expert reports, documents, and all other evidence in whatever form.

5.3 In their rebuttal submissions (i.e., Reply and Rejoinder), the Parties shall submit only additional written witness testimony, expert opinion testimony and documentary or other evidence to respond to or rebut matters raised in the other Party's prior written submission, except for new evidence they receive through document production.

14. Thus, to the extent that Amorrortu had any evidence to support his alleged claim with respect to the public tender (or otherwise) he was required to have presented it with his Statement of Claim or Memorial. Claimant should not be enabled or encouraged to use this Preliminary Objections proceeding to change the basis of his case-in-chief, particularly on the promise of supposed forthcoming evidence. Peru presented this Article 10.20.4 Objection on the understanding that Claimant had presented his case-in-chief in full, as required by the Tribunal's Procedural Order. Claimant, who has had ample time to develop and present his

¹³ 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 (21 June 2021) ("**Claimant's Rejoinder**"), ¶ 1 ("Amorrortu has alleged facts and proffered evidence establishing that Peru violated its obligations under the United States-Peru Trade Promotion Agreement (the *USPTA* or the *Treaty*) when it aborted the direct negotiation process (the *Direct Negotiation Process*) initiated by Amorrortu on behalf of Baspetrol **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.") (emphasis in original); Hearing Transcript, p. 72: 17-22 ("Mr. Amorrortu is somebody who submitted a request at the public bidding process, and all those three processes were rigged with corruption, and that's what gives rise to this claim. And that's why Objection 1 should be rejected.").

¹⁴ Claimant's Answer, ¶ 90 ("Amorrortu will have to prove the financial value of his acquired rights, but that question of damages is not relevant at this juncture"); *see also*, for instance, Hearing Transcript, pp. 77: 21-23, 84: 17-22, 85: 25 - 86: 3.

case, and any evidence supporting his claim, cannot now seek to avoid a summary dismissal on the law, by promising to shore up allegations that were never presented as having caused the treaty breach in the first place.¹⁵

15. Even assuming *arguendo* that Claimant’s claim as asserted includes his allegations of manipulation of the public tender, the claim still fails to survive Peru’s 10.20.4 objection.

16. As Peru has observed, the USPTPA does not protect a supposed right to be free of corruption, in and of itself. No arbitral tribunal constituted under an investment treaty has held such a radical position. This is not a case where corruption is advanced as a defense by the State. Rather, Claimant has asserted corruption from the State as a violation of FET. All investment arbitration disputes that analyzed allegations of corruption in this context, involved claimants with an already existing and independent right (for example, a contract or a license), which was negatively affected by corruption.¹⁶ In other words, corruption can only constitute a violation of treaty standards, if it affects an independent existing and vested right held by Claimant. Notably, Amorrortu has not contested this position. He has not, and cannot, cite to any jurisprudence to the contrary.

17. Thus, consistent with the existing jurisprudence, Amorrortu must demonstrate that he had an independent vested right that was affected by alleged corruption. As summarized further below, Peru has already demonstrated that no such right existed with respect to the direct negotiating process (which as Peru maintains, is the basis of Amorrortu’s claim as alleged). Assuming that manipulation of the public tender was an independent claim, Amorrortu would have to demonstrate that as a matter of law he had certain rights vested as a participant in the public tender process (again, separate and apart from an interest to be free from corruption).

18. Yet, notably, unlike with his allegations regarding “bundle of rights” concomitant to the direct negotiation process, Amorrortu has not even identified, let alone demonstrated, what rights or “bundle of rights” he allegedly possessed as matter of law in connection with the public tender. (This of course, is a

¹⁵ As noted further below, Claimant’s claim must be viewed in light of his factual allegations taken as true. Corruption is not a factual allegation, but rather a conclusion of mixed law and fact that must be derived from various factual allegations.

¹⁶ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, (CLA-4) ¶¶ 56, 216; ¶¶ 242-301 (claimant likewise already had a right comprised on a joint venture agreement to operate duty free shops—the challenge by EDF had to do with a continuation of such already existing right, not to measures allegedly impeding the acquisition a right); *see also Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (where claimant had obtained a licence to explore and extract hydrocarbons in the Liman Block in Western Kazakhstan. The tribunal only analyzed claimant’s corruption allegation for breach of that already obtained and protected right. It found no corruption on the part of respondent State in that case), *see Id.*, ¶¶ 422-425 (<https://www.italaw.com/sites/default/files/case-documents/italaw1429.pdf>).

further indicia that Amorrortu’s claim is conceived as being solely based on the “bundle of rights” in relation to the direct negotiation).

19. Claimant’s inability to identify what right or “bundle of rights” he possessed (apart from an interest to be free from corruption) is unsurprising because, as with the direct negotiation process, Amorrortu had no such rights. PeruPetro’s Procedure for Public Tenders (GFCN-002),¹⁷ similar to its Procedure for Direct Negotiation (GFCN-008), establishes various preconditions that must be fulfilled before a proposal is even considered.¹⁸ Notably this includes receipt of the information required for qualification under the terms of the bidding rules, and submission of all required documentation.¹⁹ The Bidding Rules of the Public Tender (“Bidding Rules”), in turn, requires that a participant meet the minimum technical indicators and submit a series of required forms.²⁰ Thereafter, PeruPetro reviews the technical and financial Offers in accordance with a formula set forth in Bidding Rules (p. 10-11), which would determine the winning proposal. Notably, even then, rights to a contract are not guaranteed, as expressly stated in Section 8.1 of the Bidding Rules. In addition, the winning company or consortium must then submit documentation for a Certificate of Qualification, which PeruPetro can “grant or deny”. Finally, as Amorrortu himself has conceded, even if a certification of qualification is obtained, PeruPetro retains the discretion not to finalize a contract with the company.²¹

20. During the Hearing, Claimant suggested that he would “prove” that he would have met all of these conditions. Yet, as has been noted, he also admitted that “[t]he question is how much more difficult it would be for us to prove that, in the absence of corruption, Mr. Amorrortu would have been entitled to the Contract,” under the public tender.²² Amorrortu’s Statement of Claim presents no evidence with respect to his proposal

¹⁷ Procedure GFCN-002, Procedure for Public Tenders (**CV-10**).

¹⁸ Procedure GFCN-002, Procedure for Public Tenders, p. 7 (**CV-10**).

¹⁹ Procedure GFCN-002, Procedure for Public Tenders, pp. 7-9 (**CV-10**).

²⁰ Terms and Conditions, International Competitive Tender No. PERUPETRO-001-2014- LOT III (October 2014), pp. 7-8 (**CV-11**).

²¹ Organic Hydrocarbons Law No. 26221 (13 August 1993), Art. 11 (**CLA-45**); First Expert Report of Carlos Raúl José Vizquerra Pérez Albela (4 March 2021) (“**First Vizquerra Expert Report**”), ¶ 9 (**RER-1**); *see also* PeruPetro’s Direct Negotiation and Competitive Bidding Process Contracting Policy: Board Agreement No. 029-2017 (10 April 2017), Art. 2.2 (**RLA-34**). *See also* First Expert Report of Aníbal Quiroga León (9 September 2020) (“**First Quiroga Expert Report**”), ¶ 89 (**CER-1**) (Free Translation by the Republic of Peru: “Article 11 of the Organic Hydrocarbons Law provides that hydrocarbon exploitation contracts may be entered into, at PeruPetro’s discretion, after direct negotiation or by call for bids.”) (Spanish original text reads: “El Artículo 11° del TUO de la Ley Orgánica de Hidrocarburos dispone que los contratos de explotación de hidrocarburos pueden celebrarse, a criterio de PeruPetro, previa negociación directa o por convocatoria.”) (emphasis added).

²² Hearing Transcript, pp. 86: 23 - 87: 1.

during the public tender, other than a cover letter.²³ As discussed above, Procedural Order No. 1 required Amorrortu to present all evidence supporting his claims-in-chief. Having failed to do so, he cannot now rely on future evidence to save his claim from a 10.20.4 objection.

21. But putting aside the lack of support for his allegations, the conditional nature of the public tender process, and the fact that the public tender itself does not guarantee either a certification of qualification or a contract, means that as a matter of law, Mr. Amorrortu cannot claim any rights appurtenant to that process, solely by virtue of participating in the bid.

22. Mr. Amorrortu's situation thus differs significantly from that found in *Bosca v. Lithuania*, cited by Claimant, which deals with alleged irregularities in a public tender. In that case, the claimant not only participated in the public tender, but had been declared the winner. The tribunal thus found that claimant had acquired a protected interest or right that was violated when the State imposed new conditions and ultimately terminated the final negotiations for the contract.²⁴

23. Amorrortu possess no such protected interest or right. He was a mere interested participant in a bidding process that by its nature is conditional and cannot confer any guarantees. Without more, Mr. Amorrortu does not have an independent right or interest protected by the Treaty, which can be adversely affected by corruption.²⁵ Moreover, as noted earlier, the public tender process, like the direct negotiation process, does not guarantee a Contract. Without a guarantee of such a contract Mr. Amorrortu has no basis for his damages claims, which, as was demonstrated during the Hearing (and discussed further below in Part II), is a requirement for "an award in favor of the claimant [to] be made under Article 10.26" of the USPTPA.²⁶

²³ Letter from Bacilio Amorrortu to "Comisión de la Licitación Pública Internacional No. PERUPETRO-1-2014" (C-14).

²⁴ *Luigiterzo Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award (17 May 2013), ¶¶ 84, 166 (CLA-46).

²⁵ As Peru warned during the Hearing, Amorrortu's contention that he is entitled to bring his claim solely based on a right to be free from corruption (without having an independent right or interest affected by corruption) is a radical one. No other Tribunal has adopted it, and this Tribunal respectfully should avoid adopting such a position. As Peru has noted, such a position would effectively open the floodgates for baseless claims whenever there is any indication or evidence of corruption in any State. See Hearing Transcript, pp. 17: 19 - 18: 2 ("What Mr. Amorrortu is doing with this Arbitration is attempting to take advantage of Peru's good faith and forceful efforts against corruption in general, including those in other unrelated economic sectors, in order to create a claim out of thin air. Furthermore, his position, as articulated in his final submission, would effectively open the floodgates for baseless claims whenever there is any indication or evidence of corruption in any State.").

²⁶ USPTPA Investment Treaty (12 April 2006), Art. 10.20; see also Hearing Transcript, pp. 55: 15 - 56: 5 ("ARBITRATOR LANDAU: Where does that leave an application for declaratory relief? There is a claim in this case for declaratory relief, Paragraph 409 of the Claimant's Memorial, which is a declaration that Peru has breached Article 10.5 of the USPTPA. That would be analytically distinct from a claim for damages. Is it your position that you cannot apply for declaratory relief under the Treaty? MR. FIGUEROA: Yes. Correct. That would be our position. The Treaty fairly clearly--certain treaties certainly permit that. The language is pretty broad. This Treaty very specifically requires a demonstration of loss in order to assert a

24. Thus, on various grounds, even a supposed claim based on the public tender must fail as a matter of law.

3. Corruption Cannot Be Assumed as True

25. A critical threshold question in light of the manner in which Amorrortu has framed his claim is whether Amorrortu's assertions of corruption should be taken as true. The answer is clearly no.

26. As Peru has explained in its briefs and at the Hearing, Article 10.20.4 requires the Tribunal to "assume to be true claimant's factual allegations in support of any claim in [...] the statement of claim."²⁷ However, mere conclusions unsupported by relevant factual allegations and any legal conclusion disguised as a factual allegation, need not be considered as true and may be contested. Similarly, allegations contradicted by Claimant's exhibits need not be taken as true.²⁸

27. The conclusion that corrupt activities have occurred is not an allegation of fact but rather a conclusion of mixed law and fact, which must be determined by the Tribunal on the basis of evidence and the totality of the circumstances. Arbitral Tribunals have developed differing standards to make this determination, from the heightened substantial certainty test, to the less strict balance of probabilities and red flags tests.²⁹ The applicability and appropriateness of these standards is an issue that is often disputed between the parties, and which has not been addressed by the parties at this stage of the arbitral proceeding. Yet, the fact that these standards exist further demonstrates the fact that corruption is not a factual allegation but a conclusion to be drawn by the Tribunal at the appropriate stage.

