

PCA Case No. 2023-22

**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 (USA)

(the “Claimant”)

- and -

THE REPUBLIC OF PERU

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

PROCEDURAL ORDER NO. 2

Decision on Bifurcation

Tribunal

Hon. Justice Mr. David Unterhalter (Presiding Arbitrator)
Professor Bryan Schwartz
Mr. Hugo Perezcano Díaz

Registry

Permanent Court of Arbitration

18 March 2024

I. PROCEDURAL BACKGROUND

1. By Notice of Arbitration dated 16 August 2022 (the “**Notice of Arbitration**”) the Claimant commenced arbitration proceedings against the Respondent pursuant to Chapter 10 of the United States-Peru Trade Promotion Agreement, ratified by Peru on 28 June 2006, signed by the United States on 14 December 2007, and entered into force on 1 February 2009 (the “**USPTPA**” or the “**Treaty**”).
2. On 27 June 2023, the Tribunal issued Procedural Order No. 1, establishing the rules of procedure and the procedural calendar of the arbitration. In accordance with Section 3.1 of Procedural Order No. 1, this arbitration is conducted under the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2013 (the “**UNCITRAL Rules**”).
3. On 21 August 2023, the Claimant submitted his Statement of Claim (the “**Statement of Claim**”).
4. On 29 September 2023, the Respondent filed its Notice of Intention to Request Bifurcation, whereby it (i) notified its intention to make preliminary objections pursuant to Article 10.20.4 of the USPTPA; and (ii) requested the Tribunal to order the suspension of the proceedings on the merits and establish a schedule for further briefing on such objections.
5. On 10 October 2023, the Parties submitted a joint calendar proposal for the filing of submissions on bifurcation, including two rounds of submissions. The Parties’ joint proposal also set out two alternative scenarios for further submissions depending on the outcome of the Tribunal’s decision on bifurcation.
6. On 30 October 2023, the Tribunal (i) directed the Parties to file one round of written submissions on bifurcation; and (ii) decided that the remainder of the calendar of the arbitration – and, in particular, the need for a second round of submissions on bifurcation – would be discussed on the basis of the Parties’ joint calendar proposal at a virtual meeting after the Tribunal and the Claimant had had sight of the Respondent’s request for bifurcation.
7. On 14 November 2023, the Respondent filed its Request for Bifurcation (the “**Request for Bifurcation**”).
8. On 5 December 2023, the Tribunal held a procedural video conference with the Parties.
9. On 6 December 2023, the Tribunal fixed a schedule for the filing of additional submissions on bifurcation.
10. On 19 December 2023, the Claimant filed his Opposition to Respondent Peru’s Request for Bifurcation (the “**Opposition to Bifurcation**”).
11. On 29 December 2023, the Respondent filed its Reply Statement to Claimant’s Opposition to Republic of Peru’s Request for Bifurcation (the “**Reply**”).
12. On 10 January 2024, the Claimant filed his Rejoinder in Opposition to Respondent Peru’s Request for Bifurcation (the “**Rejoinder**”).
13. In this Procedural Order, the Tribunal decides the Respondent’s Request for Bifurcation.

II. BACKGROUND OF THE DISPUTE

14. According to the Statement of Claim, the present dispute concerns the claim that the Claimant was deprived of his rights under Peruvian law to conduct a Direct Negotiation Process with PeruPetro, S.A. – the government entity responsible for the administration of oil blocks – to obtain a contract to operate oil fields in Blocks III and IV of the Talara Basin in Peru. In particular, the Claimant alleges that his company, Baspetro S.A.C, was prevented from obtaining a contract due to a bribery scheme involving a company named Graña y Montero and “the highest Peruvian authorities”, including the former First Lady of Peru, Nadine Heredia.¹
15. The Claimant submits that the Respondent’s “corrupt practices” are in breach of its fair and equitable treatment obligations under Article 10.5 of the USPTPA.² He seeks approximately USD 265 million, plus interest, in compensation.³
16. The present arbitration, PCA Case No. 2023-22, is the second arbitration between the same Parties (“*Amorrotu II*”). Two awards were issued in the first arbitration between the Parties, PCA Case No. 2020-11 (“*Amorrotu I*”): (i) a Partial Award on Jurisdiction, dated 5 August 2022, whereby the majority of the tribunal dismissed the Claimant’s claims for lack of jurisdiction (the “**Partial Award**”); and (ii) a Final Award on Costs, dated 25 October 2022, whereby the Tribunal ordered the Claimant to reimburse the Respondent in an amount of USD 1,029,080.18 towards its costs in the arbitration, plus interest (the “**Final Award**”, and together with the Partial Award, the “*Amorrotu I Awards*”).

