

PCA Case No. 2020-11

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

**- and -**

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

**- between -**

**BACILIO AMORRORTU (USA)**

**(the “Claimant”)**

**- and -**

**THE REPUBLIC OF PERU**

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

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**PARTIAL AWARD ON JURISDICTION**

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**The Arbitral Tribunal**

Hon. Ian Binnie, CC, QC (Presiding Arbitrator)

Prof. Bernard Hanotiau

Mr. Toby Landau, QC

**Secretary to the Tribunal**

Mr. José Luis Aragón Cardiel

*Permanent Court of Arbitration*

**August 5, 2022**

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**DEFINED TERMS**

<b>Availability Requirement</b>	According to the Respondent, determination required under Direct Negotiation Procedure 8 that an oil block is available before a Direct Negotiation process to assign the block can start
<b>Baspetrol</b>	Baspetrol S.A.C.
<b>Baspetrol Proposal</b>	Baspetrol's Proposal to operate Blocks III and IV submitted to PeruPetro on May 28, 2014
<b>CAFTA-DR</b>	Dominican Republic-Central America Free Trade Agreement
<b>Claimant</b>	Mr. Bacilio Amorrortu
<b>Claimant's Post-Hearing Brief</b>	Claimant's Post-Hearing Brief, dated September 10, 2021
<b>Decision on Bifurcation</b>	Procedural Order No. 3 (Decision on Bifurcation), dated January 21, 2021
<b>Direct Negotiation(s)</b>	Under Peruvian law, procedure of direct negotiation for operating concessions for the exploitation of hydrocarbons, which, according to the Claimant, was triggered when the Claimant submitted the Baspetrol Proposal to PeruPetro on May 28, 2014
<b>Direct Negotiation Procedure 8</b>	Procedure GFCN-008, Contracting by Direct Negotiation, Version 3.0, August 13, 2001
<b>FET</b>	Fair and equitable treatment
<b>First Quiroga Report</b>	Expert Report of Aníbal Quiroga León, dated September 9, 2020, Exhibit CER-001
<b>First Vizquerra Report</b>	Expert Report of Carlos Raúl José Vizquerra Pérez Albela, dated March 15, 2021, Exhibit RER-001
<b>Graña y Montero</b>	Graña y Montero S.A.A.
<b>ICJ</b>	International Court of Justice

<b>International Public Tender</b>	International Public Tender initiated by PeruPetro on July 14, 2014 to award a contract for the exploration and exploitation of Blocks III and IV of the Talara Basin
<b>Hearing on Preliminary Objections</b>	Hearing on Preliminary Objections held by videoconference on August 9, 2021
<b>Memorial</b>	Claimant's Memorial, dated September 11, 2020
<b>Memorial on Preliminary Objections</b>	Respondent's Memorial on Preliminary Objections, dated March 15, 2021
<b>Motion for Leave to Amend the Notice of Arbitration</b>	Claimant's Motion for Leave to Amend the Notice of Arbitration, dated December 22, 2020
<b>NAFTA</b>	North America Free Trade Agreement
<b>Notice of Arbitration</b>	Claimant's Notice of Arbitration, dated February 13, 2020
<b>Notice of Intent to Submit Preliminary Objections</b>	Respondent's Notice of Intent to Submit Preliminary Objections, dated December 9, 2020
<b>Objection 1</b>	The Respondent's objection under Article 10.20.4 of the Treaty
<b>Objection 4</b>	The Respondent's objection that Mr. Amorrortu did not submit a valid waiver as required under Article 10.18.2 of the Treaty
<b>Qualification Certificate</b>	Certificate required under the Regulation on Qualification indicating that a company requesting a Direct Negotiation it is a qualified company "to start the negotiation of a Contract"
<b>Parties</b>	Claimant and Respondent
<b>PCA</b>	Permanent Court of Arbitration
<b>PCIJ</b>	Permanent Court of International Justice
<b>Peru or Respondent</b>	The Republic of Peru
<b>PeruPetro</b>	PeruPetro, S.A.

<b>Preliminary Objections</b>	Together, Objections 1 and 4
<b>Provisa</b>	Consortium Propetsa-Visisa Serpet Asociados
<b>Qualification Procedure 6</b>	PeruPetro Procedure GFCN-006, Qualification of Oil Companies, Version 3.0, February 7, 2013
<b>Regulation on Qualification</b>	Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, August 18, 2004
<b>Rejoinder on Preliminary Objections</b>	Claimant's Rejoinder on Preliminary Objections, dated June 21, 2021
<b>Reply on Preliminary Objections</b>	Respondent's Reply on Preliminary Objections, dated May 24, 2021
<b>Request for Disclosure of the Funding Agreement</b>	Respondent's application to the Tribunal dated September 25, 2020
<b>Respondent's Post-Hearing Brief</b>	Respondent's Post-Hearing Brief, dated September 10, 2021
<b>Response to the Notice of Arbitration</b>	Respondent's Response to the Notice of Arbitration, dated March 21, 2020
<b>Second Quiroga Report</b>	Response to the Respondent's Expert Report prepared by Aníbal Quiroga León, dated April 26, 2021, Exhibit CER-002
<b>Second Vizquerra Report</b>	Reply to the Response Report prepared by Aníbal Quiroga León by Carlos Raúl José Vizquerra Pérez Albela, dated May 24, 2021, Exhibit RER-002
<b>Third Quiroga Report</b>	Rejoinder to Defendant's Reply Report prepared by Aníbal Quiroga León, dated June 21, 2021, Exhibit CER-003
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2013
<b>Submission of the United States</b>	Submission of the United States of America, dated July 13, 2021

**USPTPA or Treaty**

United States-Peru Trade Promotion Agreement,  
entered into force on February 1, 2009

**Witness Statement of Bacilio Amorrortu**

First Declaration of Bacilio Amorrortu, dated  
April 25, 2021, Exhibit CWS-001

**DRAMATIS PERSONAE**

<b>Mr. Amorrortu</b>	Mr. Bacilio Amorrortu, the Claimant
<b>Mr. Ortigas</b>	Mr. Luis Enrique Ortigas Cúneo, President and CEO of PeruPetro
<b>Mr. Quiroga</b>	Mr. Aníbal Quiroga León, legal expert on behalf of the Claimant
<b>Ms. Tafur</b>	Ms. Isabel Mercedes Tafur Marín, PeruPetro's Chief Administrator
<b>Mr. Vizquerra</b>	Mr. Carlos Raúl José Vizquerra Pérez Albela, legal expert on behalf of the Respondent

## **PART 1 - INTRODUCTION**

### **A. THE PARTIES**

1. The claimant is Mr. Bacilio Amorrortu (the “**Claimant**” or “**Mr. Amorrortu**”).
2. The Claimant is represented in this arbitration by:

**Francisco A. Rodriguez**  
**Rebeca E. Mosquera**  
**Gilberto A. Guerrero-Rocca**  
Reed Smith LLP

3. The respondent in this arbitration is the Republic of Peru (“**Peru**” or the “**Respondent**” and, together with the Claimant, the “**Parties**”).
4. The Respondent is represented in this arbitration by:

**Vanessa Rivas Plata Saldarriaga**  
*Presidenta de la Comisión Especial  
que representa al Estado en Controversias Internacionales de Inversión*  
**Mónica Guerrero Acevedo**  
**Víctor Giancarlo Peralta Miranda**  
*Secretaría Técnica de la Comisión Especial  
que representa al Estado en Controversias Internacionales de Inversión*

**Kenneth Juan Figueroa**  
**Ofilio J. Mayorga**  
Foley Hoag LLP

### **B. THE DISPUTE**

5. The dispute concerns the Respondent’s alleged frustration of the Claimant’s legitimate expectations to obtain a contract to perform oil drilling and extraction operations in oil Blocks III and IV of the Talara Basin, in the Province of Talara, Piura Region, Peru. In particular, the Claimant asserts that Peru ignored the rights he acquired directly to negotiate the contracts for Blocks III and IV (“**Direct Negotiation(s)**”), and instead

initiated a “rigged” public bidding process to favor another company, Graña y Montero S.A.A. (“**Graña y Montero**”), based on corrupt motives.<sup>1</sup>

6. The Claimant claims that, through this conduct, the Respondent violated its fair and equitable treatment (“**FET**”) obligations under the United States-Peru Trade Promotion Agreement, ratified by Peru in June 2006, signed by the United States on December 14, 2007 and entered into force on February 1, 2009 (the “**USPTPA**” or the “**Treaty**”).
7. The Respondent has advanced one objection under Article 10.20.4 of the Treaty and five jurisdictional objections under Article 23(3) of the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2013 (the “**UNCITRAL Rules**”).<sup>2</sup> By its Decision on Bifurcation, dated January 21, 2021 (the “**Decision on Bifurcation**”) the Tribunal ordered the bifurcation of the proceedings, such that two of those objections would be decided as preliminary questions: (i) the Respondent’s objection under Article 10.20.4 of the Treaty (“**Objection 1**”); and (ii) the Respondent’s objection that Mr. Amorrortu did not submit a valid waiver as required under Article 10.18.2(b) of the Treaty (“**Objection 4**”).<sup>3</sup> In this Partial Award, the Tribunal decides Objections 1 and 4 (together, the “**Preliminary Objections**”).
8. For the reasons that follow, Objection 1 is dismissed but, by majority of the Tribunal, Objection 4 is upheld and the claim is dismissed for lack of jurisdiction.