28. What the Tribunal must take as true under an article 10.20.4 objection is limited to the specific facts alleged by Amorrortu. In that respect, the only factual allegation directly related to Blocks III and IV are the following:

- A news report indicating that an entry in the First Lady's calendar ledger indicates that she met with Graña y Monetro to discuss Blocks III and IV on February 10, 2015, two months *after* Graña y Monetro had been declared the winner of the public tender;³⁰

claim. And so, I think the State Parties very clearly intended for claims here, the claims to be asserted to be claims for damages and not mere declaratory requests.").

²⁷ USPTA Investment Treaty (12 April 2006), Art. 10.20.4(c) (CLA-1).

²⁸ See Hearing Transcript, p. 27: 1-8

²⁹ See, for instance, U. Cosar, *Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences, and Sanctions* (2015), p. 533 (CLA-63) ("The standard of proof applicable to corruption and fraud claims in investment treaty cases has been contested, with some arguing for tribunals to apply the general principle of balance of probabilities and others supporting the implementation of a higher standard.").

³⁰ Claimant's Memorial (11 September 2020), ¶ 148.

- During the public tender, the bidding rules were modified on two occasions; these modifications were ostensibly neutral but tended to favor Graña y Montero;³¹
- PeruPetro applied a “broad interpretation” of applicable law which permits an authorized interested foreign company to submit supporting financial information from their parent company;³²
- After Graña y Montero was declared the winner, PeruPetro removed the requirement that PetroPeru, another state-owned entity, have a 25% participation in the license contract.³³

29. Whether these factual allegations and the evidence proffered by Claimant support a conclusion of corruption is a determination of fact and law. At this stage it would be inappropriate to assume that allegations of corruption are true for purposes of an Article 10.20.4 objection. Rather, the standard under Article 10.20.4 as outlined by applicable jurisprudence, limits the Tribunal’s query to whether assuming the factual allegations (and not conclusions) are true, Claimant has asserted a claim for which an award can be issued in Claimant’s favor. In this respect the issue of corruption is ultimately irrelevant. As Peru has discussed above, in order for Claimant’s claim to succeed he must demonstrate that he has an independent vested right or interest that was prejudiced by corruption. The existence of corruption by itself does not create a right that gives rise to a Treaty breach.

4. Amorrortu’s claim fails as a matter of law

30. Having clarified the points above, Peru has demonstrated Amorrortu’s claim must fail as a matter of law.³⁴ That claim is premised on the alleged frustration of the bundle of rights supposedly concomitant with the direct negotiation process. However as highlighted in the Hearing:

i) The direct negotiation process never formally commenced

- As Peru demonstrated, the Procedure for Direct Negotiation (GCN-0008), upon which Claimant relies to argue that a direct negotiation commenced, is simply an internal task list that is distinct from the Direct Negotiation Process established by applicable law and regulation.³⁵ The Direct Negotiation Process only commences upon the completion of various preconditions, the most important of which is obtaining a Certification of Qualification.

³¹ Claimant’s Memorial (11 September 2020), ¶¶ 160-164.

³² Claimant’s Memorial (11 September 2020), ¶¶ 165-166.

³³ Claimant’s Memorial (11 September 2020), ¶ 167. Amorrortu also makes extensive allegations concerning Graña y Montero in other sectors of the economy. Claimant’s Memorial (11 September 2020), ¶¶ 115-144. None of these relate to Blocks III and IV.

³⁴ See Peru’s Reply to Claimant’s Answer on Peru’s Submission on Preliminary Objections (24 May 2021) (“**Peru’s Reply**”), § II; Peru’s Submission on Preliminary Objections (15 March 2021), § II.

³⁵ See Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 38; Peru’s Reply, ¶ 26; Second Expert Report of Carlos Raúl José Vizquerra Pérez Albela (24 May 2021) (“**Second Vizquerra Expert Report**”), ¶ 3 (**RER-2**).

- Claimant cannot deny that the 16-page Baspetro Proposal failed to include a request for a Certification of Qualification or the very specific documents expressly required by the applicable Regulation on certification.
- Claimant’s suggestion that Amorrortu either did not know that his submission was deficient because he was not so informed within the 10-day period established by the Regulation on Qualification, falls flat. So does Amorrortu’s claim that he followed Mr. Ortiga’s supposed instructions. The requirements for certification are expressly set forth in the applicable Regulation and are deemed to be within the knowledge of Claimant, particularly given his alleged experience in the hydrocarbons sector. Clearly, Amorrortu was aware if he did not submit Baspetro’s audited financials for the last three years, for example.³⁶ Or a list of specific experience in the sector.³⁷ These are very specific documents and Claimant’s failure to present these is fatal to his claim. First because this meant that the 10-day requirement for a response under the Regulation was never triggered. And second, because without these documents he could not obtain a qualification certification, which in turn meant that the direct negotiation process had not and could not begin, as a matter of law.

ii) **The Direct Negotiation Process confers no rights of exclusivity or any other “bundle of rights”**

- Amorrortu also cannot dispute this critical point. As Peru demonstrated in its submission and at the Hearing, even if Amorrortu had obtained a Qualification Certification and a Direct Negotiation Process had commenced, the very next step would have been publication of the availability of Blocks III and IV for other interested companies.³⁸ If other companies expressed interest, as would have been the case,³⁹ the Direct Negotiation Process would have ended and a public tender commenced. This is also fatal to Amorrortu’s claim and Amorrortu ultimately has been unable to contest this point.

iii) **Amorrortu never had a right to Contract.**

- Again Claimant cannot dispute this crucial point which is also fatal to his claim. As Peru observed, the USPTPA expressly requires that a “claim” presented under the Treaty not only identify a treaty breach, but also that Claimant has incurred loss or damage by reason of that breach.⁴⁰ Furthermore, and contrary to Claimant’s false assertion during the Hearing, the USPTPA expressly prohibits declaratory relief.⁴¹ Thus the Treaty clearly and expressly limits the remedy available to a claimant to monetary damages. Without a viable damages claim, Mr. Amorrortu’s claim must fall because he has failed to assert a “claim” as defined by the Treaty and an award “under Article 10.26” cannot be issued. As Peru has noted, Claimant’s damages claim is based on a contractual right over Blocks III and IV. Yet, Amorrortu conceded that he was not guaranteed such a contractual right. As will be

³⁶ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 5 (CLA-3).

³⁷ *Id.*

³⁸ PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 6 (CLA-44).

³⁹ Recall that at least 3 other companies participated, though ultimately only two were technically qualified. Hearing Transcript, p. 79: 3-9. Thus it is highly probable that other companies would have expressed interest.

⁴⁰ USPTPA Investment Chapter (12 April 2006), Art. 10.16 (CLA-1).

⁴¹ USPTPA Investment Chapter (12 April 2006), Art. 10.26 (CLA-1) (“Where a tribunal makes a final award against a respondent, the tribunal may award, separate or in combination, **only**: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.”) (emphasis added).

discussed further below, this is not an issue of fact⁴², but rather one of law. Amorrortu could never claim a contract as a matter of right. Accordingly, the very premise of his damages claim fails as matter of law, and with it his entire claim.

31. For the reasons stated above, and in Peru’s submissions, Amorrortu’s claim must be dismissed. The Tribunal should prevent the unjustified expenditure time and costs both to the Republic and to the system that would be required to deal with this legally meritless claim.

B. Amorrortu’s Defective Waiver

32. Claimant failed to timely submit a valid waiver in this arbitration, as expressly required by the USPTP. Thus, separate and apart from the lack of legal merits of Amorrortu’s claim, the Tribunal has no jurisdiction over his claims. This is not a controversial issue at law and the relevant facts are uncontested.

33. Article 10.18 expressly titled “Conditions and Limitations on Consent of Each Party” provides in the relevant part that:⁴³

No claim may be submitted to arbitration under this Section unless: [1] the notice of arbitration is accompanied [...], by the claimant’s written waiver [2] of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

34. Peru’s consent to arbitrate thus engages *only* whenever *all the* requirements of the USPTPA are met.⁴⁴ If any of the requirements set forth by the USPTPA are lacking, consent is not perfected and there is no arbitration agreement in place.⁴⁵ Since consent is the cornerstone of the authority of this Tribunal to adjudicate Mr. Amorrortu’s claims, lack thereof negates the ability of the Tribunal to grant Mr. Amorrortu any substantive relief.⁴⁶

⁴² Notably Claimant has conceded that even as an issue of fact he would have a difficult time of proving his damages.

⁴³ USPTPA Investment Chapter (12 April 2006), Art. 18.2 (b)(ii) (**CLA-1**) (emphasis added).

⁴⁴ Submission of the United States of America (13 July 2021), ¶ 12 (“[T]he Parties to [USTPA] have only consented to arbitrate investor-State disputes where an investor submits a claim in accordance with this Agreement, including the requirements relevant to the arbitration of claims under Section B, such as those set out in Articles 10.16 and 10.18.”); *see also* USPTPA Investment Chapter (12 April 2006), Art. 10.17 (**CLA-1**) (“Each Party consents to the submission of a claim to arbitration under this **Section in accordance with this Agreement.**”) (emphasis added).

⁴⁵ *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 142 (**RLA-32**) (“[T]he submission of a formally compliant waiver (and the material obligation to abstain from initiating or continuing proceedings in a domestic court) **is a precondition to the State’s ‘consent’ to arbitrate and to the Tribunal’s jurisdiction.**”) (emphasis added).

⁴⁶ This of course is without prejudice to the *competence specialis* established under Article 10.20.4 to make a determination as to the legal merit of a claim independent of whether or not the Tribunal has jurisdiction. *See* Hearing Transcript, p. 28: 1-8. As discussed below, it is also without prejudice to the Tribunal’s inherent authority to guard the integrity of the proceedings and make procedural decisions until it has made a determination on jurisdiction. *see Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures (8 April 2016) (Buergenthal, Alvarez, Hossain), available at <https://www.italaw.com/sites/default/files/case->

35. There is no dispute that Claimant’s purported waiver in paragraph 88 of his Notice of Arbitration does not meet the requirements of the USPTPA. Amorrortu has effectively conceded that his waiver is defective by requesting that this Tribunal belatedly admit an amended waiver that is compliant with the USPTPA and going so far as inappropriately presenting this purported amended waiver as a witness declaration from Mr. Amorrortu.⁴⁷

36. Specifically, Mr. Amorrortu’s waiver is non-compliant in two essential ways: (1) Claimant’s waiver did not accompany the request of arbitration as a separate document signed by Amorrortu himself and (2) it was not unqualified, but rather expressly reserved rights to assert claims in other fora.⁴⁸

37. Peru has established that every other party to an arbitration faced with identical waiver requirements have submitted a separate document signed by the claimant to effect the necessary waivers.⁴⁹ Other Tribunals examining similar Treaty language have held that “physically submitting the waiver document accompanying his request for arbitration” is the only way to preserve the Treaty provisions “*effet utile*.”⁵⁰ Moreover, as Peru

[documents/italaw7209.pdf](#), ¶ 186 (“the Tribunal has the inherent jurisdiction and powers required to preserve the integrity of its own process and the duty to ensure that the Parties comply with their obligation to arbitrate fairly and in good faith.”).

⁴⁷ See Second Witness Statement of Bacilio Amorrortu (25 April 2021). Peru’s request that this declaration be rejected by the Tribunal remains outstanding and Peru reserves all rights in this regard.

⁴⁸ See Notice of Arbitration (13 February 2020), ¶ 88 (“To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits.”).