III. THE RESPONDENT’S REQUEST FOR BIFURCATION

17. In its Request for Bifurcation, the Respondent requests the Tribunal to address three objections to the jurisdiction of the Tribunal in a bifurcated preliminary phase:
 - a. **Objection 1:** The Claimant’s claims fall outside the Tribunal’s jurisdiction because he did not submit these claims within the three-year limitation period established in Article 10.18.1 of the USPTPA;
 - b. **Objection 2:** The Respondent has not given its consent to arbitrate the dispute under the USPTPA because the Claimant did not comply with the mandatory consultation and negotiation requirement of Articles 10.15 and 10.16 of the Treaty; and
 - c. **Objection 3:** Even if the Claimant was not required to comply with the mandatory consultation and negotiation requirement, the Respondent’s consent to arbitration has not been perfected because the Claimant failed to deliver a notice of intent to submit the claims to arbitration, as required under Article 10.16.2 of the USPTPA.⁴

¹ Statement of Claim, paras 1-14.

² Statement of Claim, paras 15, 311.

³ Statement of Claim, para. 416(b).

⁴ Request for Bifurcation, paras 2, 61.

18. The grounds for each objection are summarized *seriatim* below, followed by a summary of the grounds for the Respondent’s Request for Bifurcation and the Claimant’s Opposition to Bifurcation.

1. Objection 1 (Time-Bar)

19. Under the heading of Objection 1, the Respondent asserts that the Claimant’s claims are time-barred because they were not submitted to arbitration within the three-year limitation period required under USPTPA Article 10.18.1.⁵

20. First, the Respondent observes that the USPTPA limitation period starts to run “from the date on which the claimant first acquired, or should have acquired, knowledge of the breach alleged under Article 10.16.1”⁶ – knowledge which, according to the Respondent, may be either actual or constructive.⁷ In the Respondent’s view, the degree of knowledge capable of satisfying this provision does not require that a claimant be in a position fully to particularize its claim;⁸ rather, it is enough if sufficient alleged facts are in existence to constitute a cause of action so as to bring a claim.⁹

21. Following this rationale, the Respondent contends that the USPTPA limitation period started to run in June 2019, when, under the Respondent’s reading of the Statement of Claim, the Claimant recognizes that he first learned of the Respondent’s Treaty breaches.¹⁰

22. In turn, according to the Respondent, the Claimant’s claim was only “submitted to arbitration” in accordance with Article 10.16.4 of the USPTPA on 21 August 2023, the date on which both the Claimant’s Notice of Arbitration and his Statement of Claim were received by the Respondent¹¹ – that is, more than three years after the Claimant first acquired knowledge of the alleged Treaty breaches in 2019.¹²

23. Against this background, the Respondent rejects the Claimant’s argument that the Notice of Intent filed in September 2019 (the “**Notice of Intent**”) suspended the three-year limitation period.¹³ First, the Respondent observes that Article 10.18.1 of the USTPA is silent on the question of suspension of the time-limit, which has led the United States and other investment tribunals to

⁵ Request for Bifurcation, paras 5-6.

⁶ Request for Bifurcation, para 6.

⁷ Request for Bifurcation, para. 9.

⁸ Request for Bifurcation, para. 9; Reply, para. 20; *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (“*Corona Materials*”), Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, para. 194 (**RLA-28**).

⁹ Request for Bifurcation, para. 9; *Seo Jin Hae v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Concurring Opinion of Dr. Benny Lo, 24 September 2019, para. 37 (**RLA-37**).

¹⁰ Request for Bifurcation, para. 11; Reply, paras 17-18.

¹¹ Request for Bifurcation, para. 7.

¹² Request for Bifurcation, para. 11.

¹³ Request for Bifurcation, para. 12.

interpret similar provisions as being “clear and rigid”, and not subject to any suspension or other qualification.¹⁴ Second, in the Respondent’s view, the Notice of Intent and Statement of Claim filed in *Amorrortu I* could not have suspended the limitation period because the Claimant’s defective waiver led to the invalidity of his claims.¹⁵