### **C. BACKGROUND**

9. Mr. Amorrortu’s claim concerns the negotiation, execution and supervision of operating concessions for the exploitation of hydrocarbons in the Talara Basin of Peru. The Respondent has entrusted its authority in this respect to PeruPetro S.A. (“**PeruPetro**”), whose corporate purpose is to promote investment in hydrocarbon exploitation activities and negotiate contracts, in accordance with Law No. 26225, PeruPetro Organization and

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<sup>1</sup> Memorial, para. 251.

<sup>2</sup> Notice of Intent to Submit Preliminary Objections, para. 2.

<sup>3</sup> Decision on Bifurcation, paras. 9, 11.

Functions Law,<sup>4</sup> and the Unique Arranged Text of the Organic Law on Hydrocarbons.<sup>5</sup> PeruPetro S.A. is authorized, in its discretion, to award operating concessions either by Direct Negotiation or public bidding. The Parties agree that a concession block opened up to public bidding is not available for Direct Negotiation.<sup>6</sup>

(i) *The Investor*

10. Mr. Amorrortu is a Peruvian-born citizen who says he fled “political persecution”<sup>7</sup> to the United States in 2000, was granted asylum in 2011, renounced Peruvian citizenship and was granted permanent US residence in 2005.<sup>8</sup> Through various Peruvian corporations, he has been involved since the 1970s in providing maintenance and well services to oil companies operating in the Talara Basin.<sup>9</sup> In 1990, his company, Propetsa, was government-certified to undertake oil exploration and exploitation as well as maintenance activities.<sup>10</sup>

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<sup>4</sup> **Exhibit CLA-041**, Organization and Functions Law of PeruPetro, S.A., Law No. 26225, August 20, 1993 provides, in relevant part, as follows:

ORGANIZATION AND FUNCTIONS LAW OF PERUPETRO S.A.

Article 1. PERUPETRO S.A., is a state entity under the Energy and Mining Sector governed by private law, which operates under the name of PERUPETRO S.A., which will carry out its activities in accordance with the provisions of this Law, its Bylaws and, additionally, the General Law of Companies and other rules of the private regime.

Article 3. The corporate purpose of PERUPETRO S.A. is the following:

- a) Promote investment in Hydrocarbon exploitation and exploration activities.
- b) Negotiate, execute and supervise in its capacity as Contracting party, by the power conferred by the State by virtue of this Law, the Contracts that it establishes, as well as the technical assessment agreements. (Claimant’s translation in **Exhibit CER-001**, First Quiroga Report, para. 88)

<sup>5</sup> **Exhibit Quiroga-2**, Unique Arranged Text of the Organic Law on Hydrocarbons, Approved by Decree No. 042-2005-EM, October 7, 2005 provides, in relevant part, as follows:

Article 6. Created under the corporate name of PERUPETRO S.A., the Private Law State Enterprise of the Energy and Mining Sector, organized as a Public Limited Company according to the General Law of Companies, whose organization and functions will be approved by Law, and its corporate purpose will be the following:

- a) Promote investment in Hydrocarbon exploration and exploitation activities.
- b) Negotiate, execute and supervise in its capacity as Contracting party, by the power conferred by the State by virtue of this Law, the Contracts that it establishes, as well as the technical assessment agreements. (Claimant’s translation in **Exhibit CER-001**, First Quiroga Report, para. 88)

<sup>6</sup> Memorial, para. 197; Memorial on Preliminary Objections, para. 29.

<sup>7</sup> Memorial, para. 50.

<sup>8</sup> Memorial, paras. 47-48.

<sup>9</sup> Memorial, paras. 32-33.

<sup>10</sup> Memorial, para. 37.

(ii) *The Investment*

11. In 2012, Mr. Amorrortu formed Baspetro S.A.C. (“**Baspetro**”), a Peruvian company, to service the oil industry in Talara.<sup>11</sup> The investment in Baspetro, according to the Claimant’s Memorial of September 11, 2020 (the “**Memorial**”), falls under the broad definition of “investment” pursuant to the USPTPA, which explicitly includes an investment in “an enterprise.”<sup>12</sup>
12. Mr. Amorrortu also asserts that his “investment” includes (independently of his investment in Baspetro) the bundle of procedural rights he says he acquired as a result of his application for Direct Negotiation for Blocks III and IV. The USPTPA, according to his Memorial, protects “any rights acquired by Amorrortu under Peruvian law, to wit: the right ... explicitly enumerated in the USPTPA ... to expand his investment [in Baspetro] through the Direct Negotiation Process for the license contract to operate, maintain, and exploit Blocks III and IV.”<sup>13</sup>
13. His application for Direct Negotiation was, he says, “instructed” by Mr. Luis Enrique Ortigas Cúneo (“**Mr. Ortigas**”), the President and CEO of PeruPetro as of May 22, 2014 as follows:

During the meeting, Ortigas **instructed Amorrortu to prepare a proposal for direct negotiation** ... for the operation of Blocks III and IV. Ortigas further told Amorrortu that the Baspetro Proposal would be subject to a legal-technical-economic analysis by PeruPetro’ [sic] Administration and that it would be discussed by PeruPetro’s Board, which is the process required by PeruPetro’s Rules and Procedures.

Accordingly and **in compliance with Ortigas’ instructions**, Amorrortu sent the Baspetro Proposal via email to PeruPetro on May 28, 2014. A hard copy of the Proposal was also submitted to PeruPetro at their offices in Lima, Peru. **The Proposal complied with all the requirements as instructed by Ortigas**, including the additional proposal to operate Talara’s Block IV.<sup>14</sup>

14. On the basis of these “instructions” from Mr. Ortigas, Mr. Amorrortu contends that he acquired statutory rights to a **process** of Direct Negotiation through Baspetro for Blocks

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<sup>11</sup> Memorial, para. 53.

<sup>12</sup> Memorial, para. 19.

<sup>13</sup> Memorial, paras. 19, 21.

<sup>14</sup> Memorial, paras. 73-74 (emphasis added).

III and IV. The procedural rights required PeruPetro to negotiate with him in good faith. While Direct Negotiations do not necessarily result in a contract, Mr. Amorrortu alleges that based on PeruPetro's past practice, a contract is the most likely outcome of good faith negotiations, as stated in his Memorial:

If Peru had complied with its obligation to protect Amorrortu's investment, Baspetro would be operating Blocks III and IV ... There is simply no doubt that the exclusive Direct Negotiation Process to which Amorrortu was entitled, would have culminated with the execution of the contracts to operate Blocks III and IV in favor of Baspetro.<sup>15</sup>

## **PART 2 - PROCEDURAL HISTORY**

### **A. COMMENCEMENT OF THE ARBITRATION**

15. On February 13, 2020, the Claimant commenced these arbitral proceedings by serving upon the Respondent a Notice of Arbitration (the "**Notice of Arbitration**") pursuant to Chapter 10 of the USPTPA and Article 3 of the UNCITRAL Rules. The Notice of Arbitration was received by the Respondent on February 13, 2020.
16. On March 21, 2020, the Respondent filed its Response to the Claimant's Notice of Arbitration (the "**Response to the Notice of Arbitration**").

### **B. CONSTITUTION OF THE TRIBUNAL**

17. In his Notice of Arbitration, the Claimant appointed Prof. Bernard Hanotiau, a Belgian national, as the first arbitrator.
18. In its Response to the Notice of Arbitration, the Respondent appointed Mr. Toby Landau, QC, a national of the United Kingdom, as the second arbitrator.
19. On April 24, 2020, the Parties appointed Hon. Ian Binnie, CC, QC, a national of Canada, as presiding arbitrator. He accepted his appointment on April 26, 2020.

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<sup>15</sup> Memorial, para. 22.

**C. ADOPTION OF THE TERMS OF APPOINTMENT AND PROCEDURAL ORDER NO. 1 (RULES OF PROCEDURE)**

20. On May 11, 2020, the Tribunal circulated draft Terms of Appointment and a draft of Procedural Order No. 1 and invited the Parties' comments thereon, which were submitted on May 28, 2020. These drafts were further addressed during a procedural meeting between the Tribunal and the Parties held by videoconference on June 3, 2020.
21. The Tribunal issued Procedural Order No. 1 on June 29, 2020. By its Procedural Order No. 1, the Tribunal fixed the rules of procedure and the procedural calendar of the arbitration:
- (i) Pursuant to Section 2.1 of the Procedural Order No. 1, the languages of the arbitration are English and Spanish. In accordance with Section 2.10 thereof, this Partial Award on Jurisdiction is rendered in English and accompanied by a translation into Spanish.
  - (ii) Pursuant to Section 9.1 of Procedural Order No. 1, and by agreement of the Parties, the arbitration is conducted in accordance with the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, as adopted by UNCITRAL on July 11, 2013, in accordance with Article 1.2.a thereof, with the Permanent Court of Arbitration (the "PCA") assuming the role of the "repository" foreseen under those rules with respect to this arbitration.
22. The Terms of Appointment were adopted on August 20, 2020:
- (i) In accordance with Section 3.1 of the Terms of Appointment, the UNCITRAL Rules govern this arbitration.
  - (ii) Pursuant to Article 10.19.2 USPTPA, as indicated in Section 3.2 of the Terms of Appointment, the Secretary-General of the International Centre for Settlement of Investment Disputes acts as appointing authority in this arbitration.
  - (iii) Pursuant to Section 6.1 of the Terms of Appointment, the legal place (or "seat") of arbitration is Paris, France.