⁴⁹ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Notice of Arbitration (2 July 2009) (Jan van den Berg, Grigera Naón, Thomas), Exhibits A and B (**RLA-12**); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Request for Institution of Arbitration Proceedings (14 June 2007) (Sureda, Eizenstat, Crawford), ¶ 14 (**RLA-9**) (“As required by Article 10.18.2, RDC and FVG provide copies of their written consents and waivers as Exhibit 8.”); *id.*, ¶ 19 (“RDC’s consent to submit this dispute under ICSID Arbitration Rules expressed in this Request and the attached consents and waivers.”); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Notice of Arbitration (20 October 2010) (Mourre, Park, Wobeser), ¶ 22 (**RLA-15**) (“A copy of its waiver is attached hereto.”); *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Notice of Arbitration and Statement of Claim (10 June 2013) (Bethlehem, Kantor, Vinuesa), ¶ 7 (**RLA-24**) (“The waivers are attached at Appendix E to this Notice of Arbitration and Statement of Claim.”); *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (31 May 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 10 (**RLA-31**) (“By letter of July 28, 2014, the Claimant confirmed that in accordance with DR-CAFTA Article 10.18(2)(b)(i) it waived “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”) (emphasis omitted); *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Notice of Arbitration (2 January 2014) (Siqueiros, Baker, Nikken), ¶ 3(d) (**RLA-27**) (“The Claimants and their Enterprises also provide respectively at Annexes A and B to this Notice of Arbitration written waiver of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, in accordance with DR-CAFTA Article 10.18(1)(b).”) (emphasis omitted); *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Notice of Arbitration (9 November 2018) (Kalici, Townsend, Douglas), ¶ 17 (**RLA-36**) (“A copy of Claimants’ waiver is attached hereto.”).

⁵⁰ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011) (Jan van den Berg, Grigera Naón, Thomas), ¶ 81 (**RLA-17**) (emphasis added), citing to *Commerce*

indicated, the requirement of separate documents both emphasizes the import of the waiver itself and ensures that the State has a separate legal instrument signed by Claimant that can be easily presented in another for should Claimant violate his commitment.⁵¹ Amorrortu has not disputed any of these arguments.

38. Likewise, Peru has established both State Parties to the USPTPA are in agreement that a “waiver containing any conditions, qualifications or reservations [...] will be ineffective” and incapable of generating consent to arbitration⁵² *Renco I*, which ruled on this very treaty provision agreed, finding a qualified waiver was not effective⁵³ and contrary to the whole purpose of Article 18.2, and incurable.⁵⁴ Other tribunals analyzing identical waiver requirements also found that conditions such as those presented by Amorrortu are fatal to jurisdiction.⁵⁵ Amorrortu does not dispute any of this firm jurisprudence on this matter, nor can he. Indeed, Amorrortu was aware of this jurisprudence yet chose to ignore it when submitting his claim.

39. Amorrortu’s attempts to salvage jurisdiction in this matter despite his defective waiver, much like his claim in general, has been fluid and constantly changing. None of his arguments hold any weight.

40. First, Amorrortu argued that his waiver satisfied Article 10.18.2 because it was sufficient to avoid the risk of conflicting outcomes and double recovery. Moreover, Amorrortu argued that he has acted in accordance with his waiver by not asserting other claims in other fora and that, in any event, there is no other jurisdiction in which Amorrortu could present his claims.⁵⁶ Peru demonstrated that, as the Tribunal in *Renco I* found, Article 10.18.2 not only sought conflicting outcome and a double recovery but is a condition to

Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, ICSID Case No. ARB/09/17, Non-Disputing Party Submission of the Republic of Costa Rica (Jan van den Berg, Grigera Naón, Thomas) (20 October 2010), ¶ 3.

⁵¹ Peru’s Reply, ¶ 73.

⁵² Submission of the United States of America (13 July 2021), ¶ 19 (“[T]he waiver requirement seeks to give the respondent certainty, from the very start of arbitration under the treaty, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration. Accordingly, a waiver containing any conditions, qualifications or reservations will not meet the formal requirements and will be ineffective.”) (emphasis added).

⁵³ *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶¶ 60, 73 (**RLA-32**) (“an arbitration agreement will be formed under the Treaty only if the investor satisfies the formal and material waiver requirements of Article 10.18(2)(b).”) (emphasis omitted).

⁵⁴ *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 119 (**RLA-32**) (“For the reasons set out above, the Tribunal concludes that Renco has failed to comply with the formal requirements of Article 10.18(2)(b) by including the reservation of rights in the waiver accompanying its Amended Notice of Arbitration because: (a) The reservation of rights is not permitted by the express terms of Article 10.18(2)(b); (b) The reservation of rights undermines the object and purpose of Article 10.18(2)(b); (c) The reservation of rights is incompatible with the ‘no U-turn’ structure of Article 10.18(2)(b); and (d) The reservation of rights is not superfluous.”).

⁵⁵ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 March 2011) (Jan van den Berg, Grigera Naón, Thomas), ¶¶ 79-80 (**RLA-17**) (“The Tribunal notes that Respondent has put forth the argument that any waiver must comply with both a formal and a material element. [...] The Tribunal agrees with Respondent.”).

⁵⁶ Claimant’s Response to Jurisdictional Objections (22 December 2020), pp. 3-4.

consent meant to avoid States from having to defend against any claim arising from the same alleged measures. Thus the fact that Amorrortu had not yet filed any claims does not cure the conditional nature of his waiver or its defectiveness. Peru also demonstrated that simply because Treaty claims cannot be presented in other fora, Article 10.18's waiver requirement broadly applies to "all claims" arising from the same alleged conduct.⁵⁷

41. In his Reply to Peru's Submission on Preliminary Objections Amorrortu abandoned this argument. Instead, he offered a tortured reading of Article 10.18(2) and 10.16 of the USPTPA to argue that the Treaty does not require an absolute waiver. According to Amorrortu, the waiver is only required for claims "submitted to arbitration" under Article 10.16. A claim that is dismissed for lack of jurisdiction however is a claim that "may not be submitted to arbitration" under the USPTPA and thus is exempt of the waiver requirement. According to Amorrortu this would justify his reservation of rights to assert similar claims if they are dismissed by this Tribunal on jurisdictional grounds.⁵⁸ Peru has explained that this reasoning is tautological and devoid of logic.⁵⁹ As the *Renco I* tribunal found, Article 10.18 is a no U-turn provision requiring a waiver of any claims:

The waiver required by Article 10.18(2)(b) is intended to operate as a "once and for all" renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits).⁶⁰

42. Next, Claimant argued that because the USPTPA did not include a "warning" of the severity of the waiver requirement, as is purportedly done for the fork in the road clause, it must be interpreted broadly to exclude claims dismissed for lack of jurisdiction.⁶¹ Peru also proved this argument to be fallacious. There is no legal basis under international law that requires Treaties to provide warning of the consequences of treaty provisions.⁶² In addition, the cited provision in the fork in the road clause is merely clarifying language and does not constitute a "warning."⁶³ Moreover, Article 10.18(2) is exceedingly clear in its language that the

⁵⁷ Peru's Response to Claimant's Request for Leave to Amend Notice of Arbitration (15 January 2021), Section III, p. 8-10.

⁵⁸ Claimant's Answer, ¶¶ 115-118.

⁵⁹ Peru's Reply, ¶¶ 77-80.

⁶⁰ *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), ¶ 99 (**RLA-32**) (emphasis added).

⁶¹ Claimant's Answer, ¶¶ 119-120.

⁶² Peru's Reply, ¶ 83.

⁶³ Peru's Reply, ¶ 84.

waiver applies to “any claims”.⁶⁴ And, as noted, if that were not enough, tribunal decision analyzing similar or the same treaty language were equally clear as to the waiver requirement and its import.

43. Notably, at the Hearing, Amorrortu retreated from these arguments and, as if clutching at straws, presented a new, equally wrought and convoluted interpretation of article 10.16 of the USPTPA. Claimant observes that Article 10.16(3) of the USPTPA deems an UNCITRAL claim to have been submitted when the respondent received Claimant’s Request for Arbitration “together with the statement of claim referred to in Article 18 of the UNCITRAL rules. Similarly Article 10.18 indicates that no claim maybe submitted to arbitration unless the notice of arbitration is accompanies by a valid waiver. Claimant thus argues that because a claim is not submitted until the Statement of Claim is presented and the presentation of the Statement of Claim is determined by the tribunal’s inherent authority to issues a procedural calendar and set the date for the submission of the Statement of Claim, the Tribunal somehow retains authority to permit Amorrortu to cure his defective waiver and thus “*perfect the arbitration agreement.*” Claimant cites no authority for this “unique” interpretation.⁶⁵

44. Amorrortu’s interpretation is meritless on its face. It is certainly true that the Treaty language may appear to create window within which Claimant may cure a defective waiver. Because a claim is not deemed “submitted” until the Statement of Claim is presented, it might be argued that of Amorrortu had submitted an amended Request for arbitration with a valid waver, prior to the submission of the Statement of Claim, that this defect would be cured.⁶⁶ Peru does not take a formal stand with respect to this position but only observes the unique treaty language in that regard and the possible argument. Notably the United States has formally declared that under its interpretation a defective waiver can only be cured prior to the constitution of the Tribunal.⁶⁷

45. However, under any interpretation, the window for Amorrortu to cure his defective waiver has now closed. Certainly the Tribunal exercises certain inherent authority in establishing the procedural calendar and setting the date of submission of the Statement of Claim, but this inherent authority does not extend to modifying the clear text of the USPTPA. Thus, even under Amorrortu’s interpretation, once that Statement of Claim has been submitted, his arbitral claim is deemed submitted under the express terms of the Treaty. If Claimant has not submitted a valid waiver by the deadline for the Statement of Claim, and the submission

⁶⁴ Peru’s Reply, ¶ 86.

⁶⁵ Hearing Transcript, p. 105: 9.

⁶⁶ Peru’s Response to Claimant’s Request for Leave to Amend Notice of Arbitration (15 January 2021), p. 5; Peru’s Submission on Preliminary Objections (15 March 2021), note 166.

⁶⁷ Submission of the United States of America (13 July 2021), ¶ 24.

of his claim, then Claimant's defective waiver can no longer be cured.⁶⁸ The Tribunals so called "pre-arbitration agreement" inherent powers to set a calendar, thus does not and cannot extend so far as to modify the State Parties; clear intent in the Treaty.

46. Amorrortu's last gasp is his argument that Peru is somehow estopped from objecting to the Tribunal's jurisdiction because of its request for an order from the Tribunal that Amorrortu disclose information concerning his third party funding. As discussed further in response to the Tribunal's question, this argument is equally meritless.

47. Peru has already established why the doctrine of estoppel is inapplicable in this regard and that none of three elements of estoppel are met here.⁶⁹ Notably, Amorrortu has not demonstrated how he was prejudiced or how Peru has benefited individually (as opposed to the general benefit to the integrity of the arbitral procedure), from his request for third party funding disclosure.

48. More importantly, Peru's request for third party funder disclosure cannot be viewed as anything but procedural in nature, and meant to ensure the integrity of the process. It is universally understood that under the principle of competence-competence, the Tribunal retains jurisdiction over the arbitral proceeding until it has determined it has none.⁷⁰ Accordingly, the parties may, and indeed in certain situations, must, have recourse to the Tribunal to make certain determinations, or issue certain orders in order to protect their respective interests and the integrity of the process. Disclosure of third party funding, including certain of its terms, is consistent with this, and indeed consistent with trends in the arbitral community. No other tribunal has held that access to such recourse estops a State from timely asserting jurisdictional objections, particularly, where, as here, a State has already reserved its right to assert such objection. This is for good reason: to do so would irreparably tie a State's hands in its defense in any arbitral proceeding, including its right to ensure that its procedural rights are protected. Such a ruling would cause irreparable damage not just to Peru, but to the investment arbitration system itself.

III. ANSWERS TO THE TRIBUNALS QUESTIONS

49. Peru hereby provides its responses to the Tribunals specific questions presented to the parties on August 19, 2021.

⁶⁸ Peru's Response to Claimant's Request for Leave to Amend Notice of Arbitration (15 January 2021), p. 5; Peru's Submission on Preliminary Objections (15 March 2021), note 166.

⁶⁹ Peru's Reply, ¶ 63.