2. Objection 2 (Consultation and Negotiation)

24. Objection 2 is based on the proposition that the Claimant failed to comply with the mandatory Consultation and Negotiation requirement in Articles 10.15 and 10.16 of the USPTPA, which, in the Respondent’s submission, is a mandatory precondition for the submission of a claim to arbitration,¹⁶ as acknowledged by the Claimant himself.¹⁷
25. In this connection, the Respondent recalls that the Claimant did not attempt to settle the present dispute;¹⁸ instead, as noted in the Statement of Claim, he claims to have satisfied this requirement before submitting his Notice of Intent in *Amorrortu I*.¹⁹
26. The Respondent rejects the Claimant’s argument on two grounds. First, *Amorrortu II* constitutes a new claim against the Respondent requiring a new round of consultations and negotiations independent of those conducted before the initiation of the *Amorrortu I* proceedings.²⁰ Second, the dispute between the Parties has changed significantly since the *Amorrortu I* tribunal declined to hear the dispute, thus casting uncertainty upon the outcome of any negotiations related to that case, which are still ongoing.²¹ In this respect, the Respondent notes that the Claimant is seeking to set aside the Partial Award and Final Award in *Amorrortu I* and has also failed to honour the latter award.²²

¹⁴ Request for Bifurcation, para. 12; *The Renco Group, Inc. v. Republic of Peru [II]*, PCA Case No. 2019-46 (“**Renco II**”), United States Article 10.20(2) Submission, 6 March 2020, paras 3-4 (**RLA-40**); *Grand River Enterprises Six Nations, Ltd. et.al. v. United States of America*, UNCITRAL (“**Grand River v. United States**”), Decision on Objections to Jurisdiction, 20 July 2006, para. 29 (**RLA-8**); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB (AF)/99/I, Award, 16 December 2002, para. 63 (**RLA-4**).

¹⁵ Request for Bifurcation, para. 14.

¹⁶ Request for Bifurcation, paras 15, 17.

¹⁷ Request for Bifurcation, para. 17; Letter from Claimant to the PCA, 26 August 2022, p. 1 (**R-1**).

¹⁸ Request for Bifurcation, para. 19.

¹⁹ Request for Bifurcation, para. 19.

²⁰ Request for Bifurcation, para. 19.

²¹ Request for Bifurcation, para. 19.

²² Request for Bifurcation, para. 19.

27. Similarly, the Respondent rejects the Claimant’s argument that his alleged meeting with Minister Vera in June 2023 satisfies the negotiation requirement²³ because Mr. Vera has no legal authority to settle an arbitration dispute.²⁴

3. Objection 3 (Notice of Intent)

28. Lastly, the Respondent argues that its consent to arbitrate was never perfected because the Claimant failed to submit a notice of intent before filing his Statement of Claim – which, in the Respondent’s submission, is another pre-condition to arbitration under Article 10.16.2 of the USPTPA²⁵ intended to ensure that the State is put on notice of a new claim against it.²⁶
29. The Respondent contends that the Notice of Intent filed in *Amorrortu I* could not have fulfilled the notice-of-intent requirement for *Amorrortu II* because the claims brought in each case are different.²⁷ According to the Respondent, by failing to notify his intent to bring a claim, the Claimant deprived the Respondent of the opportunity to hire external counsel and defend itself at the outset of these arbitration proceedings.²⁸

4. Request for Bifurcation

30. Flowing from its jurisdictional objections, the Respondent requests that the proceedings be bifurcated pursuant to Article 10.20.4 of the USTPA or, alternatively, under Article 23(3) of the UNCITRAL Rules.²⁹
31. First, the Respondent submits that the bifurcation of its jurisdictional objections is required under Article 10.20.4 of the USPTPA, pursuant to which “[w]ithout prejudice to a tribunal’s authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal’s competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made”.³⁰
32. Under the Respondent’s reading of this provision, it may raise any objection under Article 10.20.4 as long as such objection (i) can be resolved by the Tribunal as a matter of law, and (ii) is based on the facts as alleged by the Claimant or on undisputed facts.³¹ By operation of Article 10.20.4, says the Respondent, the facts to be assumed as true for the purposes of an analysis under this

²³ Reply, para. 38.

²⁴ Reply, para. 39.

²⁵ Request for Bifurcation, paras 22-24.

²⁶ Request for Bifurcation, para. 25.

²⁷ Request for Bifurcation, para. 26.

²⁸ Request for Bifurcation, para. 26.

²⁹ Request for Bifurcation, para. 3.

³⁰ Request for Bifurcation, para. 28.