- (iv) Pursuant to Section 8.1 of the Terms of Appointment, the PCA acts as Registry in these proceedings. Mr. José Luis Aragón Cardiel, PCA Legal Counsel, was designated to act as Registrar and Secretary to the Tribunal.

**D. MEMORIAL**

23. On September 11, 2020, the Claimant submitted his Memorial, accompanied, *inter alia*, by the witness statement of Mr. Bacilio Amorrortu (the “**Witness Statement of Bacilio Amorrortu**”), the legal expert reports of Mr. Aníbal Quiroga León (“**First Quiroga Report**”) and Ms. Mónica Yadira Yaya Luyo, the political expert report of Mr. Francisco Durand and the damages expert report of Mr. Andres Chambouleyron and Mr. Santiago Dellepiane A. of BRG.

**E. REQUEST FOR DISCLOSURE OF FUNDING AGREEMENT (PROCEDURAL ORDER NO. 2)**

24. On September 25, 2020, the Respondent requested that the Tribunal order the Claimant (i) to disclose the names of any funder(s) with whom the Claimant or his legal representatives may have entered or plan to enter into an agreement in relation to this case; (ii) to confirm that the funding arrangement includes payment of an adverse costs award; and (iii) to provide copies of the relevant provision from the funding agreement(s) relating to costs awards, and aspects of the conduct, termination, or settlement of the present arbitration that require funder approval (the “**Request for Disclosure of the Funding Agreement**”).
25. On October 2, 2020, the Claimant (i) confirmed “that he is relying on the assistance of a third party to pay for the costs of these proceedings;” (ii) offered to disclose the identity of the funder to the Tribunal and the Respondent under certain conditions; and (iii) requested that the Tribunal dismiss the Respondent’s request that he disclose certain terms of the funding agreement.
26. On October 6, 2020, the Respondent commented on the Claimant’s letter of October 2, 2020 and reiterated its request as set out in its letter of September 25, 2020.

27. On October 19, 2020, the Tribunal issued Procedural Order No. 2, whereby the Claimant was ordered to disclose the identity of the third party funder to the Tribunal and the Respondent.
28. On October 23, 2020, the Claimant disclosed the identity of his third party funder to the Tribunal and the Respondent.

**F. DECISION ON BIFURCATION (PROCEDURAL ORDER NO. 3)**

29. On December 9, 2020, the Respondent submitted a Notice of Intent to Submit Preliminary Objections (the “**Notice of Intent to Submit Preliminary Objections**”), whereby (i) it notified its intention to make preliminary objections pursuant to Article 10.20.4 of the Treaty and Article 23(3) of the UNCITRAL Rules; (ii) it requested the Tribunal to consider all of those objections as preliminary questions; and (iii) it requested the Tribunal to suspend the proceedings on the merits in accordance with Article 10.20.4 of the Treaty.
30. On December 10, 2020, the Tribunal (i) invited the Claimant’s comments on the Notice of Intent to Submit Preliminary Objections; and (ii) ordered the suspension of the deadline for the filing of the Respondent’s Statement of Defense, as well as all subsequent deadlines set out in the Procedural Calendar.
31. On December 22, 2020, the Claimant (i) submitted a Motion for Leave to Amend his Notice of Arbitration (the “**Motion for Leave to Amend the Notice of Arbitration**”) “to provide the purportedly defective waiver that Peru claims Article 10.18.2(b) [of the Treaty] requires;” and (ii) requested that the Tribunal adjudicate such motion “before proceeding with the other jurisdictional objections raised by Peru and the merits of Amorrortu’s claims.”
32. On January 15, 2021, the Respondent requested that the Tribunal reject the Claimant’s Motion for Leave to Amend the Notice of Arbitration, or, in the alternative, to reserve such decision until it had heard all of Peru’s preliminary objections.
33. On January 21, 2021, the Tribunal issued its Decision on Bifurcation (Procedural Order No. 3), whereby it decided that the Respondent’s objection under Article 10.20.4 of the Treaty (Objection 1) and the Respondent’s objection that Mr. Amorrortu did not submit

a valid waiver (Objection 4) would be decided as preliminary questions, while the rest of the objections raised by the Respondent would be joined to the merits of the case.

**G. WRITTEN SUBMISSIONS ON PRELIMINARY OBJECTIONS**

34. On February 9, 2021, the Tribunal issued the Procedural Calendar, as agreed by the Parties, for the phase on the Preliminary Objections.
35. On March 15, 2021, the Respondent submitted its Memorial on Preliminary Objections (the “**Memorial on Preliminary Objections**”), accompanied by the legal expert report of Mr. Carlos Vizquerra (the “**First Vizquerra Report**”).
36. On April 26, 2021, the Claimant submitted his Answer on Preliminary Objections (the “**Answer on Preliminary Objections**”), accompanied by the second legal expert report of Mr. Aníbal Quiroga León (the “**Second Quiroga Report**”) and a declaration from Mr. Bacilio Amorrortu.
37. On May 24, 2021, the Respondent submitted its Reply on Preliminary Objections (the “**Reply on Preliminary Objections**”), accompanied by the second legal expert report of Mr. Carlos Vizquerra (the “**Second Vizquerra Report**”).
38. On June 21, 2021, the Claimant submitted his Rejoinder on Preliminary Objections (the “**Rejoinder on Preliminary Objections**”), accompanied by the third legal expert report of Mr. Aníbal Quiroga León (the “**Third Quiroga Report**”).

**H. NON-DISPUTING PARTY SUBMISSION**

39. On May 6, 2021, the United States of America, through its Department of State, proposed to file a written non-disputing party submission in this case pursuant to Article 10.20.2 of the USPTPA.
40. On May 11 and May 12, 2021, the Respondent and the Claimant indicated respectively that they did not object to the United States’ proposal.
41. On May 13, 2021, the Tribunal granted leave to the United States to file a written non-disputing party submission.

42. On July 13, 2021, the United States filed its non-disputing party submission (the “**Submission of the United States**”).

**I. HEARING ON PRELIMINARY OBJECTIONS (PROCEDURAL ORDER NO. 4)**

43. By letter dated February 9, 2021, having sought and considered the Parties’ views, the Tribunal reserved August 9, 2021, as the date for a virtual hearing on the Preliminary Objections (the “**Hearing on Preliminary Objections**”).

44. On June 24, 2021, the Tribunal circulated a draft of Procedural Order No. 4, convening the Hearing on Preliminary Objections and addressing all other technical and ancillary aspects thereof and invited the Parties’ comments on the draft order.

45. On July 7, 2021, the Respondent requested that the duration of the Hearing on Preliminary Objections be extended given that (i) the Parties expected to call Mr. Vizquerra and Mr. Quiroga for examination, and (ii) the Hearing would be the first opportunity for the Parties to address the Submission of the United States.

46. On July 8, 2021, the Claimant noted that it did not oppose “any extension that the Tribunal may deem appropriate and necessary provided that the extension does not delay the proceedings.”

47. On July 9, 2021, the Parties submitted their comments on the draft Procedural Order No. 4 circulated by the Tribunal on June 24, 2021. Later that day, the Tribunal, noting that it was unavailable to continue the Hearing on August 10 or 11, 2021, decided to extend the hearing hours on August 9, 2021, by an additional 1.5 hours.

48. On July 18, 2021, the Parties jointly submitted a hearing schedule proposal.

49. On July 19, 2021, the Tribunal, the Parties, and the PCA held a pre-hearing conference in preparation for the Hearing on Preliminary Objections.

50. On July 20, 2021, the Tribunal issued Procedural Order No. 4.

51. The Hearing on Preliminary Objections was held on August 9, 2021 by videoconference. A public webcast of the hearing was also made available on the PCA’s website. The following persons attended the Hearing on Preliminary Objections:

**The Tribunal**

Judge Ian Binnie, CC, QC (Presiding Arbitrator)  
Professor Bernard Hanotiau  
Mr. Toby Landau, QC

**For the Claimant**

Bacilio Amorrortu  
*Claimant*

Francisco A. Rodriguez  
Rebeca E. Mosquera  
Tracy Leal  
*Akerman LLP*

Aníbal Quiroga  
*Expert Witness*

**For the Respondent**

Vanessa Rivas Plata Saldarriaga  
Mónica Guerrero  
Jhans Armando Panihuara Aragón  
*Special Commission that Represents the Republic of Peru in International  
Investment Disputes*

Kenneth J. Figueroa  
Alberto Wray  
Ofilio J. Mayorga  
Jose Rebolledo  
Juan Pablo Hugues  
*Foley Hoag, LLP*

Carlos Raúl Vizquerra  
*Expert Witness*

**Permanent Court of Arbitration**

José Luis Aragón Cardiel  
Clara Ruiz Garrido  
Luis Popoli

**Court Reporters**

Dawn Larson  
*Worldwide Reporting*

Dante Rinaldi  
Elizabeth Cicoria  
Marta Rinaldi  
*D-R Esteno*

**Interpreters**

Silvia Colla  
Daniel Giglio

**Technical Support**

Faraz Khan  
*Law in Order*

**J. POST-HEARING MATTERS**

52. On August 19, 2021, as discussed at the close of the Hearing on Preliminary Objections, the Tribunal invited the Parties to submit post-hearing briefs.
53. On September 10, 2021, the Claimant and the Respondent submitted their post-hearing briefs (the “**Claimant’s Post-Hearing Brief**” and the “**Respondent’s Post-Hearing Brief**”).