⁷⁰ *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), available at <https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf>, ¶ 341 ("It is well established that tribunals constituted under international law are competent to rule on their jurisdiction even in the absence of a jurisdictional challenge.").

A. First Objection- Statement of Claim Discloses no Cause of Action

1. Multiple Claims Made

- a. 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?**

50. Peru respectfully observes that this question is based on two erroneous premises that have been clarified above. First, Claimant’s claim as asserted in the Statement of Claim is based exclusively on the alleged interruption of the direct negotiation process and is not based on the public tender. Second, corruption claims are not factual allegations, but conclusions to be determined based on factual allegations, and as such should not and cannot be deemed as true. The facts that can be assumed to be true under the standard of analysis of an Article 10.20.4 objection (which remains undisputed by Amorrortu) were outlined by Peru in its briefs,⁷¹ its opening presentation⁷² and in Section I, *supra*. The question, then, is assuming these factual allegations to be true, must the Article 10.20.4 application be dismissed. The answer is resoundingly no.

51. As Peru has established, in order for Claimant to prevail on his FET claim, he must demonstrate that he had a specific vested interest or right which was negatively affected by the State’s conduct, in breach of the Treaty. Claimant cannot demonstrate this vested interest or right as a matter of law. As Peru established, this is not just because Claimant was in non-compliance with GFCN_008, but also because (i) due to such non-compliance, the direct negotiation process never commenced, (ii) even if it had commenced the direct negotiation does not confer the “bundle of rights” alleged by Claimant, and (iii) the direct negotiation provides no ultimate right to a contract, and thus there can be no right or interest that was harmed. Thus the specific facts alleged, even if assumed to be true, did not violate any vested right or interest, and thus there was no Treaty breach.

52. Furthermore, for the sake of argument, even though corruption cannot and should not be deemed as true for purposes of Article 10.20.4, even if the factual allegations assumed to be true constituted corruption, nothing in the USPTPA or international law provides for a general right against corruption. Nor has any tribunal so ruled. Put another way, the existence of corruption does not create rights. Rather, as Peru has established, cases in which corrupt measures or irregularities were found to constitute a treaty breach, are

⁷¹ Peru’s Submission on Preliminary Objections (15 March 2021), ¶ 12; Peru’s Reply, ¶ 8.

⁷² Peru’s Opening Presentation, Hearing on Preliminary Objections (9 August 2021), Slide 13.

premised on the fact that such corruption or irregularity violated or impacted an existing right. Thus in *EDF v. Romania*, the measure impacted an existing contractual right.⁷³ In *Bosco v. Lithuania*, the Claimant had met all relevant criteria and had been declared a winner of a competitive bid.⁷⁴ None of these scenarios exist in this case.

53. Finally, as noted, Claimant's claim is not and has never been presented as being based on irregularities with the public tender. Thus this Tribunal cannot be seized of a claim that does not exist. However, assuming *arguendo* that Amorrortu's claim also is based on the alleged irregularities with the public tender, for the reasons discussed in Part I, *supra*, Amorrortu similarly cannot demonstrate that as a matter of law, he had a right to be selected the winner of the public tender or to be awarded a contract. Accordingly, even under this scenario, Amorrortu's claim must be dismissed.

b. If so, is declaratory relief an available remedy with respect to the Claimant's claims regarding direct negotiation and/or the public tender?

54. Declaratory relief is expressly excluded by the USPTPA, which provides in Article 10.26:

Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and applicable interest; and (b) restitution of property.⁷⁵

55. Commentators of this specific provision in the US Model BIT have confirmed this, asserting that "th[e] authority [of Tribunals to order full reparation] extends to only two types of reparations: monetary damages [...] and restitution of property."⁷⁶ "Satisfaction—another form of reparation often involving acknowledgment of a breach or expressions of regret—is therefore excluded [...]."⁷⁷

56. The USPTPA is *lex specialis*, and thus its express limitations govern and supersede any applicable principle under customary international law.⁷⁸

⁷³ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009), ¶ 56 (CLA-4).

⁷⁴ *Luigiterzo Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award (17 May 2013), ¶ 166 (CLA-46).

⁷⁵ USPTPA Investment Chapter (12 April 2006), Art. 10.26 (CLA-1). Claimant's assertion during the Hearing that "[w]hen you look at the Award section of the Treaty, the Award section says no punitive damages are allowed, but that is really the only limitation that you have with respect to an Award to the Tribunal" was thus incorrect. See Hearing Transcript, p. 110: 12-16.

⁷⁶ L.M. Caplan and J.K. Sharpe, 18 United States, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (C. Brown ed.) (17 January 2013), pp. 844-845 (RLA-23) (emphasis added).

⁷⁷ *Id.*, note 345.

⁷⁸ See *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007) (Cremades, Rovine, Siqueiros), available at https://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf, ¶ 118 (recognizing that rules of customary international law are not applicable to matters regulated by NAFTA's Chapter 11, that constitutes *lex specialis*: "The customary international law that the ILC Articles codify do not apply to matters which are specifically governed by *lex*

57. Thus, even if assuming *arguendo*, this Tribunal is seized of claims relating to alleged corruption in the negotiation process and/or the public tender, the Tribunal could not issue an award limited to declaratory relief. As noted in Peru’s response to Tribunal Question 5 (the Right to Contract Issue), this is an independent reason for dismissing Claimants claim under Article 10.20.5, because, an award in favor of Claimant cannot be made under Article 10.26.

2. The Estoppel Issue

The Tribunal invites submission on the alleged estoppel and un particular: 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

58. As the Tribunal notes, Amorrortu’s allegation that on May 22, 2014, he was “instructed to prepare a proposal for direct negotiation for the operation of Blocks III and IV by PeruPetro CEO Luis Ortigas” must be taken as true. Claimant’s arguments place an inordinate amount of burden on this one allegation, as Amorrortu uses Ortiga’s alleged instruction to excuse the many deficiencies identified in the Baspetro proposal and his failure to comply with the express requirements of the Direct Negotiation Procedure (GFCN_008) and the qualification process.

a. Mr. Ortigas had no authority as a matter of law to instruct Amorrortu in a manner inconsistent with the law or PeruPetro’s Boards previous decisions.

59. As an initial matter, it bears reminding that in his pleading and at the Hearing, Claimant highlighted that Amorrortu is a sophisticated businessman with deep ties in the Peruvian oil and gas industry and with prior experience operating Block III. Accordingly, and even beyond the general principle of *ignorantia juris no excusat*, it is reasonable to assume that he would have been familiar with the procedures followed by PeruPetro to enter into license contracts, and with the applicable laws and regulation that govern such contracting.

specialis –i.e., Chapter Eleven of the NAFTA in the present case.”); Commentaries on Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 55 (CLA-67) (“These articles [that contemplate other forms of reparation, besides compensation and restitution] do not apply where and to the extent that [...] the content or implementation of the international responsibility of a State are governed by special rules of international law.”); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008) (Nariman, Bernárdez, Bernardini), ¶ 113 (RLA-11) (“The ILC’s Articles on State Responsibility is a detailed and official study on the subject but it contains no rules and regulations of State Responsibility vis-à-vis non-State actors. Tribunals are left to determine ‘the ways in which State Responsibility may be invoked by non-State entities’ from the provisions of the text of the particular Treaty under consideration”).

60. Accordingly, Amorrortu cannot deny knowledge of the fact that for a direct negotiation process to begin, an area must be available (i.e. not under contract or under plans to be submitted to a public tender). Nor can he deny knowledge of the fact that as part of any direct negotiating application, he was required to make a specific request for a certification of qualification and submit the express and specific documents identified in the Regulation on Qualification. Nor can he deny knowledge of the fact that without such a qualification certification a direct negotiation cannot commence.

61. Yet Amorrortu seeks to disavow any of these requirement based upon Mr. Ortigas' alleged instruction.⁷⁹ Amorrortu's efforts however incompatible with the law. As with nearly all jurisdictions, Peruvian laws and regulations are of a mandatory nature and everyone, including PeruPetro, must comply with them.⁸⁰ Neither PeruPetro nor its officials can legitimately provide instructions that are contrary to applicable laws and regulations. As explained by Peru's legal expert, Dr. Vizquerra:

[C]onversations and meetings with Amorrortu had no effects from a legal point of view. The conduct of employees of the entities are not administrative confirmations that produce interest, obligations or rights relating to the administrative subjects.

62. Furthermore, PeruPetro, as corporate entity and under applicable law, does not act by virtue of the decisions and instruction of s ingle official. Rather its corporate decisions are taken by a vote the general board of shareholders, which also approves all contracts with PeruPetro.⁸¹ Indeed, even Dr. Quiroga, Amorortu's legal expert, acknowledged that simple conversations with Mr. Ortigas cannot convey the will of an entity such as PeruPetro.

[Dr. Wray:] [H]ow is the will of the public officials conveyed? [...]

[Quiroga]: Well, when they are regulated, Administrative Acts when they are regulated through Administrative Acts, but in the case of companies like PeruPetro, it could be through a Board of Directors' agreement and different decisions that are reached.⁸²

63. Notably it was precisely PeruPetro's Board as a whole that had decided several months earlier that it was "necessary to sign a Temporary License Agreement, for a period that allows PERUPETRO SA to carry

⁷⁹ As with other aspect of his claim, Amorrortu has been vague about the content of Mr. Ortigas' instructions, which has changed and shifted over the course of the proceeding. Indeed, there appears to be inconsistencies even between Amorrortu and his legal expert. Dr. Quiroga, Amorrortu's legal expert, provides alleged details of Mr. Ortiga's instructions, but does not cite the source of information. Third Expert Report of Aníbal Quiroga León (21 June 2021), ¶ 36 (CER-3). Such details are tellingly absent from Amorrortu's pleadings or witness statements. During the Hearing, when asked the source upon which Dr. Quiroga relied to specify the alleged details of Mr. Ortigas instructions, Quiroga simply failed to cite to any available evidence. Hearing Transcript, pp. 193: 25 - 194: 10.

⁸⁰ Ley de Organización y Funciones de PeruPetro, S.A., Ley No. 26225 (20 August 1993), Art. 1 (CLA-41).

⁸¹ Ley de Organización y Funciones de PeruPetro, S.A., Ley No. 26225 (20 August 1993), Art. 12 y 15 (CLA-41).

⁸² Hearing Transcript, pp. 196: 19 - 197: 1.

out the selection process⁸³ for the conclusion of a new License Agreement for the Exploitation of Hydrocarbons in Block[s] III [and IV].”⁸⁴ This decision was already made public.⁸⁵ Mr. Ortigas cannot act or instruct in a manner that is inconsistent with the decision of the PeruPetro Board, and any such instructions would be invalid and illegitimate.⁸⁶

64. Thus, Amorrortu’s allegation, taken as true, does not change the analysis or the ultimate conclusion. Whatever Mr. Ortigas instructions may have been, these instructions could not unilaterally change the decision of PeruPetro as an entity to submit Blocks III and IV to public tender. Moreover they could not modify the applicable laws and regulations.

65. Thus, at the very least, Amorrortu should have known that Mr. Ortigas’ instructions, taken as true, were no valid and that any application for a direct negotiation would likely not be successful given PeruPetro’s publicly announced plan to submit the blocks to public tender. Even with respect to direct negotiation Amorrortu should have-- and is legally deemed to have been-- aware that such direct negotiations could only commence by submission of a proper and complete request for a certification of qualification. Ultimately Amorrortu did not have any rights to or concomitant with a direct negotiation process.

b. In any event, estoppel is not a source of rights under international law

66. Even if we were to assume that Dr. Quiroga’s instructions estopped Peru from claiming the non-availability of the Blocks for direct negotiations, under international law, this did not create any right protected by the Treaty, which is the core of Peru’s objection against Amorrortu’s claim. The *Vestey v. Venezuela* tribunal opined that:

⁸³ During the Hearing, Claimant asserted that there are various means of selection, and that the reference to “selection” could include direct negotiation. *See*, for instance, Hearing Transcript, p. 90: 11-14. This is at best a misunderstanding on the part of Amorrortu, or at worst, intentionally misleading. “Selection” whenever used on PeruPetro documents relates to public tender. *See* PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 6 (CLA-44); PeruPetro’s Direct Negotiation and Competitive Bidding Process Contracting Policy: Board Agreement No. 029-2017 (10 April 2017), p. 5 (RLA-34). It is the only in a public tender process where a company is selected among others. The term selection is never used to refer to direct negotiation.