³¹ Request for Bifurcation, para. 29.

provision are “lock[ed] in” as those contained in the Notice of Arbitration and the Statement of Claim.³² Accordingly, the Claimant is barred from “reconstructing” his factual allegations or introducing new ones “to artificially create issues of fact” once USPTPA Article 10.20.4 is invoked.³³

33. The Respondent rejects the *Renco I* tribunal’s interpretation of this provision, under which objections as to competence fall outside the scope of the automatic bifurcation mechanism in USPTPA Article 10.20.4 because they constitute “other objections” for the purposes of this Article, “which are different from objections that ‘as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made’”.³⁴ According to the Respondent, a tribunal’s obligation to decide objections in a preliminary phase is triggered with respect to “any” objection that can be resolved as a matter of law, regardless of whether it touches upon jurisdiction or not.³⁵
34. In this connection, and relying on the *Pac Rim* tribunal’s application of a similarly-worded treaty provision, the Respondent asserts that the object and purpose of USPTPA Article 10.20.4 is to allow the early dismissal of claims that fail on purely legal grounds.³⁶ The Respondent also asserts that the United States’ non-disputing party submission in *Renco I*, advocating for the exclusion of jurisdictional objections from the automatic bifurcation mechanism under Article 10.20.4, contradicts the Treaty’s negotiating history and the intention of the State Parties.³⁷
35. Based on its understanding of USPTPA Article 10.20.4, the Respondent asserts that its three jurisdictional objections turn on “purely legal issues”³⁸ warranting dismissal of the Claimant’s claims as a matter of law,³⁹ meaning that bifurcation of these objections for preliminary consideration is required under the USPTPA.⁴⁰

³² Reply, paras 14, 23-24.

³³ Reply, para. 14.

³⁴ Request for Bifurcation, para. 30; *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1 (“*Renco I*”), Decision as to the Scope of the Respondent’s Preliminary Objections Under Article 10.20.4, 18 December 2014, paras 180-231 (**RLA-25**).

³⁵ Request for Bifurcation, paras 30-31; Reply, paras 9-10; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (“*RDC v. Guatemala*”), Second Decision on Objections to Jurisdiction, 18 May 2010, § III.1 (**RLA-11**); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17 (“*Commerce Group v. El Salvador*”), Award, 14 March 2011, para. 55 (**RLA-17**).

³⁶ Request for Bifurcation, para. 30; *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12 (“*Pac Rim Cayman v. El Salvador*”), Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, para. 116 (**RLA-13**).

³⁷ Reply, para. 11.

³⁸ Request for Bifurcation, paras 34 -36; Reply, paras 15, 20, 25-26.

³⁹ Request for Bifurcation, paras 34 -36; Reply, paras 15, 20, 25-26.

⁴⁰ Request for Bifurcation, para. 33.

36. In the alternative, the Respondent submits that bifurcation is warranted under Article 23(3) of the UNCITRAL Rules.⁴¹ By reference to Article 17(1) of the UNCITRAL Rules, the Respondent contends that a tribunal's discretion in deciding whether to bifurcate matters for preliminary consideration must weigh in considerations of efficiency and the effective administration of arbitral proceedings.⁴²
37. In this connection, the Respondent submits that each of its preliminary objections meets the test for bifurcation set out in *Glamis Gold*, under which a tribunal must consider: (i) whether the objection is *prima facie* substantial and not frivolous; (ii) whether the objection is intertwined with the merits; and (iii) whether granting the objection results in a material reduction of the proceedings in the next phase.⁴³ The Respondent observes that other tribunals have relied on this test to bifurcate jurisdictional objections *ratione temporis*⁴⁴ and *ratione voluntatis*⁴⁵ such as the ones at issue in this case.
38. By reference to the first limb of the *Glamis Gold* test, the Respondent submits that Objection 1 (Time-Bar) is substantial and not frivolous because, even assuming the Claimant's factual allegations as true, the Claimant's claims were submitted after the three-year limitation period had elapsed.⁴⁶ The Respondent also refers to *Carlos Sastre* as an example of a tribunal that bifurcated a time-bar objection because it considered that it raised a "serious and reasonable

⁴¹ Request for Bifurcation, para. 38.

⁴² Request for Bifurcation, paras 39-40; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, 22 November 2002, para. 31 (**RLA-3**).

⁴³ Request for Bifurcation, para. 42; Reply, para. 28; *Glamis Gold, LTD. v. United States of America*, UNCITRAL ("**Glamis Gold**"), Procedural Order No. 2, 31 May 2005, para. 12 (**RLA-6**).

⁴⁴ Request for Bifurcation, para. 43; *Corona Materials*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, paras 236-238 (**RLA-28**); *Carlos Sastre and others v. The United Mexican States*, ICSID Case No. UNCT/20/2 ("**Carlos Sastre v. Mexico**"), Procedural Order No. 2, 13 August 2020, paras 64-68, 78 (**RLA-42**); *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 9, 10 March 2021, paras 31-33 (**RLA-46**); *Grand River v. United States*, Order and Schedule Regarding Bifurcation, 26 October 2005, para. 1 (**RLA-7**).