**K. REQUESTS FOR RELIEF**

54. In its Memorial on Preliminary Objections and Reply on Preliminary Objections, the Respondent requests the following relief:

For the foregoing reasons, the Republic of Peru respectfully requests that the Tribunal:

- a. Decide that the claim asserted in this arbitration, as a matter of law, is not a claim for which an award in favor of Claimant may be made under the USPTA and dismiss Claimant’s claim for breach of the fair and equitable standard in Article 10.5 of the 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.<sup>16</sup>

55. In its Answer on Preliminary Objections and Rejoinder on Preliminary Objections, the Claimant requests the following relief:

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

- 1) reject Objections 1 and 4;
- 2) award Amorrortu reasonable costs and attorneys' fees incurred in opposing Objections 1 and 4 pursuant to Article 10.26 of the USPTPA;
- 3) award Amorrortu costs and attorneys' fees incurred in opposing Objection 4 pursuant to Article 10.20(6) of the USPTPA;
- 4) order Peru to file its Statement of Defense without more delays; and
- 5) award such other relief as the Tribunal deems appropriate.<sup>17</sup>

### **PART 3 - OBJECTION UNDER ARTICLE 10.20.4 OF THE TREATY (OBJECTION 1)**

56. Objection 1 is premised upon Article 10.20.4 of the USPTPA, which provides, in relevant part, 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.

...

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.<sup>18</sup>

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<sup>16</sup> Memorial on Preliminary Objections, para. 112; Reply on Preliminary Objections, para. 95. *See also* Respondent's Post-Hearing Brief, para. 136.

<sup>17</sup> Answer on Preliminary Objections, para. 130; Rejoinder on Preliminary Objections, para. 45. *See also* Claimant's Post-Hearing Brief, para. 75.

<sup>18</sup> **Exhibit CLA-001**, USPTPA Investment Chapter, Article 10.20.4.

57. The events described below are drawn from the Parties' submissions and constitute a recount of the facts that the Parties consider must be assumed as true for the purposes of Article 10.20.4 of the Treaty. They do not constitute factual findings of the Tribunal.
58. This summary of events is followed by the Parties' respective positions on Objection 1. As more fully elaborated below, assuming all of the Claimant's allegations of fact as true, the Respondent submits that the Claimant has no interests protected under the Treaty, meaning that his claims fail as a matter of law. This is denied by the Claimant.

**A. SUMMARY OF FACTUAL ALLEGATIONS RELEVANT TO OBJECTION 1**

59. The Claimant has been involved in drilling and extraction operations in the Talara Basin, Piura Region, Peru, since 1976.<sup>19</sup> In 1993, the Claimant was awarded, through the consortium Propetsa-Visisa Serpet Asociados ("**Provisa**"), the operation of Block III for 20 years.<sup>20</sup> On August 13, 1997, Provisa transferred its participation in Block III to Mercantile Peru Oil & Gas, SA.<sup>21</sup> The Claimant affirms that this was a consequence of "the fierce political persecution launched by the dictatorial government of President Alberto Fujimori" against him.<sup>22</sup>
60. According to the Claimant, it was as a result of such persecution that he "was forced to seek political asylum in the United States," which he obtained in 2000.<sup>23</sup> In 2010, he became a citizen of the United States.<sup>24</sup>
61. In 2012, the Claimant constituted the company Baspetro with the expectation to operate oil fields in Peru and recover the contractual rights to operate Block III.<sup>25</sup>

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<sup>19</sup> Memorial, para. 5; Memorial on Preliminary Objections, para. 14; Answer on Preliminary Objections, para. 20.

<sup>20</sup> Memorial, para. 38; Memorial on Preliminary Objections, para. 14; **Exhibit C-004**, Hydrocarbons Exploitation Services Contract signed between PetroPeru and PROVISA, March 4, 1993, Clause 3.1.

<sup>21</sup> Memorial, para. 46; Memorial on Preliminary Objections, para. 14; **Exhibit CWS-001**, Witness Statement of Bacilio Amorrotu, para. 26. See **Exhibit C-003**, Directory Agreement No. 034-2014, March 20, 2014, p. 8.

<sup>22</sup> Answer on Preliminary Objections, para. 21. See also Memorial, paras. 6, 44.

<sup>23</sup> Memorial, paras. 6, 47; Answer on Preliminary Objections, para. 21; **Exhibit C-001**, Letter from the U.S. Department of Justice, Immigration and Naturalization Service, January 29, 2001.

<sup>24</sup> Memorial, para. 7; Answer on Preliminary Objections, para. 22.

<sup>25</sup> Memorial, paras. 8, 53; Memorial on Preliminary Objections, para. 15; Answer on Preliminary Objections, para. 23.

62. In July 2013, the Claimant contacted Luis Enrique Ortigas, then President of PeruPetro, and expressed his interest to take over the operation of Block III.<sup>26</sup> On August 12, 2013, PeruPetro replied that Block III was not available for Direct Negotiation.<sup>27</sup> The Claimant reiterated his interest to operate Block III on at least three occasions after that first meeting with Mr. Ortigas.<sup>28</sup>
63. On March 20, 2014, PeruPetro approved a temporary contract in favor of a third company, Interoil, for the operation of Blocks III and IV for an additional 12-month period, i.e., “for a period that allows PERUPETRO SA to carry out the selection process for the conclusion of a new License Agreement for the Exploitation of Hydrocarbons in Bloc[ks] III [and IV].”<sup>29</sup>
64. On May 22, 2014, the Claimant met personally with Mr. Ortigas. According to the Claimant, at that meeting Mr. Ortigas (i) “instructed Amorrortu to prepare a proposal for direct negotiation ... for the operation of Blocks III and IV;”<sup>30</sup> and (ii) “further told Amorrortu that the Baspetro proposal would be subject to a legal-technical-economic analysis by PeruPetro’s Administration and that it would be discussed by PeruPetro’s Board.”<sup>31</sup>
65. On May 28, 2014, the Claimant, on behalf of Baspetro, submitted a proposal to operate Blocks III and IV (the “**Baspetro Proposal**”).<sup>32</sup> The Claimant states that the Baspetro Proposal included, among others, (i) “relevant technical information showcasing

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<sup>26</sup> Memorial on Preliminary Objections, para. 16; Answer on Preliminary Objections, para. 25; Memorial, para. 67; **Exhibit C-031**, Letter from Bacilio Amorrortu to Luis Ortigas, July 31, 2013.

<sup>27</sup> Memorial, para. 68; Memorial on Preliminary Objections, para. 16; Answer on Preliminary Objections, para. 26; **Exhibit C-006**, Letter from Luis Ortigas to Bacilio Amorrortu, August 12, 2013.

<sup>28</sup> Memorial, paras. 69-70; Answer on Preliminary Objections, paras. 27-28; **Exhibit C-007**, E-mail from Bacilio Amorrortu to Maria Angelica Cobena, January 16, 2014; **Exhibit C-028**, E-mail from Bacilio Amorrortu to Maria Angelica Cobena, March 20, 2014.

<sup>29</sup> **Exhibit C-003**, Directory Agreement No. 034-2014, March 20, 2014 (Respondent’s translation); Memorial, para 71; Memorial on Preliminary Objections, para. 17; Answer on Preliminary Objections, para. 29.

<sup>30</sup> Memorial, para. 73; Memorial on Preliminary Objections, para. 18; Answer on Preliminary Objections, para. 30.

<sup>31</sup> Memorial, para. 73; Answer on Preliminary Objections, para. 30.

<sup>32</sup> Memorial, para. 74; Memorial on Preliminary Objections, para. 19; Answer on Preliminary Objections, para. 31; **Exhibit C-011**, Proposal from Baspetro SAC to PeruPetro to operate Blocks III and IV of the Peruvian North-West, May 27, 2014.

Amorrortu's expertise and Baspetro's qualifications to operate Blocks III and IV;"<sup>33</sup> (ii) a guarantee that Baspetro would engage "a first-class international technical team;"<sup>34</sup> and (iii) an economic framework which "contemplated significant and realistic investments in the drilling of new oil wells, in the re-activation of existing oil wells, and allocated 50% of revenue to PeruPetro."<sup>35</sup>

66. On July 14, 2014, PeruPetro commenced an International Public Tender to award a contract for the exploration and exploitation of Blocks III and IV (the "**International Public Tender**").<sup>36</sup>
67. On July 16, 2014, the Claimant met Mr. Ortigas in Peru. He informed the Claimant that the Board of Directors of PeruPetro had rejected the Baspetro Proposal.<sup>37</sup> Immediately after that meeting, the Claimant met Ms. Isabel Mercedes Tafur Marín ("**Ms. Tafur**"), then PeruPetro's Chief Administrator, who informed him that her office had no knowledge of the Baspetro Proposal and requested a copy.<sup>38</sup> The Claimant sent the proposal to Ms. Tafur a few hours later.<sup>39</sup>
68. On August 20, 2014, PeruPetro invited Baspetro to participate in the International Public Tender, following which the Claimant presented a bid on October 31, 2014.<sup>40</sup>

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<sup>33</sup> Memorial, para. 75; Answer on Preliminary Objections, para. 32. *See also* Memorial on Preliminary Objections, para. 19.

<sup>34</sup> Memorial, para. 76; Answer on Preliminary Objections, para. 33. *See also* Memorial on Preliminary Objections, para. 19.

<sup>35</sup> Memorial, para. 80; Answer on Preliminary Objections, para. 37. *See also* Memorial on Preliminary Objections, para. 19.

<sup>36</sup> Memorial, para. 82; Memorial on Preliminary Objections, para. 21; Answer on Preliminary Objections, para. 39; **Exhibit C-012**, PeruPetro S.A., Press Release, July 14, 2014.