⁸⁴ *See*, for instance, Directory Agreement No. 034-2014 (20 March 2014), p. 1 (C-3); Hearing Transcript, p. 128: 8-12 (“The Board of Directors of PeruPetro on 20 March 2014 had already decided that Blocks III and IV were going to be subjected to a selection procedure. This was decided internally by PeruPetro. PeruPetro had already decided this, and this is relevant.”).

⁸⁵ Directory Agreement No. 034-2014 (20 March 2014), p. 2 (C-3) (emphasis added); Decreto de Urgencia No. 032-2009 (27 February 2009) (CLA-49).

⁸⁶ Ley de Organización y Funciones de PeruPetro, S.A., Ley No. 26225 (20 August 1993), Arts. 12, 16(c), 18 (CLA-41). In this sense, Dr. Quiroga’s affirmation at the Hearing that “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” is therefore unfounded. Notably Dr. Quiroga offered no basis for this assertion. Quiroga also noted that he did not have experience in these aspect. Hearing Transcript, p. 196: 3-7.

The principle of estoppel cannot create otherwise nonexistent property rights. This is so if one grounds the principle of estoppel on international law.⁸⁷

67. The same case arises here. Even if Mr. Ortigas' alleged oral instructions to Mr. Amorrortu somehow estopped Peru to claim the unavailability of Blocks III and IV for direct negotiations, or to otherwise exercise its discretion not to conduct direct negotiations with Amorrortu (*quod non*), he still had to demonstrate he acquired a right protected by the Treaty; estoppel is not a source of rights protected by international law. As a result, even if estoppel applied, it does not change the ultimate conclusion an Amorrortu's claim must be dismissed.

3. The Tribunal invites submission on the alleged estoppel and un particular: 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

68. As an initial matter, "the concept of a legitimate expectation [must be] distinguish[ed from] the existence of a protected acquired right [and/or] a mere hope or legally irrelevant personal expectation."⁸⁸ Surely, in seeking to obtain a business, contract, or license, any individual (and indeed the State itself) has an expectation that the law will be followed and that an application for such business, contract or license or contract will be done in a fair and corrupt manner. However, those general expectations and hopes are not protected by international law or by the UPSTPA.⁸⁹ As noted in Part I, supra, the USPTPA does not protect

⁸⁷ *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (15 April 2016) (Kaufmann-Kohler, Grigera Naón, Dupuy), available at <https://www.italaw.com/sites/default/files/case-documents/italaw7230.pdf>, ¶ 257.

⁸⁸ *International Thunderbird Gaming Corporation v. the United Mexico States*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2015), available at <https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf>, ¶ 31.

⁸⁹ See, for instance, *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award (9 September 2003) (Danelius, Hunter, Kronke), ¶¶ 327, 329 (RLA-5); *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award (29 March 2005) (Danelius, Bring, Smets), pp. 19, 69, 72 (RLA-8) (holding that only legally binding commitments with economic value are entitled to treaty protection); *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003) (Robinson, Rubin, Jacovides), ¶ 2 (RLA-4); *Deutsche Telekom AG v. The Republic of India*, UNCITRAL, PCA Case No. 2014-10, Interim Award (13 December 2017) (Kaufmann-Kohler, Price, Stern), ¶ 181 (RLA-35) ("the Tribunal stresses that the situation before it differs from the cases relied upon by India. In *Mihaly*, the agreements entered into by the claimant were non-binding; in *Petrobart*, the negotiations 'did not result in any binding undertakings in the Contract'; in *Zhinvali*, the 'negotiations [...] to conclude a definitive set of agreements [...] never came to fruition'; in *Nagel*, the claimant entered into a cooperation agreement 'only of a preparatory nature'. By contrast, in the present case, Devas had a binding agreement contemplating the lease of valuable satellite spectrum, which agreement became effective after Antrix informed Devas that it had obtained full clearance from the Government to proceed with the lease."). In this same vein, last June 5, 2020, the *Nelson v. Mexico* tribunal determined that draft agreements that were not concluded under Mexican law, and did not created rights under such law, could not be considered as "investments" and could hence not advance a claim for unlawful expropriation nor violation of fair and equitable treatment under NAFTA. See *Mr. Joshua Dean Nelson v. The United Mexican States*, ICSID Case No. UNCT/17/1, Final Award (5 June 2020) (Zuleta, Veeder, Gomezperalta Casali), ¶¶ 228, 241-242, 281-283; 313-314 (RLA-39).

against irregularities or corruption generally. Rather such irregularity or corruption must have negatively impacted an existing and vested right or interest.

69. Indeed in all the cases cited by Amorrortu to support his position, the relevant claimant already had an existing contractual right upon which its claims relied upon.⁹⁰ This is not the situation with Amorrortu. As discussed above, neither with respect to the direct negotiation, nor with the public tender (assuming arguendo that this is part of Claimant’s claim), did Amorrortu have any rights. Thus even if Amorrortu’s allegations were to permit a conclusion that corruption existed, this, by itself, did not rise to the level of a violation of FET.⁹¹

70. In any event, Amorrortu’s factual allegations, assumed to be true, include the fact that “Ortigas informed Amorrortu [...] that the Board of Directors of PeruPetro had rejected the Baspetro Proposal,”⁹² meaning that the Baspetro Proposal was indeed reviewed and given consideration, although ultimately rejected. Amorrortu was then informed of this rejection.

71. But even if we take as true Mr. Ortigas’ conclusory affirmation that Mr. Ortigas’s statement was “false”, according to Amorrortu’s own allegations, assumed to be true, he yet another formal response to the Baspetro Proposal, via a letter from PeruPetro’s General Manager, Ms. Tafur.⁹³ That letter implicitly

⁹⁰ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), ¶ 90 (CLA-26) (cited at Claimant’s Memorial (11 September 2020), ¶ 230; Claimant’s Answer, ¶ 9) (the tribunal here ruled that the activities sought to be protected were the expansion of an already existing investment, comprising of a music radio station. Specifically, it reasoned that if an “investment, once made, was subsequently denied frequencies and broadcasting licenses in violation of Ukraine’s obligations assumed in the BIT, th[e] claim constitutes an ‘investment dispute.’” *Conversely*, here, Amorrortu never had an investment”); *Luigiterzo Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award (17 May 2013), ¶ 166 (CLA-46) (cited at Claimant’s Memorial (11 September 2020), ¶ 237; Claimant’s Answer, ¶¶ 9, 87 (This tribunal similarly noted that “the Claimant made an investment in Lithuania when he concluded and realized the Service Agreement [on the sparkling wine industry].” *Conversely*, no direct negotiation was at place, not even a right to it.); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009), ¶ 56 (CLA-4) (cited, *inter alia* at Claimant’s Memorial (11 September 2020), ¶ 244; Claimant’s Answer, ¶¶ 9, 87; Claimant’s Rejoinder, ¶ 19) (akin to *Lemire v. Ukraine* and *Bosca v. Lithuania*, Claimant in *EDF v. Romania* already had a protected investment, the joint venture to operate duty free shops that allowed it to bring the investment claim. The measures challenged by EDF had to do with a continuation of such already existing investment. Amorrortu, here, never had a right to a direct negotiation or any investment related to Blocks III and/or IV, protected by the USPTPA).

⁹¹ Claimant’s argument that Peru is also estopped from claiming that the Block III and IV were unavailable because this was part of the corrupt scheme to favor Grana y Monetro suffers from the same problem. Again, corruption cannot be assumed. The only factual allegation that can be assumed, and that is agreed upon by both parties, is that PeruPetro had announced as early as [date] that Block III and IV would be subject to a public tender. This of course undermines Amorrortu’s “expectation” since no responsible business person would assume that direct negotiation process would get very far in light of this. Indeed, any expectation would have to take into consideration that PeruPetro’s procedures require that the Blocks be made publicly available for competitors and that if any interest was shown, the direct negotiation would end and a public tender commence. In any event, because Amorrortu had no right over Blocks II and IV, or any rights derived from or concomitant to the direct negotiation process or the public tender, even assuming there was a corrupt scheme, these alone do not constitute a treaty breach.

⁹² Claimant’s Memorial (11 September 2020), ¶ 83.

⁹³ Letter from PeruPetro, S.A. to Bacilio Amorrortu (20 August 2014) (C-13).

rejected the Bapsetrol proposal and invited him to the public tender. Note that as Peru pointed out in the opening statement, the PeruPetro Procedures for Direct Negotiations (GFCN-008) indicate that a letter be sent to a company whose direct negotiation proposal has been rejected in accordance with a template indicated in “Annex 01” of those Procedures.⁹⁴ As Peru noted, the template is just that, a letterhead template permitting PeruPetro absolute discretion as to the content of the latter of rejection.

72. Accordingly, and in light of the fact that corruption is a conclusion of fact and law that cannot be assumed to be true for purposes of an Article 10.20.4 objection, the factual allegations assumed to be true, must be assessed for what they are worth. These allegations, point just as much the Baspsetrol having been evaluated and rejected fairly.

73. In any event, for purposes of an Article 10.20.4 Objection, the only critical issue thus is not whether the facts as alleged constitute corruption, or whether there was an expectation that the Baspsetrol proposal would be processed in a non-corrupt matter. The only relevant issue is whether Amorrortu or Baspsetrol had a vested right that would have been impacted by corruption or other conduct, and thus constitute a Treaty breach. For the reasons already explained, the answer is that he did not. Amorrortu’s claim thus fails as matter of law.

4. The 28 May 2014 Baspsetrol Proposal

- a. 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-3) seems silent on the point;**

74. The textual basis for that statement is Article 14 of the Qualification Regulations, as Peru immediately discusses. But, for the sake of clarity, CLA-3 is not Procedure GFCN-006, as referenced in the Tribunal’s question. That procedure is found in the record as CLA-15.

75. The Qualification Procedure, governed by the Qualification Regulations (CLA-3), precedes a direct negotiation process and, most importantly, is the only means to obtain the Certificate of Qualification necessary to start direct negotiations.⁹⁵ According to those Regulations, only if an oil company “submits the documents mentioned in [...] Articles [5 or 6 of the Qualification Regulations] in a complete manner,” then

⁹⁴ Hearing Transcript, p. 35: 6-12.

⁹⁵ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 14 (**CLA-3**) (“Every Oil Company must be duly qualified, by PERUPETRO SA, to initiate the negotiation of a Contract.”) (Translation submitted by Claimant).

“PERUPETRO SA is obliged to grant the Qualification of the Oil Company, within ten (10) business days.”⁹⁶ If this obligation is not complied with by PeruPetro, then, and only then, could “[a]dministrative responsibility of its officials” arise. But nothing more. The textual basis for all the above is Article 14 of the Qualification Regulations.⁹⁷

PERUPETRO SA is obliged to grant the Qualification of the Oil Company, within ten (10) business days of receiving the request referred to in Articles 5 or 6 of this Regulation, as appropriate, **[subject to administrative liability of its officials]**, provided that the Oil Company submits the documents mentioned in said Articles in a complete manner and if, after the corresponding evaluation is made, no observations, errors or omissions are found or the additional information referred to in Article 7 is not requested; on the contrary the term referred to in the last paragraph of the Article will be computed 10.⁹⁸

76. Thus the Regulation on Qualification expressly provides for only the liability of the responsible official, but does not provide any other remedy. Nor does it provide any rights to the applicant. As Dr. Vizquerra has indicated the Regulation provides for no rights by administrative silence, and to the extent it is applicable, the result would be an inferred rejection of the application.⁹⁹

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

77. In the specific case of qualification of oil companies in Peru, entitlement to have a qualification request application considered on its merits pursuant to the regulation on Qualification and the potential “administrative liability” for officials are not mutually exclusive. There is actually a correlation between both concepts: if a duty to consider the merits of an application for qualification arises, the consequence of

⁹⁶ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 14 (**CLA-3**) (Translation submitted by Claimant).