⁴⁵ Request for Bifurcation, para. 43; *Nasib Hasanov v. Georgia*, ICSID Case No. ARB/20/44 ("**Hasanov v. Georgia**"), Procedural Order No. 2, 26 March 2021, para. 13 (**RLA-47**); *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21 ("**Bay View v. Rwanda**"), Procedural Order No. 2, 28 June 2019, para. 47 (**RLA-36**); *Carlos Sastre v. Mexico*, Procedural Order No. 2, 13 August 2020, paras 69-73, 78 (**RLA-42**); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28 ("**Tulip Real Estate v. Turkey**"), Decision on the Respondent's Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012, paras 55-56 (**RLA-19**); *Alps Finance & Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, para. 68 (**RLA-16**); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, paras 30, 72 (**RLA-20**); *Murphy Exploration and Production Company International v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, paras 129, 161 (**RLA-14**).

⁴⁶ Request for Bifurcation, para. 46; Reply, para. 31.

question” about the application of the relevant treaty provision, which, in turn, could impact the tribunal’s jurisdiction.⁴⁷

39. Similarly, Objections 2 (Consultation and Negotiation) and 3 (Notice of Intent) are substantial, in the Respondent’s view, because they concern the Claimant’s failure to fulfil certain preconditions for the valid submission of a claim under the Treaty.⁴⁸ By reference to *Hasanov*, the Respondent submits that Objection 2 in particular is serious because it raises questions about “the relevance of negotiations as a precondition to arbitration”.⁴⁹ In turn, the Claimant’s rebuttal of Objection 3 on the basis that the Treaty only requires a notice of intent per claim and not per arbitration confirms, in the Respondent’s view, that the objection is not frivolous:⁵⁰ according to the Respondent, the Claimant’s position is not supported by the language in USPTPA Article 10.16.2, which (i) requires that the investor communicate its intention to submit a claim to arbitration (not merely to communicate that a claim exists);⁵¹ and (ii) includes the term “any”, meaning that *any* claim, whether or not previously submitted to arbitration, requires a notice of intent.⁵²
40. Addressing the second limb of *Glamis Gold*, the Respondent posits that bifurcation should be preferred in circumstances in which jurisdictional issues are not intertwined with the merits, thus avoiding the burden and expense of potentially duplicative presentations during the jurisdiction and merits phases.⁵³ In the instant case, the Respondent considers that the Tribunal can decide its preliminary objections without addressing the merits of the Claimant’s case.⁵⁴ Objection 1 (Time-Bar) may be resolved solely on the basis of the Claimant’s own assertions reflected in his Notice of Arbitration and Statement of Claim,⁵⁵ while Objections 2 (Consultation and Negotiation) and 3 (Notice of Intent) “can also be decided without reference to any facts relevant to the claims”⁵⁶ – and also without reference to the new factual allegations on supposed negotiation attempts raised by the Claimant after the filing of the Notice of Arbitration and the Statement of Claim.⁵⁷ In this connection, the Respondent cites *Bay View*, *Carlos Sastre* and *Tulip Real Estate* as

⁴⁷ Request for Bifurcation, para. 47; Reply, para. 32; *Carlos Sastre v. Mexico*, Procedural Order No. 2, 13 August 2020, para. 66 (**RLA-42**).

⁴⁸ Request for Bifurcation, para. 48.

⁴⁹ Request for Bifurcation, para. 49; *Hasanov v. Georgia*, Procedural Order No. 2, 26 March 2021, para. 15.i (**RLA-47**).

⁵⁰ Reply, paras 42, 49.

⁵¹ Reply, para. 45.

⁵² Reply, para. 46.

⁵³ Request for Bifurcation, para. 52; *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, 17 January 2020, para. 25 (**RLA-39**).

⁵⁴ Request for Bifurcation, para. 52.

⁵⁵ Request for Bifurcation, para. 53.

⁵⁶ Request for Bifurcation, para. 54.