<sup>37</sup> Memorial, para. 83; Memorial on Preliminary Objections, para. 21; Answer on Preliminary Objections, para. 40.

<sup>38</sup> Memorial, para. 84; Memorial on Preliminary Objections, para. 21; Answer on Preliminary Objections, para. 41; **Exhibit CWS-001**, Witness Statement of Bacilio Amorrortu, para. 90.

<sup>39</sup> Memorial, para. 84; Memorial on Preliminary Objections, para. 21; Answer on Preliminary Objections, para. 41; **Exhibit CWS-001**, Witness Statement of Bacilio Amorrortu, para. 90; **Exhibit C-032**, Letter from Bacilio Amorrortu to Isabel Tafur, July 16, 2014.

<sup>40</sup> Memorial, paras. 85-86; Memorial on Preliminary Objections, paras. 22-23; Answer on Preliminary Objections, paras. 42-43; **Exhibit C-013**, Letter from PeruPetro, S.A. to Bacilio Amorrortu, August 20, 2014; **Exhibit C-014**, Letter from Bacilio Amorrortu to "*Comisión de la Licitación Pública Internacional No. PERUPETRO-1-2014*," October 31, 2014.

69. On November 3, 2014, PeruPetro informed the Claimant that Baspetro's bid did not meet the technical requirements of the International Public Tender.<sup>41</sup> On December 12, 2014, PeruPetro announced Graña y Montero as the only company to qualify for the bid for Blocks III and IV.<sup>42</sup>
70. The Claimant contends that the International Public Tender was "purposely designed to exclude Baspetro and award the contract to Graña y Montero."<sup>43</sup> In the Claimant's submission, there was a corruption scheme in place between Graña y Montero and Peru: the company paid bribes to the Humala administration in exchange for the government contracts it selected, including the contract for the operation of Blocks III and IV.<sup>44</sup>

## **B. THE RESPONDENT'S POSITION**

71. Based on the above factual background, the Respondent submits that the Claimant does not possess any right either to Direct Negotiation or to a contract falling under the scope of protection of the Treaty. First, the Respondent asserts that the Claimant did not comply with any of the three preconditions for Direct Negotiation foreseen under Peruvian law, meaning that no Direct Negotiation process was ever commenced. Even assuming that a Direct Negotiation actually started, the Respondent considers that it could not guarantee the conclusion of a contract, while also observing that a mere expectation to obtain a contract is not protected under the Treaty. Similarly, the Respondent maintains that participation in a public tender does not guarantee the conclusion of a contract, noting that the Treaty does not include a general right to be free of corruption. Lastly, the Respondent submits that the Claimant's claim is not viable as a matter of law because he is not entitled to the damages he seeks, which is sufficient to dismiss his claim under Article 10.20.4 of the USPTPA.

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<sup>41</sup> Memorial, para. 87; Memorial on Preliminary Objections, para. 24; Answer on Preliminary Objections, para. 44; **Exhibit C-015**, Letter from Roberto Guzman to Bacilio Amorrortu, November 3, 2014.

<sup>42</sup> Memorial, para. 87; Answer on Preliminary Objections, para. 44; **Exhibit C-029**, PeruPetro, S.A., Press Release, April 6, 2015.

<sup>43</sup> Memorial, para. 87; Answer on Preliminary Objections, para. 44.

<sup>44</sup> Memorial, paras. 145-149.

**1. Preconditions for a Direct Negotiation as a Matter of Peruvian Law**

72. The Respondent denies that a Direct Negotiation process commences upon submission of a letter of interest, as asserted by the Claimant; rather, three preconditions must be met under Peruvian law before a Direct Negotiation can commence.<sup>45</sup>
73. First, the Respondent states that PeruPetro must formally confirm its discretionary decision to engage in a Direct Negotiation<sup>46</sup> “by sending a written communication to the interested company setting forth the commencement date of negotiations and requesting that the interested company designate the representatives who will participate in the negotiation.”<sup>47</sup> According to the Respondent, it is for PeruPetro alone to determine whether an oil block is to be assigned through Direct Negotiation or through a different process.<sup>48</sup>
74. Second, the Respondent maintains that a determination must be made as to whether the relevant block is available for Direct Negotiation (the “**Availability Requirement**”).<sup>49</sup>
75. Third, the Respondent refers to the Regulation on the Qualification of Petroleum Companies (the “**Regulation on Qualification**”), pursuant to which the company requesting the negotiation must obtain a certification that it is a qualified company “to start the negotiation of a Contract” (the “**Qualification Certificate**”).<sup>50</sup> The Respondent submits that the Claimant himself and his legal expert have admitted that the Qualification Certificate requirement must be complied with before the Direct Negotiation

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<sup>45</sup> Memorial on Preliminary Objections, paras. 38-39.

<sup>46</sup> The Respondent notes that, pursuant to Article 11 of the Hydrocarbons Law, PeruPetro has the discretion to select direct negotiation as one of two modalities to enter into hydrocarbon exploitation contracts. *See* Memorial on Preliminary Objections, paras. 40, 46; **Exhibit CLA-045**, Organic Hydrocarbons Law No. 26221, August 13, 1993, Article 11.

<sup>47</sup> Memorial on Preliminary Objections, paras. 40, 48; Reply on Preliminary Objections, fn. 59; **Exhibit RER-001**, First Vizquerra Report, para. 44.

<sup>48</sup> Memorial on Preliminary Objections, para. 47; Reply on Preliminary Objections, para. 30.

<sup>49</sup> Memorial on Preliminary Objections, para. 41; Reply on Preliminary Objections, para. 28, fn. 59; **Exhibit CLA-044**, PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation, August 13, 2012, pp. 5-10.

<sup>50</sup> Memorial on Preliminary Objections, para. 42; **Exhibit CLA-003**, Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, August 18, 2004, Article 2 (Respondent’s translation); **Exhibit CLA-044**, PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation, August 13, 2012, pp. 5-10. *See also* Reply on Preliminary Objections, para. 36; Answer on Preliminary Objections, paras. 78-79; Memorial, para. 201; **Exhibit CER-001**, First Quiroga Report, para. 91.

commences.<sup>51</sup> As further elaborated below, even if such certification is obtained and actual negotiations commence, the Respondent contends that no rights whatsoever are generated with respect to a contract.<sup>52</sup>

76. Lastly, the Respondent also argues that Procedure GFCN-008, Contracting through Direct Negotiation, Version 3.0, of August 13, 2012 (“**Direct Negotiation Procedure 8**”) is not equivalent to the Direct Negotiation procedure, as asserted by the Claimant.<sup>53</sup> It avers that such procedure is an internal regulation directed to PeruPetro’s officials in order to determine if a request for a Direct Negotiation can move forward.<sup>54</sup> As such, the triggering of Direct Negotiation Procedure 8 does not imply the initiation of a direct negotiation.<sup>55</sup>

## **2. Whether a Direct Negotiation was Ever Commenced**

77. The Respondent asserts that the Claimant never complied with the preconditions for a Direct Negotiation as a matter of law. Therefore, no Direct Negotiation was ever commenced and neither Baspetro nor the Claimant acquired a right to such procedure.<sup>56</sup>
78. First, the Respondent asserts that there was never a formal determination by PeruPetro to commence Direct Negotiations as required by law.<sup>57</sup> On the contrary, the Respondent states that PeruPetro communicated “on various occasions and in various ways” its intention to submit Blocks III and IV to a public tender,<sup>58</sup> including, among others, Mr. Ortigas’ communication of August 13, 2013<sup>59</sup> and PeruPetro’s directory decision of March 20, 2014.<sup>60</sup> The Respondent further indicates that the only formal determination

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<sup>51</sup> Answer on Preliminary Objections, paras. 78-79; Respondent’s Post-Hearing Brief, para. 84; **Exhibit CER-001**, First Quiroga Report, para. 91.

<sup>52</sup> Memorial on Preliminary Objections, para. 44; **Exhibit CLA-003**, Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, Article 2, August 18, 2004.

<sup>53</sup> Reply on Preliminary Objections, para. 26; **Exhibit CLA-044**, PeruPetro Procedure GFCN-008, Contracting Through Direct Negotiation, August 13, 2012.

<sup>54</sup> Reply on Preliminary Objections, paras. 26-27 ; **Exhibit RER-002**, Second Vizquerra Report, para. 3.

<sup>55</sup> Reply on Preliminary Objections, para. 27; **Exhibit RER-002**, Second Vizquerra Report, para. 21.

<sup>56</sup> Memorial on Preliminary Objections, para. 46.

<sup>57</sup> Memorial on Preliminary Objections, para. 49.

<sup>58</sup> Memorial on Preliminary Objections, para. 49.

<sup>59</sup> Reply on Preliminary Objections, para. 31.