⁹⁷ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 14 (**CLA-3**) (Translation submitted by Claimant).

⁹⁸ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 14 (**CLA-3**) (emphasis added) (Translation submitted by Claimant). The original Spanish version of the operative phrase “bajo responsibilidad Administrativa de sus funcionarios” is more accurately translated as indicated in the bracketed text above. Claimant’s translation “under the Administrative responsibility of its officials” lends itself to ambiguity and is thus incorrect.

⁹⁹ Second Vizquerra Expert Report, note 15 (**RER-2**); First Vizquerra Expert Report, ¶¶ 22, 29 (**RER-1**); *see also* Hearing Transcript, p. 130: 2-5 (“If we apply that standard, it was proper to consider the constructive denial, since this case referred to public interest in the area of natural resources.”). In any event, as Peru has indicated, PeruPetro is not an administrative entity. Hence, administrative silence, either positive or negative, as regulated by Law 29060 (**CV-9**) is not applicable to PeruPetro’s actions. In fact, Dr. Vizquerra clearly indicated that his discussion on what type of administrative silence would apply to PeruPetro’s actions was only “[f]or the sake of argument” (“*en el supuesto negado*”) as, again, administrative silence is not applicable to PeruPetro. *See* Second Vizquerra Expert Report, note 15 (**RER-2**).

the failure to conduct such consideration is administrative liability of the public servants entrusted with such consideration.¹⁰⁰ The consequence, however, is not a right for the applicant to have its application approved.

78. It should be further emphasized that the above-referenced correlation, and the entitlement to have an application for qualification considered on the merits, only arises whenever a company has (i) requested qualification, and (ii) submitted in a complete manner the documents of Article 5 or 6 of the Qualification Regulations.¹⁰¹

79. It is undisputed that Amorrortu did not comply with either of these conditions. Amorrortu never requested a certification for qualification (which as has been demonstrated by Peru- and uncontroverted by Amorrortu- is separate and distinct from a request for a direct negotiation. Furthermore, Amorrortu never presented the very specific documentation required by Article 5 of the regulation. In this situation, the timeframe for review and response to a request from qualification was never triggered, and PeruPetro had no duty to consider the merits of an application that was never made.¹⁰²

5. Was the Corporate “Qualification” a Condition Precedent or Condition Subsequent to Direct Negotiation?

a. 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”?

80. As noted above and in Part I, *supra*, the assertion that that the direct negotiation process was “rigged” and that there was corrupt scheme to favor Graña y Montero is a conclusion, not an allegation of fact, and thus, need not be assumed as true for purposes of the an Article 10.20.4 objections. Only factual allegations may be assumed as true and as further indicated in Part I, *supra*, Amorrortu makes only a limited amount of factual allegations that are relevant to a determination of irregularities specifically with respect to Blocks III and IV. Corruption ultimately cannot unravel all, at this stage of the proceeding, because corruption cannot be assumed.

81. But furthermore, and as explained in Part I above, corruption cannot unravel all unless Claimant has a vested right or interest that was prejudiced by that corruption. As Peru has explained, “no Arbitral Tribunal

¹⁰⁰ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 14 (**CLA-3**).

¹⁰¹ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 14 (**CLA-3**).

¹⁰² *See* Hearing Transcript, pp. 130: 17-19, 166: 12 - 167: 21.

has held that corruption alone provides grounds to an investment arbitration claim. There is no support for this extreme position, and Claimant, unsurprisingly, cannot cite to any authority for it.”¹⁰³

82. Thus the operative question for the Tribunal in this Article 10.20 objection is not whether or not corruption existed, but rather whether Amorrortu has demonstrated that as a matter of law, he had a vested right or interest that could have been impacted by corrupting (if it is ultimately found). And as to that pivotal question, the answer is that the failure by Claimant to satisfy particular regular requirements are one of three factors that are fatal to his claim.

83. As Peru demonstrate in this arbitration, qualification as an oil company under the Regulations of Qualification is a condition precedent to the commencement of the formal direct negotiation process. This is evidenced in the Regulation on Qualification itself which indicates that “All Oil Companies must be duly qualified by PeruPetro S.A, to start negotiation of a contract.”¹⁰⁴ PeruPetro’s Procedures on Direct Negotiations likewise places the Qualification process to occur at step 13, prior to the posting of the availability the blocks to competitors at step 19, and prior to notification to the General management of PeruPetro that Contracting will be done through direct negotiation.¹⁰⁵ As Peru observed during the Hearing, step 22 is the earliest that one can say the direct negotiation has commenced.¹⁰⁶ It is thus clearly a condition precedent, along with the lack of interest from any potential competitor, to the commencement of the direct negotiation process.¹⁰⁷

84. It is not merely a condition prior to contracting, which can be done at any phase. Dr. Quiroga’s affirmation in this regard are incorrect and notably, he cites to no authority for it.¹⁰⁸ In fact, it is contrary to

¹⁰³ Hearing Transcript, p. 19: 5-9.

¹⁰⁴ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 2 (**CLA-3**) (emphasis added) (Free Translation by the Republic of Peru) (Spanish original text reads: “Toda Empresa Petrolera deberá estar debidamente calificada, por PERUPETRO S.A., para iniciar la negociación de un Contrato.”).

¹⁰⁵ Perupetro Procedure GFCN-8, Contracting Through Direct Negotiation (13 August 2012), p. 7 (**CV-4**) (**CLA-44**). Note that the original Spanish text states “Comunica a la Gerencia General que se *realizará* el proceso de Contratación e Negociación Directa”. Claimant’s English translation incorrectly translated the phrase to “Notify General Management of *selection* of the Procurement by Direct negotiation.” This translation incorrectly translated “realizar” (“shall realize” or “shall be done”) to “selection” (whose Spanish equivalent is “selección”). As noted above when PeruPetro uses the term selección or selection it refers exclusively to public tenders.

¹⁰⁶ Hearing Transcript, p. 40: 1-3.

¹⁰⁷ First Vizquerra Expert Report, ¶ 20 (**RER-1**); Formato de la Constancia de Calificación (**CV-3**); Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 2 (**CLA-3**).

¹⁰⁸ Notably Dr. Quiroga admitted to having limited expertise in the actual conduct of these types of application. (“Q. You have not participated directly in a Direct Negotiation of License Agreements for the exploitation and exploration of hydrocarbons in Perú? A [Dr. Quiroga]. Not in particular.”). Hearing Transcript, pp. 186: 25 - 187: 3.

Amorrortu's own admission elsewhere. In his Answer, Amorrortu admits that "Peru is correct in that before the direct negotiation process commences, Baspetro must comply with the qualification certification requirements of Article 11 of the Law of Hydrocarbons."¹⁰⁹ Indeed in his first report even Doctor Quiroga admitted as much stating: "Article 2 of the Regulation on Qualification of Oil Companies establishes as a prerequisite to the beginning of the negotiation of a contract with PeruPetro to obtain the qualification as an oil company before said Entity."¹¹⁰ His latter affirmation is thus not only unsubstantiated, but contradictory to his original position, and to the express terms of the Law and regulation.

85. As Peru explained during the Hearing, Claimant has purposefully sought to create confusion between PeruPetro's Direct Negotiation Procedure, which as was explained is an internal checklist of tasks, and the Direct Negotiation Process, which is the formal process of direct negotiation as envisaged in the Hydrocarbons Law and applicable regulations. As Peru explained, the Procedure itself provides no rights to applicants, and simply instructs PeruPetro officials what steps to take when an interested party submits a proposal. The formal Direct Negotiation Process, through which an eventual contract may be granted, is the legal process governed by the superseding Hydrocarbons Law and regulation. It is this process that is the relevant process for Claimant's claim.

86. Ultimately, since Amorrortu never even requested a qualification certification as required by the applicable Regulations, nor submitted the required documentation, he failed to meet a condition precedent to direct negotiation, and the direct negotiation process never commenced. Thus Amorrortu had no rights or interests concomitant to a process that never commenced and his claim must fail. As notes this is one of three independent reasons of why Amorrortu's claim fails. The others being the fact that the rights to exclusivity alleged to be attached to a direct negotiation do not exist and that in any event the direct negotiation process does not guarantee the execution of a contract.¹¹¹

b. 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?

87. The direct negotiation process and its conditions are an issue of law expressly governed by the Hydrocarbons Law and the applicable regulations on qualification. PeruPetro's practices furthermore cannot

¹⁰⁹ Claimant's Answer, ¶¶ 78-79 (emphasis added).

¹¹⁰ First Quiroga Expert Report, ¶ 91 (CER-1) (Free Translation by the Republic of Peru) (Spanish original text reads: "El artículo 2° del Reglamento de Calificación de Empresas Petroleras establece como requisito previo al inicio de la negociación de un contrato con PeruPetro obtener la calificación como empresa petrolera ante dicha Entidad.")

¹¹¹ Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM (18 August 2004), Art. 2 (CLA-3).

legitimately contradict what is established in the Law and regulations. Thus a fact witness with “hand one experience” would be of no value in its determination.

88. In any event, the Parties and the Tribunal have already benefited in this case from the opinion of an expert with “hands on” legal experience in PeruPetro process: Mr. Vizquerra. Contrary to Dr. Quiroga, Mr. Vizquerra, who was cross-examined at length during the Hearing, and open to questioning by the Tribunal has “hands on” experience of the PeruPetro process and has advised clients through direct negotiation and public tender processes.¹¹² Dr. Vizquera very clearly explained that the qualification process is a condition precedent to the direct negotiation process.¹¹³

6. The “Right to a Contract” Issue

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

89. Peru has established and Amorrortu has conceded that the direct negotiation process, even when commenced after obtaining a certification of qualification, does not guarantee execution of Contract. Moreover, PeruPetro, as a matter of law, retains the discretion at all times to refuse to enter into a contract. This an issue of law, clearly established in applicable laws and regulation, and, as noted, conceded by Claimant.

90. This is fatal to Amorrortu’s claim, because, as presented in his Statement of Claim, Amorrortu seeks damages that are premised on Baspetro ultimately obtaining a contract and operating Blocks III and IV. Article 10.16 of the USPTPA very clearly requires a claim submitted to arbitration to not only establish a breach of a Treaty protection but also “that the claimant has incurred a loss or damage by reason of, or arising out of that breach.”¹¹⁴ Thus the existence of loss or damage is a necessary element to Amorrortu claim, without which his claim must fail.

91. Moreover, as noted previously, Article 10.26 of the USPTPA expressly excludes declaratory relief as an available remedy. Thus for an award in favor of claimant to be “made under Article 10.26”, Claimant must establish that as a matter of law he is entitled to the monetary damages he seeks.

92. Peru asserts that by basing his damages claim (again a necessary element to his claim) on the existence of a contract to operate Lots III and IV, Amorrortu has asserted a claim for which he is not entitled

¹¹² “My name is Carlos Raúl Vizquerra. I was introduced. I am a lawyer. My specialty is hydrocarbons. I have experience in the conduction of contract negotiation procedures and in the procedures for the qualification of oil companies [with PeruPetro]” Hrng. Transcript, p. 117: 9-13.

¹¹³ Hearing Transcript, pp. 118: 21 - 119: 4; Second Vizquerra Expert Report, ¶ 11 (**RER-2**).

¹¹⁴ USPTPA Investment Chapter (12 April 2006), Art. 10.16(1) (**CLA-1**).

as a matter of law. It is not a merely an issue of the quantification of damages, but rather of a question of whether the very premise of Amorrortu's damages claim (and thus his claim as a whole) is viable as a legal matter given his recognition that he was never entitled to a Contract.

93. Of critical importance is also the fact that it is conceded by all Parties that Amorrortu never had a contract with PeruPetro, nor any right to operate Blocks III and IV at the time of the alleged breach. Thus, Claimant's very claim depends on his right to a Contract, which never existed and which PeruPetro always had the direction to deny. In short, Claimant seeks a damages claim that is not viable as a matter of law- he seeks damages for something to which he is not a legally entitled and thus his claim fails under Article 10.20.4.