⁵⁷ Reply, para. 36-37.

examples of decisions that have considered notice-related objections to raise only questions of law or to require factual determinations unrelated to the merits.⁵⁸

41. Lastly, in respect of the third limb of *Glamis Gold*, the Respondent argues that all three objections, if accepted, would warrant the full dismissal of the case and would thus bring an end to the arbitration.⁵⁹

IV. THE CLAIMANT'S OPPOSITION TO BIFURCATION

42. The Claimant contends that the jurisdictional objections raised by the Respondent are (i) incapable of triggering the automatic bifurcation mechanism in Article 10.20.4 of the USPTPA; and (ii) in any event, do not warrant bifurcation under Article 23(3) of the UNCITRAL Rules.
43. First, the Claimant rejects the Respondent's argument that its preliminary objections trigger the preliminary question mechanism of Article 10.20.4 of the Treaty.⁶⁰ According to the Claimant, this provision requires only the bifurcation of "failure to state a claim" objections, while "other objections", including jurisdictional objections such as the ones at issue here, may be bifurcated for preliminary consideration at the Tribunal's discretion.⁶¹ In the Claimant's view, the cases cited by the Respondent on this point are inapposite⁶² – in particular, the Claimant notes that the expedited procedure in *Pac Rim* took place under Article 10.20.5 of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA"), which is not equivalent to Article 10.20.4 of the USPTPA.⁶³
44. In any event, the Claimant denies that the factual allegations to be assumed as true under Article 10.20.4 are "locked in" the Notice of Arbitration and Statement of Claim,⁶⁴ as paragraph (c) of this provision expressly allows the Tribunal to consider "any relevant facts not in dispute".⁶⁵ The presumption in Article 10.20.4 would nonetheless not apply, says the Claimant, in respect of

⁵⁸ Request for Bifurcation, para. 55; *Bay View v. Rwanda*, Procedural Order No. 2, 28 June 2019, paras 18-19 (**RLA-36**); *Carlos Sastre v. Mexico*, Procedural Order No. 2, 13 August 2020, para. 73 (**RLA-42**); *Tulip Real Estate v. Turkey*, Decision on the Respondent's Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012, para. 50 (**RLA-19**).

⁵⁹ Request for Bifurcation, paras 53-55.

⁶⁰ Opposition to Bifurcation, para. 31.

⁶¹ Opposition to Bifurcation, paras. 31, 33-34; Rejoinder, para. 13; *Renco I*, Decision as to the Scope of Respondent's Preliminary Objections Under Article 10.20.4, 18 December 2014, para. 192 (**Exhibit 8**).

⁶² Opposition to Bifurcation, para. 38; *Pac Rim Cayman v. El Salvador*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, paras 80-85, 112 (**RLA-13**); *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction, 18 May 2010, § III.1 (**RLA-11**); *Commerce Group v. El Salvador*, Award, 14 March 2011, para. 55 (**RLA-17**).

⁶³ Opposition to Bifurcation, para. 38; Rejoinder, para. 16; *Pac Rim Cayman v. El Salvador*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, paras 80-85, 112 (**RLA-13**).

⁶⁴ Rejoinder, para. 4.

⁶⁵ Rejoinder, paras 4, 23-24.

objections requiring factual determinations and the consideration of testimony and evidence, this being the case at least of Objections 1 (Time-Bar) and 2 (Consultation and Negotiation).⁶⁶

45. In the Claimant's view, the Respondent's "wrongful invocation" of the preliminary question mechanism in Article 10.20.4 of the USPTPA is a "disingenuous strategy" requiring by itself the rejection of the Request for Bifurcation and an order that the Respondent file its Statement of Defense forthwith.⁶⁷
46. Second, the Claimant considers that the Respondent's Request for Bifurcation should also be rejected under Article 23(3) of the UNCITRAL Rules, as the Respondent has failed to satisfy its burden of showing that its preliminary objections meet the *Glamis Gold* test: he considers all of them to be "frivolous" and, in the case of Objection 1 (Time-Bar) to be also intertwined with the merits.⁶⁸
47. Regarding Objection 1 (Time-Bar), the Claimant denies the Respondent's assertion that he first acquired knowledge of the Respondent's Treaty breaches in June 2019;⁶⁹ rather, the Statement of Claim refers to that date as the moment when the Claimant's suspicions "reached a critical level" and when he "launched his investigation".⁷⁰ The Claimant considers there to be a contradiction in the Respondent's argument: "on one side that there was no corruption, and on the other side, that Mr. Amorrortu should have first acquired knowledge of the very corruption which Peru has refused to acknowledge more than three years before the commencement of this arbitration."⁷¹
48. According to the Claimant, Peru has not discharged its burden of proving that the Claimant "acquired or should have acquired actual knowledge" of the corruption that allegedly frustrated his investment three years before the commencement of the arbitration⁷² – an impossible showing, in his view, as the corruption that allegedly frustrated his investment was only confirmed once the diaries of the First Lady of Peru became public in or around 31 August 2020.⁷³ Because such determination would necessitate a fact-intensive enquiry, says the Claimant, the Tribunal in *Amorrortu I* rejected a request to bifurcate a similar objection.⁷⁴
49. In any event, the Claimant submits that the USPTPA limitation period "ceased to run when Amorrortu I was submitted to arbitration and has not been resumed because Amorrortu I is still

⁶⁶ Rejoinder, paras 21-22.