<sup>60</sup> Respondent’s Post-Hearing Brief, para. 63; **Exhibit C-003**, Directory Agreement No. 034-2014, March 20, 2014.

made by PeruPetro with respect to Blocks III and IV was to submit them to a public tender.<sup>61</sup>

79. In respect of the Availability Requirement, the Respondent claims that Blocks III and IV were never available for Direct Negotiation. In particular, the Respondent notes that (i) in August 2013, Mr. Ortigas informed the Claimant that they were not available for Direct Negotiation;<sup>62</sup> (ii) the Interoil temporary contract extension “expressly indicated that PeruPetro needed time to organize a public tender;”<sup>63</sup> and (iii) after Ms. Tafur requested a copy of the Baspetro Proposal, PeruPetro reiterated that the Blocks were subject to a public tender.<sup>64</sup>
80. With regard to Mr. Ortigas’ instruction of May 22, 2014, the Respondent contends that it had no effect from a legal point of view, as PeruPetro does not act by virtue of the decisions and instructions of a single official.<sup>65</sup> Instead, PeruPetro’s corporate decisions are taken by a vote of the general board of shareholders, which also approves all contracts with PeruPetro.<sup>66</sup> The Respondent observes that this was recognized by the Claimant’s legal expert, Mr. Quiroga.<sup>67</sup> Lastly, the Respondent submits that, even if Mr. Ortigas’ instruction had estopped Peru from claiming the unavailability of Blocks III and IV, the Claimant would still have to demonstrate that he acquired a right protected by the Treaty, as estoppel cannot create otherwise inexistent rights under international law.<sup>68</sup>
81. As to the Qualification Certificate, the Respondent maintains that, regardless of whether Blocks III and IV were available, Baspetro never obtained the certification of qualification necessary to proceed to actual negotiations. It states that a company’s request or proposal for Direct Negotiation does not by itself constitute a request for

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<sup>61</sup> Memorial on Preliminary Objections, para. 49.

<sup>62</sup> Reply on Preliminary Objections, para. 34. See **Exhibit C-006**, Letter from Luis Ortigas to Bacilio Amorrortu, August 12, 2013.

<sup>63</sup> Reply on Preliminary Objections, para. 34. See **Exhibit C-003**, Directory Agreement No. 034-2014, March 20, 2014, p. 1.

<sup>64</sup> Reply on Preliminary Objections, para. 34; **Exhibit C-013**, Letter from PeruPetro, S.A. to Bacilio Amorrortu, August 20, 2014.

<sup>65</sup> Respondent’s Post-Hearing Brief, para. 62.

<sup>66</sup> Respondent’s Post-Hearing Brief, para. 62; **Exhibit CLA-041**, Organization and Functions Law of PeruPetro, S.A., Law No. 26225, August 20, 1993, Articles 12, 15.

<sup>67</sup> Respondent’s Post-Hearing Brief, para. 62; Transcript (English), 195:25, 196: 1-7.

<sup>68</sup> Respondent’s Post-Hearing Brief, paras. 66-67; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, April 15, 2016, para 257.

qualification unless it includes all the documents required in Articles 5 and 6 of the Regulation on Qualification,<sup>69</sup> none of which was submitted with the Baspetro Proposal.<sup>70</sup> As a result, the Respondent concludes, the Baspetro Proposal did not formally trigger the qualification process or the ten-day period established in Article 14 of the Regulation on Qualification.<sup>71</sup>

82. The Respondent also contends that PeruPetro's obligation to issue a certification is expressly conditioned "on the presentation by the interested company of all the required documentation."<sup>72</sup> If the request for certification is incomplete, PeruPetro is not obliged to notify the applicant of the deficiency.<sup>73</sup> Thus, no obligation was ever incurred, the Respondent argues, as Baspetro did not present all the required documentation.<sup>74</sup>
83. In any event, the Respondent contests the Claimant's argument that administrative silence applied in the absence of a response from PeruPetro.<sup>75</sup> In the Respondent's view, the Claimant's legal expert himself has recognized that the administrative laws concerning administrative silence do not directly apply to the "undoubtedly civil" context of PeruPetro's license contracts.<sup>76</sup> In addition, the Respondent indicates that the Regulation on Qualification limits the consequences of a breach of the obligation to "administrative responsibility of the officials."<sup>77</sup>

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<sup>69</sup> Memorial on Preliminary Objections, para. 58; **Exhibit CLA-003**, Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, Articles 4, 5, 6; **Exhibit RER-001**, First Vizquerra Report, para. 16; **Exhibit CER-001**, First Quiroga Report, paras. 94-95. *See also* Reply on Preliminary Objections, May 24, 2021, para. 38.

<sup>70</sup> Memorial on Preliminary Objections, paras. 53-54; Reply on Preliminary Objections, para. 39.

<sup>71</sup> Memorial on Preliminary Objections, paras. 55, 57-59; **Exhibit CLA-003**, Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, Article 14. *See also* Reply on Preliminary Objections, para. 40.

<sup>72</sup> Reply on Preliminary Objections, para. 42; **Exhibit CLA-003**, Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, August 18, 2004, Article 14.

<sup>73</sup> Reply on Preliminary Objections, para. 43.

<sup>74</sup> Reply on Preliminary Objections, para. 43.

<sup>75</sup> *See* para. 102 below.

<sup>76</sup> Reply on Preliminary Objections, para. 41; **Exhibit CER-002**, Second Quiroga Report, para. 11.

<sup>77</sup> Reply on Preliminary Objections, para. 44; **Exhibit CLA-003**, Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, August 18, 2004, Article 14.

### 3. Right to a Contract

84. According to the Respondent, as a matter of Peruvian law PeruPetro is under no obligation to enter into a contract following a Direct Negotiation process<sup>78</sup> (which, it notes, is not disputed by the Claimant).<sup>79</sup> In the Respondent's view, the extent to which Direct Negotiations may have concluded with the execution of a contract in the past is "irrelevant,"<sup>80</sup> as PeruPetro retains the discretion to refuse to enter into a contract regardless of any past decisions.<sup>81</sup>
85. Additionally, the Respondent denies that the start of a Direct Negotiation process would have vested in the Claimant the right to an "exclusive technical evaluation and the community analysis of a Direct Negotiation proposal before any competing company is invited to participate in the process."<sup>82</sup> According to the Respondent, once a company receives the certificate of qualification, the availability of the block is published and other companies have the right to express their interest.<sup>83</sup> PeruPetro must then open a public tender and the Direct Negotiation ends.<sup>84</sup> As such, the Respondent concludes that the Claimant "would have found himself in the same situation through the direct negotiation process, as was ultimately the case: presenting a bid as part of a public tender."<sup>85</sup>
86. The Respondent adds that, if any, the start of a Direct Negotiation offers the advantage of presenting a proposal on an advance basis to PeruPetro and obtaining a response.<sup>86</sup> The Respondent claims that such right was respected, as PeruPetro received the Baspetrol

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<sup>78</sup> Reply on Preliminary Objections, para. 12; **Exhibit RER-001**, First Vizquerra Report, para. 9; **Exhibit CLA-003**, Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, August 18, 2004, Article 2.

<sup>79</sup> Reply on Preliminary Objections, para. 12; **Exhibit CER-002**, Second Quiroga Report, para. 58.

<sup>80</sup> Reply on Preliminary Objections, para. 13.

<sup>81</sup> Reply on Preliminary Objections, para. 14.

<sup>82</sup> Reply on Preliminary Objections, para. 48; Answer on Preliminary Objections, para. 8.

<sup>83</sup> Reply on Preliminary Objections, para. 48; **Exhibit CLA-044**, PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation, August 13, 2012, p. 3.

<sup>84</sup> Reply on Preliminary Objections, para. 48; **Exhibit CLA-044**, PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation, August 13, 2012, p. 3.

<sup>85</sup> Reply on Preliminary Objections, para. 49.

<sup>86</sup> Reply on Preliminary Objections, para. 50.

Proposal and provided a formal response indicating that the areas were subject to a public tender.<sup>87</sup>

87. Similarly, the Respondent submits that the Claimant cannot demonstrate, as a matter of law, that it was guaranteed to win the International Public Tender and be awarded a contract.<sup>88</sup> In particular, the Respondent contends that (i) the Claimant was a mere participant in the bidding process;<sup>89</sup> (ii) participation in a public tender does not guarantee the right to a contract;<sup>90</sup> and (iii) even when a winning proposal has been determined, PeruPetro retains the discretion not to finalize a contract.<sup>91</sup> In addition, the Respondent notes that the Claimant has presented no evidence with respect to his Baspetro Proposal during the International Public Tender, other than a cover letter,<sup>92</sup> and he is now precluded from doing so.<sup>93</sup>
88. Lastly, the Respondent avers that the Claimant's claim is based exclusively on the alleged interruption of the Direct Negotiation process, but not on conduct relating to the public tender,<sup>94</sup> saying that the Claimant "never had, nor has he ever claimed, any right to be declared the winner of the public tender and awarded a contract."<sup>95</sup> Thus, the Respondent contends that "there is no independent basis upon which this Tribunal can be seized of [the Claimant]'s claim based on the allegation relating to the public tender alone."<sup>96</sup>

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<sup>87</sup> Memorial, para. 85; Reply on Preliminary Objections, para. 52; **Exhibit C-013**, Letter from PeruPetro, S.A. to Bacilio Amorrortu, August 20, 2014. *See also* Respondent's Post-Hearing Brief, para. 71.

<sup>88</sup> Respondent's Post-Hearing Brief, para. 8.

<sup>89</sup> Respondent's Post-Hearing Brief, para. 23.

<sup>90</sup> Respondent's Post-Hearing Brief, para. 21.

<sup>91</sup> Respondent's Post-Hearing Brief, para. 19; **Exhibit CLA-045**, Organic Hydrocarbons Law No. 26221, August 13, 1993, Article 11; **Exhibit RER-001**, First Vizquerra Report, para. 9; **Exhibit RLA-034**, PeruPetro's Direct Negotiation and Competitive Bidding Process Contracting Policy: Board Agreement No. 029-2017, April 10, 2017, Article 2.2; **Exhibit CER-001**, First Quiroga Report, para. 89.