94. In order to avoid dismissal under Article 10.20.4. Claimant improperly attempt to convert this into an issue of fact, which he himself recognizes he will have trouble proving.¹¹⁵ He claims that he would be able to prove that he would ultimately have obtained a contract because all previous direct negotiation processes have ended up in a contract. As Peru has noted repeatedly before, Amorrortu's assertion that all previous direct negotiations have ended in a contract is premised on merely three examples over thirty years.¹¹⁶ Furthermore, as noted above, the Tribunal's Procedural Order No. 1 instructed the parties to submit all their relevant evidence in their initial pleadings. Amorrortu thus now cannot promise new supposed "proof". But beyond that, because Peruvian law grants PeruPetro discretion to deny a contract, Amorrortu promised proof that he as a matter of law cannot provide. As noted in its submission PeruPetro could have granted 100 contracts in 100 prior direct negotiation processes As a matter of law it still retained the right to deny Amorrortu a contract. And since Amorrortu did not have any rights at the time of the alleged measure, he cannot demonstrate an entitlement to the contact as a matter of law.

b. Is this a matter of quantum rather than jurisdiction to hear the claim?

95. This is not a quantum issue. As Peru noted at the Hearing

[On this point] what is at issue is not the specific valuation of the alleged loss of revenue or the alleged value of the Contracts. [...] That would be a factual issue to be determined in a damages phase in this Arbitration. Rather, what's at issue here is the very legal premise of the damages claimed. The only loss he is asserting is one that can only occur if he had a right to the Contracts, and he doesn't.¹¹⁷

¹¹⁵ Hearing Transcript, pp. 77: 21-24, 84: 18-22, 87: 25 - 88: 3.

¹¹⁶ First Witness Statement of Bacilio Amorrortu (10 September 2020), ¶ 86, note 49 (CWS-1).

¹¹⁷ Hearing Transcript, pp. 56: 20 - 57: 3 (emphasis added).

96. Nor is it jurisdictional. Peru's argument is one rooted solidly in Article 10.20.4. Amorrortu does not and cannot have any entitlement to the very premise of his damages, which is a necessary element of his claim. As a result, he has not asserted a claim for which an award can be issued in his favor under Article 10.26.

- c. **If declaratory relief is an available remedy with respect to the Claimant's claims regarding Direct Negotiation and/or the public tender (see A.1.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?**

97. As noted above the USPTOA expressly excludes declaratory relief as a form of remedy. As the *lex specialis*, the Tribunal is bound by this limitation. Furthermore, Claimant himself has confirmed that it does not seek declaratory relief in any event, but rather monetary damages (as required by the Treaty). At the Hearing, Amorrortu clarified that

[O]ur Claim for Declaratory Relief is a part of our Claim for Damages. And what we ask is, yes, we ask Perú to be declared in breach of the Fair and Equitable Treatment obligations but also to be condemned in damages, to pay damages, and there's an "and" there. **There is no independent action for declaratory relief, and** that's very important.¹¹⁸

98. Thus, the hypothetical presented by the Tribunal questions, respectfully does not exist and is not permitted by the treaty. It therefore would have no bearing on the success of Peru's 10.20.4 objection.

99. But for purpose of argument, and in response to the hypothetical situation presented by the Tribunal, even if declaratory relief were an available remedy, and even if assuming for purposes of argument issue related to the public tender were a part of Amorrortu's claim (as discussed above, they are none), Peru's objection would still succeed, and Amorrortu's claims should still be dismissed.

100. This is because, Amorrortu's lack of entitlement to a contract, and its impact on the viability of his damages claim, is only one of several independent grounds to dismiss Amorrortu's claim. Indeed, before assessing the available remedies, a right protected by the Treaty must be proved. That right must be independent from the general desire (shared by the State) to be free from corruption. As discussed above, the existence of corruption does not create right; rather corruption must have affected an already existing or vested right or interest.

101. Peru has demonstrated that even if assuming that all of facts as pleaded by Amorrortu are true, Amorrortu (i) never started the direct negotiation process, and (ii) never obtained rights under such process, even if assuming it was started (*quod non*). As noted above, Peru also demonstrated that even in the hypotheses that the public tender was part of Amorrortu's claim (which under a fair reading of the Statement

¹¹⁸ Hearing Transcript, pp. 109: 25 - 110: 6 (emphasis added).

of Claim it is not), Amorrortu has failed to establish any independent rights derives or concomitant form that public tender. As a result, under any hypotheses, Amorrortu's claim fails and must be dismissed.

B. Fourth Objection: Defective Waiver

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.

102. Peru reiterates that there is no consent formed in this case. A waiver that complies with all the requirements set forth in the USPTPA, and submitted with the timeframe set forth in the Treaty, is a precondition to consent.¹¹⁹ Since that did not occur here, there is no agreement to arbitrate and this Tribunal, respectfully, lacks jurisdiction. Moreover, this situation is not curable absent Peru's express agreement, which Peru has not given.

103. Aware of this fatal jurisdictional defect, Amorrortu has concocted an estoppel argument based on Peru's recourse to this Tribunal for third party funding disclosure, after Claimant refused to disclose such information voluntarily. The argument seeks to impute a constructive consent to arbitration, in complete disregard of the textual requirements of the USPTPA, and notwithstanding Peru's express reservation to challenge the jurisdiction of this Tribunal for lack of consent.¹²⁰ Amorrortu's argument is radical, to say the least. No other tribunal has imposed constructive consent on the basis argued by Claimant and for good reason. It would ignore fundamental principles of due process and investment arbitration, including a sovereign State's prerogative to limit its consent to arbitration and the ability of the State to defend its interests during the preliminary phases of an arbitration.

104. If that were not enough, in this specific instance, it would effectively reward Amorrortu's own decisions to first, ignore the express requirements to consent established in the USPTPA and known in relevant jurisprudence, and second, refuse to disclose voluntarily third party funding information critical to the integrity of the arbitral proceeding. Amorrortu's position, in short, borders on bad faith and abuse of process.

105. Ultimately, given the clear and express nature of the waiver requirement under the USPTPA, Amorrortu's appeals to salvage jurisdiction notwithstanding his own decision to ignore the clear Treaty

¹¹⁹ Submission of the United States of America (13 July 2021), ¶ 12; *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 142 (RLA-32).

¹²⁰ Peru's Response to the Notice of Arbitration (21 March 2020), ¶ 5.

requirements for consent, should not be given credence. Under these circumstances, and in the words of the *Tembec* and *Fireman Fund's* tribunals, Peru “does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.”¹²¹

106. In any event, Claimant’s efforts to create an estoppel defense out of Peru’s Letter of 25 September 2020 seeking information about whether Mr. Amorrortu had third party funding for these proceedings (the “Request for Disclosure”), lacks any merit. No reasonable reading of that Letter would conclude that it overrides Peru’s express reservation to challenge the formation of consent to this arbitration.

107. Amorrortu has emphasized that Peru did not repeat its reservation of rights to jurisdictional objections in the Request for Disclosure. However, Peru has already reserved its rights to make jurisdictional objections, including on the basis of lack of consent, as early as its Response to the Notification of Arbitration.¹²² This reservation could not have reasonably expired before Peru’s actual rights to make the jurisdictional objections in its submissions.¹²³ There is simply no authority for the proposition that the absence of a constantly repeated reservation, Peru has waived its rights to object to the jurisdiction of the Tribunal.

108. Rather, as the United States has submitted, “provided that a respondent raises jurisdictional or preliminary objections within the timeframes established by the treaty, the applicable rules, the tribunal, or otherwise by agreement of the parties, a respondent is not precluded or estopped from raising such objections solely by virtue of participating in the proceeding or availing itself of the authority of the tribunal.”¹²⁴

109. Indeed, even if Peru had not expressly reserved its objections, availing itself of the authority of the Tribunal for the purpose of the Request for Disclosure could not have meant that Peru lost its right

¹²¹ *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, UNCITRAL, Decision on Preliminary Question (6 June 2006) (Mestral, Robinson, Jan van den Berg), available at <https://www.italaw.com/sites/default/files/case-documents/ita0122.pdf>, ¶ 186; *Fireman’s Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Decision on the Preliminary Question (17 July 2003) (Lowenfeld, Carrillo Gamboa, Jan van den Berg), available at https://www.italaw.com/sites/default/files/case-documents/ita0330_0.pdf, ¶ 64.

¹²² Peru’s Response to the Notice of Arbitration (21 March 2020), ¶ 5.

¹²³ Hearing Transcript, p. 64: 16-22 (“The reservation of rights occurred at the very First Submission which Peru made. So, once it has reserved its right, that it will, that it is reserving its rights to submit jurisdictional objections, for which it has under the Rules the right to assert at the Counter-Memorial, it need not consistently reserve its rights because it already has done so.”).

¹²⁴ Submission of the United States of America (13 July 2021), ¶ 15 (emphasis added).

to object to the formation of consent within the timeframe established by the applicable Rules.¹²⁵ If Peru's right to challenge the jurisdiction of the Tribunal was intact at the time of the submission of its Notice to Submit Preliminary Objections and beyond, precluding that right when it is timely exercised, because of a Request for Disclosure, would effect a blatant violation of the State's due process rights.

110. Certainly, no other tribunal has held that such a result is possible. Quite the opposite. Peru identified numerous cases where the Respondent requested the tribunals' action before challenging its jurisdiction at the adequate procedural opportunity.¹²⁶ Claimant has ignored this overwhelming jurisprudence and unsurprisingly, fails to cite any authority in support of his own position.

111. Instead, Claimant bases his arguments on a fundamental mischaracterization of Peru's Request for Disclosure as a request for "substantial relief." As noted above, even if that was the case, it would not impede Peru from challenging the jurisdiction of the Tribunal for the lack of a valid waiver so long as it continued to have the right to do so under the applicable Rules.¹²⁷ Nevertheless, Amorrortu is wrong as to the nature of the relief sought.

112. The relief Peru sought with the Request for Disclosure had no bearing on the substance of Amorrortu's claim. Indeed the information requested as to (i) the existence or identity of any third party funder, (ii) the funding arrangements as to a cost award, and (iii) funder approval for termination or settlement of the arbitration, have no relation either to the merits of Amorrortu's claim or the determination of liability of Peru. Therefore, Claimants' characterization of the Request for Disclosure as pursuing or receiving "*substantive relief*"¹²⁸ is specious.

113. As detailed below, each category of relief sought in the Request for Disclosure, contrary to Claimant's assertions, is procedural rather than substantive.

¹²⁵ See Peru's Notice of Intent to Submit Preliminary Objections (9 December 2020), pp. 11-13; see also United Nations Commission on International Trade Law Arbitration Rules (2013), Art. 23.2 (**CLA-36**).

¹²⁶ See Peru's Reply, ¶ 62; see also ICSID, *Case Details of Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* (ICSID Case No. ARB/18/35), available at <https://icsid-archive.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/35> (last accessed 21 May 2021) (**R-6**); *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Canada's Submission on Place of Arbitration (15 January 2013) (Derains, Chertoff, Lowe) (**RLA-46**); *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Canada's Statement on Jurisdiction and Admissibility (22 February 2013) (Derains, Chertoff, Lowe) (**RLA-47**).

¹²⁷ Indeed, taken to its full logical extent, Amorrortu's estoppel argument would preclude Peru from asserting any of its four (4) other jurisdictional objections which it identified in its Notice of Intent to Submit Preliminary Objections and which the Tribunal expressly reserved. See Procedural Order No. 3, Decision on Bifurcation (21 January 2021), ¶¶ 2, 12. Such a result would not be correct or in keeping with due process.

¹²⁸ Hearing Transcript, p. 109: 7-11.

114. The first request (the identity of the third party funder), served the main purpose of permitting the parties and the Tribunal to identify potential of conflicts of interest.¹²⁹ This is necessary to preserve the integrity of the proceedings and has no impact to the substance of the arbitration.