⁶⁷ Opposition to Bifurcation, para. 39.

⁶⁸ Opposition to Bifurcation, paras 3-4, 12, 42.

⁶⁹ Opposition to Bifurcation, para. 8.

⁷⁰ Opposition to Bifurcation, para. 8.

⁷¹ Opposition to Bifurcation, para. 49.

⁷² Opposition to Bifurcation, para. 8.

⁷³ Opposition to Bifurcation, paras 8, 46-48, 50-51.

⁷⁴ Opposition to Bifurcation, paras. 8, 49; *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Procedural Order No. 3 (Decision on Bifurcation), 21 January 2021 (**Exhibit 6**).

pending” – a reference to the Claimant’s petition to vacate the *Amorrortu I* Awards in France.⁷⁵ The Claimant observes that the *Renco II* tribunal held that the limitation period under the USPTPA excluded the period of pendency of the *Renco I* arbitration citing to a general principle of suspension of limitation periods during an arbitral proceeding recognized under international law.⁷⁶

50. In respect of Objection 2 (Consultation and Negotiation), the Claimant submits, first, that USPTPA Article 10.15 does not support the proposition that consultation and negotiation are required every time an arbitration is commenced: the requirement is fulfilled as long as the claims in both arbitrations affect the investor in violation of its rights and concern the same subject matter.⁷⁷ Similarly, in the Claimant’s view, the procedural events that took place after the issuance of the Final Award in *Amorrortu I* do not alter the conclusion that the investment dispute remains the same.⁷⁸
51. The Claimant further asserts that the consultation and negotiation initiated before the commencement of *Amorrortu I* was left open by the Respondent and continued through *Amorrortu II*. In this connection, the Claimant notes that he met the Minister of Energy and Mining of Peru in Lima as recently as 28 June 2023 to “deliver a proposal for the resolution of this investment dispute”.⁷⁹
52. Objection 3 (Notice of Intention) is also frivolous and not suited for bifurcation, in the Claimant’s view, because Article 10.16 of the Treaty requires a notice of intent for every claim, not for every arbitration, as wrongly suggested by the Respondent.⁸⁰ The Claimant states that he properly notified of each of the claims for *Amorrortu I*, which are exactly the same as those for *Amorrortu II*.⁸¹

V. THE TRIBUNAL’S ANALYSIS

53. At the outset, the Tribunal notes that the principal basis for the Respondent’s Request for Bifurcation is Article 10.20.4 of the Treaty, which provides for the mandatory bifurcation of “any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.1”. According to the Respondent, all of Objections 1-3 can be resolved as a matter of law and therefore must be bifurcated for consideration in a preliminary phase. In the alternative, the Respondent submits that the bifurcation of its objections is warranted under Article 23(3) of the UNCITRAL Rules.

⁷⁵ Opposition to Bifurcation, paras 9, 52.

⁷⁶ Opposition to Bifurcation, paras 53-57; *Renco II*, Decision on Expedited Preliminary Objections, 30 June 2020, para 233 (**Exhibit 19**).

⁷⁷ Opposition to Bifurcation, para. 66.

⁷⁸ Opposition to Bifurcation, para. 67.

⁷⁹ Opposition to Bifurcation, paras 10, 58-65, 68.

⁸⁰ Opposition to Bifurcation, paras 15, 73; Rejoinder, para. 31.

⁸¹ Opposition to Bifurcation, para. 71.