<sup>92</sup> Respondent's Post-Hearing Brief, para. 20; **Exhibit C-014**, Letter from Bacilio Amorrortu to "*Comisión de la Licitación Pública Internacional* No. PERUPETRO-1-2014," October 31, 2014.

<sup>93</sup> The Respondent notes that, under paras. 5.2 and 5.3 of Procedural Order No. 1, the Parties shall present all evidence supporting their claim with their Memorial and Statement of Defense, respectively. *See* Respondent's Post-Hearing Brief, para. 13.

<sup>94</sup> Respondent's Post-Hearing Brief, paras. 4-7, 50.

<sup>95</sup> Respondent's Post-Hearing Brief, para. 8.

<sup>96</sup> Respondent's Post-Hearing Brief, para. 10.

#### 4. Protection of Expectations

89. The Respondent states that mere expectations to obtain a contract are not protected by international law or by the USPTPA.<sup>97</sup> In this respect, the Respondent cites *Nigel v. Czech Republic*, a case in which the claimant had concluded an agreement with a Czech State-owned entity to “seek to obtain” a license, the Czech Government awarded a license under a public tender process to a different bidder and the tribunal found that, absent conferral of the actual license, no right existed to such license.<sup>98</sup> In this case, the Respondent contends that the Claimant did not have any agreement with Peru giving any sort of assurance of a Direct Negotiation or of obtaining a contract.<sup>99</sup>
90. Similarly, the Respondent submits that the USPTPA does not protect a supposed right to be free of corruption, “in and of itself.”<sup>100</sup> Instead, corruption can only constitute a violation of the FET standard where it affects “an independent existing and vested right” held by the claimant.<sup>101</sup> In the present case, the Respondent reiterates, the Claimant does not possess such protected interest or right.<sup>102</sup>
91. In any event, the Respondent submits that the Claimant’s assertions of corruption should not be taken as true under USPTPA Article 10.20.4, because they are not factual allegations, but rather a conclusion of mixed law and fact.<sup>103</sup> To illustrate this point, the Respondent refers to the differing standards developed by arbitral tribunals, such as the heightened substantial certainty test or the balance of probabilities and red flags tests.<sup>104</sup>

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<sup>97</sup> Memorial on Preliminary Objections, para. 66; Respondent’s Post-Hearing Brief, para. 68.

<sup>98</sup> Memorial on Preliminary Objections, para. 67; **Exhibit RLA-005**, *William Nagel v. Czech Republic*, SCC Case No. 049/2002, Final Award, September 9, 2003, paras. 4, 8, 12, 13, 1, 327, 329.

<sup>99</sup> Memorial on Preliminary Objections, para. 67.

<sup>100</sup> Respondent’s Post-Hearing Brief, para. 16.

<sup>101</sup> Respondent’s Post-Hearing Brief, para. 16; **Exhibit CLA-004**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, paras. 56, 216, 242-301. *See also* Respondent’s Post-Hearing Brief, para. 52; **Exhibit CLA-046**, *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05, Award, May 17, 2013, para. 166.

<sup>102</sup> Respondent’s Post-Hearing Brief, para. 23.

<sup>103</sup> Respondent’s Post-Hearing Brief, para. 27.

<sup>104</sup> Respondent’s Post-Hearing Brief, para. 27; **Exhibit CLA-063**, U. Cosar, *Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences, and Sanctions* (2015), p. 533.

**5. Whether Declaratory Relief is an Available Remedy Under the USPTPA**

92. The Respondent contends that the USPTPA expressly requires that a claim presented under the Treaty must both identify a treaty breach and be premised on loss or damage suffered by reason of that breach.<sup>105</sup> Noting further that Article 10.26 of the USPTPA restricts the relief that may be awarded by the Tribunal “only” to monetary damages and restitution of property, the Respondent concludes that declaratory relief is expressly prohibited under the Treaty.<sup>106</sup>
93. In this regard, the Respondent recalls that the Claimant claims damages equivalent to “the fair market value of the contracts to operate Blocks III and IV.”<sup>107</sup> Seeing that the Claimant never obtained a right to a contract,<sup>108</sup> the Respondent concludes that he is not entitled to the damages he seeks, which is sufficient to dismiss his claim under Article 10.20.4 of the USPTPA.<sup>109</sup> In addition, the Respondent notes that the Claimant himself has confirmed that his claim for declaratory relief is a part of his claim for damages, but not an independent action.<sup>110</sup>

**C. THE CLAIMANT’S POSITION**

94. The Claimant submits that (i) a Direct Negotiation process starts with the submission of a proposal by an interested company as a matter of law, and (ii) such a Direct Negotiation was commenced when Baspetro submitted its Proposal to PeruPetro. In addition, the Claimant states that he does not claim the right to be granted a contract, but the right to negotiate an agreement free of corruption. Lastly, the Claimant argues that the

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<sup>105</sup> Reply on Preliminary Objections, paras. 15-18; Respondent’s Post-Hearing Brief, para. 30; **Exhibit CLA-001**, USPTPA Investment Chapter, Article 10.16.1(a); **Exhibit RLA-043**, *Merrill and Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, para. 245; **Exhibit CLA-028**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, para. 98.

<sup>106</sup> Respondent’s Post-Hearing Brief, para. 30; **Exhibit CLA-001**, USPTPA Investment Chapter, Article 10.26. *See also* Respondent’s Post-Hearing Brief, paras. 54-57; **Exhibit RLA-023**, L.M. Caplan and J.K. Sharpe, 18 *United States*, in *Commentaries on Selected Model Investment Treaties* (C. Brown ed.), January 17, 2013, pp. 844-845, fn. 345.

<sup>107</sup> Memorial, para. 389; Reply on Preliminary Objections, para. 18.

<sup>108</sup> *See* paras. 84-88 above.

<sup>109</sup> Reply on Preliminary Objections, paras. 19-20.

<sup>110</sup> Respondent’s Post-Hearing Brief, para. 97; Transcript (English), 109:25-110:1-6.

Respondent's assertion that he does not have a claim for which damages can be awarded presents an issue of quantum rather than of jurisdiction.

**1. Preconditions for a Direct Negotiation as a Matter of Peruvian Law**

95. Relying first on PeruPetro's Direct Negotiation Procedure 8, the Claimant contends that a Direct Negotiation process is commenced with the submission of a proposal for Direct Negotiation by an interested oil company.<sup>111</sup> After a proposal is submitted, the interested company "has the right to have its proposal subjected to the various steps or phases established in [Direct Negotiation Procedure 8]" including, but not limited to, the determination of the availability of the oil block.<sup>112</sup>
96. The Claimant accepts that Article 2 of the Regulation on Qualification requires that "every oil company shall be duly qualified by PeruPetro S.A., to commence the negotiation of a contract."<sup>113</sup> He notes, however, that such requirement was satisfied in this case, as further elaborated in the following section.<sup>114</sup>

**2. Whether a Direct Negotiation was Ever Commenced**

97. The Claimant asserts that the Direct Negotiation process begins with a submission by the oil company expressing its interest in negotiating a contract,<sup>115</sup> meaning that the Availability Requirement and the Qualification Certificate are two steps of the Direct Negotiation process.<sup>116</sup>
98. The Claimant maintains that, in the present case, the Direct Negotiation process was commenced when Baspetro submitted its Proposal to operate Blocks III and IV on May, 28, 2014. The Claimant stresses that Baspetro submitted the Proposal because PeruPetro requested him to do so "not once, but twice,"<sup>117</sup> when (i) Mr. Ortigas asked Baspetro, on

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<sup>111</sup> Answer on Preliminary Objections, para. 71. See **Exhibit CLA-044**, PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation, August 13, 2012, p. 11, Flow Chart 9.

<sup>112</sup> Answer on Preliminary Objections, paras. 72, 67-70; **Exhibit CLA-044**, PeruPetro Procedure GFCN-8, Contracting Through Direct Negotiation, August 13, 2012, pp. 11-13, Flow Chart 9.

<sup>113</sup> Answer on Preliminary Objections, paras. 78-79; **Exhibit CER-001**, First Quiroga Report, para. 91; **Exhibit CLA-003**, Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, August 18, 2004, Article 2 (Claimant's translation).

<sup>114</sup> See paras. 97-104 below.

<sup>115</sup> Memorial, para. 192; Answer on Preliminary Objections, paras. 4-5, 65.ii.

<sup>116</sup> Claimant's Post-Hearing Brief, para. 39-42, 44; Transcript (English), 154:11-25, 155:1-25.

<sup>117</sup> Memorial, paras. 73, 84; Answer on Preliminary Objections, para. 75.