115. The second request (the funding arrangements related to cost) was made so that Peru could analyze the possible need for an “application for security for costs.”¹³⁰ Security for costs “is a right that arises out of the proceeding and whose nature is uncertain or contingent. It can be said to be a right to the effectiveness of the Arbitral Tribunal’s decision and is an example of the many rights determined by the notion of *procedural integrity*.”¹³¹ Again, the request is not substantive in nature.

116. The third request (funder approval for termination or settlement) has no substantive element to it either. The information was requested in order to determine “the terms and degree of the funder’s control over the conduct of the arbitration, including any veto rights or decision-making authority over key steps in the arbitration, such as a decision to settle or abandon the case.”¹³² This again, has nothing to do with the merits of Amorrortu’s claim, but rather with inherently procedural rights, including the capacity to suspend or settle proceedings voluntarily.

117. Notwithstanding the very clearly procedural nature of Peru’s request, Amorrortu maintains that it “requested substantive relief from the Tribunal.”¹³³ On Claimant’s view, Procedural Order N° 2, despite its clear denomination, “is a substantive Order”¹³⁴ and, “by definition contemplates [this Tribunal’s] existence.”¹³⁵ According to Claimant, “Peru did not make or even reference any, any issue with this Tribunal’s authority or existence until he got the relief that he wanted. So, at that point, Peru is either estopped under the doctrine of estoppel, doctrine of abuse of process, doctrine of good faith.”¹³⁶

¹²⁹ Procedural Order No. 2 (19 October 2020), ¶ 6 (“The Claimant does not dispute the authority of the Tribunal to order disclosure. He offers to provide the name of the funder to the members of the Tribunal, principally with the goal of identifying potential conflicts of interest.”).

¹³⁰ Procedural Order No. 2 (19 October 2020), ¶ 9 (“The Respondent indicates that an undertaking by the third party funder to pay an adverse costs award (or its absence) may be relevant to its potential application for security for costs.”).

¹³¹ *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9 Decision on Provisional Measures (20 June 2018) (Nunes Pinto, Gómez-Pinzón, Torres Bernárdez), available at https://www.italaw.com/sites/default/files/case-documents/italaw9849_2.pdf, ¶ 201 (Free Translation provided by the Republic of Peru).

¹³² Letter from Peru to the Tribunal (25 September 2020), p. 5.

¹³³ Hearing Transcript, p. 73: 3-5.

¹³⁴ Hearing Transcript, p. 107: 24-25.

¹³⁵ Hearing Transcript, p. 107: 22-23.

¹³⁶ Hearing Transcript, p. 108: 2-6.

118. Claimant's arguments are baseless. The reference to the doctrines of abuse of process and good faith are meritless on their face. As already noted, Peru at all times acted consistent with its procedural rights and the applicable Rules. Moreover, the Tribunal itself recognized that the disclosure of third party funders was proper to address the need for assessment of potential conflict of interest.¹³⁷

119. With regard to the estoppel doctrine, Peru explained in detail that the elements of estoppel are not met in this case, even if they were applicable, an explanation that remains undisputed by Amorrortu.¹³⁸ In summary, Peru has made no unequivocal statement or conduct that could have led Mr. Amorrortu to believe that it was not objecting to the jurisdiction of the Tribunal. Further, Amorrortu has not established that there was either a benefit to Peru, much less a detriment to himself caused by his understanding of the supposed reliance on Peru's actions.

120. No reasonable person would understand that Peru's Request for Disclosure meant it was not objecting to the jurisdiction of the Tribunal, particularly give its express reservation of its rights to do so. Rather such an express reservation of rights would be expected to stand until an equally express waiver is submitted, or until the timeframe within which to assert that right expired. Neither occurred here.

121. Indeed, even the Tribunal itself recognized expressly in Procedural Order N° 2 that its jurisdiction remained to be determined.¹³⁹ This is perhaps the best evidence the Request for Disclosure could not be read as an acquiescence to jurisdiction. Had the Tribunal understood there was no longer a dispute about the jurisdiction its statement would have been superfluous.

122. Claimant also failed to demonstrate that Peru received any benefit from the Request for Disclosure. As stated previously the relief sought in the Request for Disclosure was strictly procedural, effectively, safeguarding the integrity of the proceedings. Thus, it was a necessity for the legitimacy of the arbitration, not a *benefit* to Peru.

¹³⁷ Procedural Order No. 2 (19 October 2020), ¶ 8 (“In the Tribunal’s view, the identity of the third party funder should be disclosed both to the Tribunal and to the Respondent. [...] Such disclosure is sufficient to deal with potential conflicts of interest.”).

¹³⁸ Peru’s Reply, ¶ 63.

¹³⁹ Procedural Order No. 2 (19 October 2020), ¶ 11 (“In the Tribunal’s view, there is a potentially important ‘access to justice’ issue. **If the Claimant can meet the jurisdictional prerequisites to have his claim arbitrated (a matter which is still to be determined)** there is no additional requirement that he prove financial capacity to meet any potential adverse costs award or that he is the master of his own litigation.”).

123. With respect to the other relief sought, putting aside that it too was motivated by preserving the integrity of the proceeding, the fact of the matter is this relief was denied by the Tribunal. Accordingly, Claimant cannot claim that Peru had any benefit.

124. Finally, Claimant has not established how he would be prejudiced for purposes of the estoppel doctrine. All his assertions in this regard are vague platitudes about how Peru's purported benefit is "detrimental to Amorrortu's strategy and as Amorrortu."¹⁴⁰ The only concrete point that Claimant makes is that Procedural Order No. 2 "is an Order that Amorrortu fought"¹⁴¹ and only "in reliance of Peru's conduct, gave to Peru the information that he had refused in the past."¹⁴² However, the issuance of Procedural Order No. 2 itself is a testament to the Tribunal's finding Amorrortu never had a legitimate right to withhold this information in the first place. Therefore, even if the linchpin of Amorrortu's strategy was the secrecy of his funder's identity, no prejudice can ensue from revealing it for the sake of a fair proceeding.

125. For the reasons stated before, the doctrine of estoppel is inapplicable here. Peru has acted well within its rights may Amorrortu cannot escape the express conditions for consent established in the USPTPA nor the consequences of having failed to present a timely and valid waiver.

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?

126. As noted above, there is no reasonable or legal basis to maintain that Peru's September 25, 2020 Letter constitutes implied or constructive consent. Indeed there is no basis to maintain that constructive or implied consent to arbitration, as a general matter, can be imposed on a sovereign State that has clearly established the limits and conditions to its arbitral consent in an international Treaty. Claimant certainly provides no authority for such a proposition. In this sense, the Tribunal's question, respectfully, is a tautology that rests on an unsound assumption.

127. The only answer can be found in the Treaty. If consent exists, it can only exist because the express conditions of the USPTPA have been met, including presentation of a valid waiver. Conversely, if those conditions have not been met, there is no consent, and this Tribunal cannot cure the defect by accepting an amended waiver. As the tribunal in *Clayton v. Canada* concluded, the mandate of an investment

¹⁴⁰ Claimant's Rejoinder, ¶ 41.

¹⁴¹ Hearing Transcript, p. 108: 2.

¹⁴² Claimant's Rejoinder, ¶ 41.

arbitration tribunal “is confined by the terms of the particular treaty under which the claim is brought. It is not open to the investor and the respondent in a particular case (tacitly) to rewrite these terms. In other words, the principle of preclusion cannot establish any jurisdiction” where the underlying treaty confers none.¹⁴³

128. In any event, the Tribunal’s question serves to elucidate a fatal flaw in Amorrortu’s newest theory to justify acceptance of his proposed amended waiver presented (inappropriately and without the Tribunal’s authority or Peru’s consent) as Amorrortu’s Second Declaration. As noted in Part I, *supra*, this theory rests on a convoluted and tortured interpretation of the USPTPA. According to Amorrortu since his claim is not deemed submitted until he has filed his memorial, or Statement of Claim, and the Tribunal exercised inherent authority in establishing a procedural calendar for presentation of that Statement of Claim, the Tribunal maintains its inherent authority to “accept” the parties consent by accepting Claimant’s amended waiver. This interpretation simply has no legs to stand on.

129. The USPTPA establishes a clear and unequivocal limit to the time when a dispute *shall be* deemed submitted to arbitration. For this case, Article 10.16.4 (c) sets the cutoff date for the submission of a claim to arbitration to the time that the statement of claim is received by Respondent.¹⁴⁴ Peru received Mr. Amorrortu’s Statement of Claim on September 11, 2020. That is the date when the Tribunal shall apply the mandatory presumption of submission to arbitration.

130. The effect of Article 10.16.4 (c) is to set a singular point in time embodied in a unique event after which the Tribunal *must* assume that the Claimant has chosen to submit his claim. At that point, Respondent and the Tribunal can test whether Claimant’s submission meets the requirements for acceptance of consent of the USPTPA. If a claim is *deemed* submitted to arbitration in violation of the express prohibitions of Article 10.18, the requirements for consent have been not met.¹⁴⁵ Therefore, the Tribunal would have no choice but to decline jurisdiction.¹⁴⁶

131. Even if the Tribunal has the power to set the deadline in which the Statement of Claim is to be submitted, or to change such date, once the event occurs (i.e. once the Statement of Claim is submitted)

¹⁴³ *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), available at <https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf>, ¶ 340.

¹⁴⁴ USPTPA Investment Chapter (12 April 2006), Art. 10.16.4(c) (**CLA-1**).

¹⁴⁵ Submission of the United States of America (13 July 2021), ¶ 12.

¹⁴⁶ *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (Moser, Yves Fortier, Landau), ¶ 142 (**RLA-32**).

the Tribunal must comply with the Agreement and deem the dispute submitted to arbitration. If a deficient claim was submitted to arbitration, the Claimant must endure the consequences of his shortcomings.

132. The USPTPA does not provide that a claim be submitted to arbitration at any other time. The USPTPA does not permit the Tribunal to ignore the fact that a triggering event for the acceptance of consent has occurred. Claimant's argument is asking the Tribunal to ignore the fact that the claim has *already* been submitted to arbitration under the terms of the USPTPA and that it cannot engage the consent of Peru.

133. Claimant's argument indicating that this case is not like *Renco I* is also illogical. Claimant argues that the key distinction is that the claimant in *Renco I* submitted his notice of arbitration in conjunction to the Statement of Claim, depriving that tribunal of the alleged inherent powers that Amorrortu claims exist in this case.¹⁴⁷ This again conflates the *event* that triggers submission to arbitration of a claim under the USPTPA, and the power of the Tribunal to set a calendar under the UNCITRAL Rules. A Tribunal in reality does not have the power to regulate the acceptance of consent under the Agreement. Nor can any supplement, withdrawal or amendment cure the lack of consent once the occurrence of one of the triggering events set forth in Article 10.16 as occurred (once the Statement of Claim was filed). If it could, the tribunal in *Renco I* would have merely invited the claimant to submit an amended waiver.

134. On the contrary, that tribunal made a thorough consideration of the facts and steadfastly rendered a decision upholding the text of the USPTPA.¹⁴⁸

135. Peru will recall that it is the uniform position of State Parties to the USPTPA that the Tribunal itself cannot remedy an ineffective waiver. Whenever a claimant files an effective waiver subsequent, the corresponding triggering event of Article 10.16.4 the only relief available is the dismissal of the arbitration, unless the respondent State agrees otherwise.¹⁴⁹ Peru does not agree to any different consequence in this case.

¹⁴⁷ Hearing Transcript, p. 106: 2-6

¹⁴⁸ *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), ¶ 157 (**RLA-32**) (“Having given careful consideration to the matter, the Tribunal has felt constrained to conclude that the clear and express language of Article 10.18 of the Treaty, as well as its object and purpose, establishes a *lex specialis* which must prevail over, or in any event precludes, the *Mavrommatis* doctrine.”)

¹⁴⁹ Submission of the United States of America (13 July 2021), ¶ 24.

IV. REQUEST FOR RELIEF

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

Date: September 10, 2021

Respectfully submitted



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