54. The Claimant, in turn, denies that the Respondent's objections are capable of triggering Article 10.20.4 of the USPTPA. He requests that the Tribunal exercise its discretion under Article 23(3) of the UNCITRAL Rules to deny bifurcation.
55. The Tribunal must first address whether the Respondent's objections fall within the scope of Article 10.20.4 of the Treaty. This provision reads as follows:
- Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.1.
56. The Tribunal observes that the plain text of Article 10.20.4 refers to two distinct classes of objections. As already noted, the class of objections for which Article 10.20.4 mandates bifurcation is "any objection by the respondent that ... a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.1". In other words, where the objection concerns a claim in respect of which an award cannot be made under Article 10.26.1, Article 10.20.4 requires the tribunal to address and decide the objection (i) as a preliminary matter, and (ii) as a matter of law, *i.e.*, without engaging in a factual enquiry.
57. Article 10.20.4 then refers to a second class of objections that is residual in nature – "other objections" outside those for which bifurcation is required – and identifies a sub-class of objections falling within this broader 'residual' category: "an objection that a dispute is not within the tribunal's competence".
58. In the Tribunal's view, all three objections advanced by the Respondent are properly characterized as objections that the present dispute is not within the Tribunal's competence. Objection 1 (Time-Bar) is, in essence, a challenge to the Tribunal's competence *ratione temporis*. Similarly, Objections 2 (Consultation and Negotiation) and 3 (Notice of Intent), as particularized by the Respondent itself, arise from the proposition that the Respondent has not given its consent to arbitrate the dispute under the Treaty⁸² – a quintessential question of competence of an investment tribunal.
59. Once this is so, Objections 1-3 are objections as to competence that fall within the 'residual' class of objections defined in Article 10.20.4, and thus bifurcation is not peremptory, but is subject instead to the Tribunal's "authority to address other objections as a preliminary question", that is to say, upon an exercise of the Tribunal's discretion as to whether bifurcation is warranted.
60. In the exercise of this authority, having considered the Parties' respective views, the Tribunal finds that none of the objections advanced by the Respondent warrant bifurcation.
61. First, Objection 1 (Time-Bar) as pleaded by the Respondent requires the Tribunal to determine the starting date of the three-year limitation period specified under Article 10.18.1 of the USPTPA – *i.e.*, the date on which the Claimant "first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1". The Respondent's submission is that the limitation period started to run in June 2019, while the Claimant argues that the corruption that allegedly

⁸² See, *e.g.*, Request for Bifurcation, paras. 15, 22.

frustrated his investment was only confirmed in or around 31 August 2020. Thus, the factual enquiry that the Tribunal is required to engage in respect of Objection 1 may turn on evidence that is also relevant to the merits of the Claimant's claims. The Tribunal may also be required to make findings of fact so as to decide Objection 1 that are not without consequence for the adjudication of the merits, should that be reached. These considerations incline the Tribunal to the conclusion that Objection 1 should not be determined in a preliminary proceeding. Though the Tribunal does not consider Objection 1 to be frivolous, we apprehend that the evidential enquiry relevant to its adjudication is unlikely to be sufficiently self-contained so as to save costs and time, and avoid overlap with the merits of the case. The request for bifurcation in respect of Objection 1 must therefore be declined.

62. Similarly, Objection 2 (Consultation and Negotiation) raises a mixed question of fact and law requiring, *inter alia*, a factual assessment of the content and significance of the Claimant's alleged attempts to settle this dispute with the Peruvian Government. In the Tribunal's view, the analysis required in respect of Objection 2 would be better addressed as part of the larger evidentiary exercise engaged with the merits.
63. Lastly, with respect to Objection 3 (Notice of Intent), the Tribunal is again not convinced that bifurcation is warranted. Issues of fact have been raised in respect of Objection 3, in addition to issues of law, including whether the current proceedings involve a "different dispute". Therefore, even though Objection 3 is a more narrowly circumscribed, adjudicating Objection 3 separately would still be likely to require the Tribunal to undertake a broader factual inquiry and delve into legal issues that involve the wider merits of the case, without all the relevant context.
64. The Tribunal observes, finally, that Objections 1-3 require the Tribunal to address and decide – albeit to varying extents – issues of fact that are in dispute between the Parties. This reinforces the Tribunal's conclusion that Objections 1-3 fall outside the scope of Article 10.20.4 of the Treaty, as none of them are claims simply "for which an award in favour of the claimant may be made [*as a matter of law*] under Article 10.26.1".⁸³

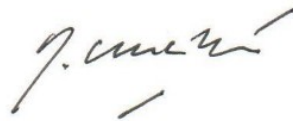
⁸³ Brackets and emphasis by the Tribunal.

VI. DECISION ON BIFURCATION

65. For the reasons set forth above, the Tribunal:

- a. REJECTS the Respondent's Request for Bifurcation;
- b. ORDERS the Respondent to file its Statement of Defence within 6 weeks from this Decision on Bifurcation (*i.e.*, no later than **Monday, 29 April 2024**);
- c. DIRECTS the Parties to confer and attempt to agree on a procedural calendar for the next phase of the proceedings, which should replicate Option 2 of the schedule proposed jointly by the Parties on 10 October 2023 and include three hearing date proposals, and revert to the Tribunal on these matters by **Monday, 25 March 2024**; and
- d. RESERVES its decision on costs.

Place of Arbitration: New York, United States of America



Justice David Unterhalter
(Presiding Arbitrator)

On behalf of the Tribunal