May 22, 2014, to prepare a proposal for Direct Negotiation; and (ii) when Ms. Tafur requested of a copy of the Baspetro Proposal in July 2014. Contrary to the Respondent's allegations, the Claimant submits that Mr. Ortigas had the authority to invite the Claimant to submit a proposal because he, as CEO of PeruPetro, had a power of attorney from Peru "to manage Peru's resources and to bind Peru in the management of those resources."<sup>118</sup>

99. In any case, the Claimant states that both the Availability Requirement and the Qualification Certificate requirement were satisfied in this case.
100. First, the Claimant asserts that Blocks III and IV were available for Direct Negotiation because they were not under contract for the proposed period, and they were not the subject of a public tender.<sup>119</sup> With regard to PeruPetro's directory decision of March 20, 2014, which is relied upon by the Respondent, the Claimant notes that it referred generally to a "selection process," which does not exclude a Direct Negotiation process.<sup>120</sup> In addition, the Claimant notes that, "irrespective of what internal decision PeruPetro had made," the International Public Tender was not opened until July 14, 2014, after Baspetro had already submitted its Proposal.<sup>121</sup>
101. In respect of the Qualification Certificate, the Claimant's position is that the qualification process begins with a submission by the oil company expressing its interest in negotiating a contract.<sup>122</sup> Subsequently, pursuant to Article 14 of the Regulation on Qualification, PeruPetro is obliged to grant the certification of qualification within ten days from the receipt of such request, provided that (i) the company presents the documents required in Articles 5 and 6 of the Regulation; or (ii) no additional documents are requested by PeruPetro pursuant to Article 7 of the Regulation.<sup>123</sup>
102. In the absence of a pronouncement from PeruPetro within the ten-day period, the Claimant contends that the "legal fiction" of the administrative silence applies, and the

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<sup>118</sup> Claimant's Post-Hearing Brief, para. 15; Transcript (English), 195:9-24.

<sup>119</sup> Answer on Preliminary Objections, para. 74.

<sup>120</sup> Claimant's Post-Hearing Brief, para. 18.

<sup>121</sup> Answer on Preliminary Objections, para. 76.

<sup>122</sup> Answer on Preliminary Objections, para. 79.

<sup>123</sup> Answer on Preliminary Objections, para. 80; **Exhibit CER-001**, First Quiroga Report, paras. 96-97, 105, 107. See **Exhibit CLA-003**, Regulation on the Qualification of Petroleum Companies approved through Supreme Decree No. 030-2004-EM, August 18, 2004, Articles 5, 6, and 7.

Qualification Certificate requirement is deemed to be satisfied.<sup>124</sup> The Claimant maintains that this arises from a “systematic interpretation” of Law No. 27444 for General Administrative Procedures and other applicable statutes.<sup>125</sup>

103. On this basis, and “having failed to raise any issue with respect to Baspetro’s qualifications and having deprived Amorrortu of the opportunity to appeal such decisions,” the Claimant argues that the Respondent “cannot now contend that Baspetro was not a qualified oil company through which Amorrortu commenced the process of direct negotiation.”<sup>126</sup>
104. Additionally, the Claimant maintains that his participation in the bidding process cannot be interpreted as an abandonment of his right to the Direct Negotiation process, as suggested by Peru.<sup>127</sup> The Claimant notes that he opposed “in several occasions” the bidding process,<sup>128</sup> and, in any case, he claims that there is no document or indication that his participation in the bidding process was conditioned on the abandonment of the Direct Negotiation process or that he had renounced it.<sup>129</sup>

### **3. Right to a Contract**

105. The Claimant says that he has never claimed the right to a contract “as a matter of law.” Instead, he contends that (i) he invested in Baspetro with the reasonable expectation to have his Proposal considered in a process free of corruption; and (ii) with the start of the Direct Negotiation, he obtained the right to “the exclusive technical evaluation and the community analysis of a direct negotiation proposal before any competing company is invited to participate in the process.”<sup>130</sup> The Claimant submits that this right has “significant value,” as evidenced by the fact that, “in most if not all cases, [a Direct Negotiation process] concludes with the execution of the contract.”<sup>131</sup> The Claimant

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<sup>124</sup> Answer on Preliminary Objections, paras. 78, 82; Rejoinder on Preliminary Objections, para. 30.

<sup>125</sup> Answer on Preliminary Objections, para. 82; Claimant’s Post-Hearing Brief, para. 47; **Exhibit CER-002**, Second Quiroga Report, para. 11. *See also* **Exhibit CER-001**, First Quiroga Report, paras. 80-87, 107-108.

<sup>126</sup> Answer on Preliminary Objections, para. 84.

<sup>127</sup> Rejoinder on Preliminary Objections, para. 31; Reply on Preliminary Objections, para. 23; **Exhibit RER-002**, Second Vizquerra Report, para. 49-50.

<sup>128</sup> Rejoinder on Preliminary Objections, para. 32; Notice of Arbitration, para. 34.

<sup>129</sup> Rejoinder on Preliminary Objections, para. 33; **Exhibit CER-003**, Third Quiroga Report, para. 37.

<sup>130</sup> Answer on Preliminary Objections, para. 8.

<sup>131</sup> Answer on Preliminary Objections, para. 8.

further submits that this issue “is evidently a factual issue that is inappropriate in the context of a preliminary objection.”<sup>132</sup>

106. Additionally, the Claimant contends that, in the absence of corruption, he would have been given the statutorily required opportunity to cure any purported deficiency in the Baspetro Proposal and ultimately would have been awarded the contracts to operate Blocks III and IV.<sup>133</sup>

#### **4. Protection of Expectations**

107. The Claimant submits that “one of the major components of the [FET] standard is the parties’ legitimate and reasonable expectations with respect to the investment they have made,” which include the expectation to negotiate an agreement free of corruption.<sup>134</sup> The Claimant notes that in *EDF v. Romania* the tribunal determined that corruption “is a violation of the [FET] obligation owed to the [c]laimant pursuant to the BIT, as well as a violation of international public policy.”<sup>135</sup> In the Claimant’s view, this is particularly relevant under the Treaty, which devotes an entire chapter to anti-corruption practices and lists the elimination of corruption as one of its goals.<sup>136</sup>
108. The Claimant notes that expectations are protected when (i) there is a promise or assurance attributable to a competent organ or representative of the State, either explicit or implicit; (ii) the investor relied on that promise or assurance as a matter of fact; and (iii) such reliance was reasonable.<sup>137</sup> In this case, the Claimant submits that Mr. Ortigas’ instruction to prepare a proposal is attributable to Peru because “he was exercising the discretion and governmental authority vested in him as president of PeruPetro.”<sup>138</sup>

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<sup>132</sup> Claimant’s Post-Hearing Brief, para. 53.

<sup>133</sup> Claimant’s Post-Hearing Brief, para. 33.

<sup>134</sup> Answer on Preliminary Objections, para. 87 (emphasis removed); **Exhibit CLA-004**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, para. 216. *See also* Claimant’s Post-Hearing Brief, para. 19.

<sup>135</sup> Claimant’s Post-Hearing Brief, para. 2; **Exhibit CLA-004**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, para. 221.

<sup>136</sup> Answer on Preliminary Objections, para. 87; Rejoinder on Preliminary Objections, paras. 20-21; **Exhibit CLA-042**, USPTPA Chapter Nineteen; **CLA-002**, USPTPA Preamble. *See also* Claimant’s Post-Hearing Brief, para. 3.

<sup>137</sup> Claimant’s Post-Hearing Brief, para. 20; **Exhibit CLA-075**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, December 11, 2013, para. 668.

<sup>138</sup> Claimant’s Post-Hearing Brief, para. 24; **Exhibit CLA-118**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, September 27, 2016, para. 233.

Further, he avers that his expectations were reasonable because Mr. Ortigas was the highest authority of PeruPetro and the International Public Tender had not been determined, let alone announced.<sup>139</sup>

109. The Claimant concludes that the Respondent violated the USPTPA's FET obligations when it exercised its discretion to further a corrupt scheme,<sup>140</sup> "irrespective of whether the Direct Negotiation process was ever commenced and irrespective of whether a contract to operate and service Blocks III and IV was guaranteed."<sup>141</sup>
110. Lastly, contrary to the Respondent's arguments, the Claimant maintains that the factual allegations of corruption must be assumed true, adding that the evidence of corruption in this case is "overwhelming."<sup>142</sup>

##### **5. Whether Declaratory Relief is an Available Remedy Under the USPTPA**

111. The Claimant submits that declaratory relief may be preliminary to a decision on any form of reparation, or it may be the only remedy sought by a party.<sup>143</sup> In the present case, the Claimant clarifies that he is asking the Tribunal both (i) to declare that Peru violated its FET obligations; and (ii) to compensate the Claimant for the losses caused by that breach.<sup>144</sup> In any event, the Claimant maintains that USPTPA Article 10.16.1(a)(ii) does not limit the Tribunal's authority to grant any relief it deems justified and appropriate.<sup>145</sup>
112. With regard to the Respondent's assertion that he does not have a claim for which damages can be awarded, the Claimant reiterates that he is not claiming the right to a contract as a matter of law, but the right to "the exclusive technical evaluation and the community analysis of a direct negotiation proposal before any competing company is invited to participate in the process," which, the Claimant contends, has "significant

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<sup>139</sup> Claimant's Post-Hearing Brief, para. 26.

<sup>140</sup> Rejoinder on Preliminary Objections, paras. 18, 19, 22; **Exhibit CLA-004**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, para. 221. *See also* Claimant's Post-Hearing Brief, para. 1.

<sup>141</sup> Rejoinder on Preliminary Objections, para. 22.

<sup>142</sup> Claimant's Post-Hearing Brief, paras. 5-8.

<sup>143</sup> Claimant's Post-Hearing Brief, para. 10; **Exhibit CLA-117**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, paras. 560-62.

<sup>144</sup> Claimant's Post-Hearing Brief, para. 11.

<sup>145</sup> Claimant's Post-Hearing Brief, para. 12.

value.”<sup>146</sup> The Claimant submits that this presents an issue of quantum that does not pertain to the viability of his claims.<sup>147</sup>

#### **PART 4 - THE TRIBUNAL’S ANALYSIS OF OBJECTION 1**

113. Mr. Amorrortu’s particularized complaint is that by reason of alleged corruption at the highest level of the then-Peruvian government, he was denied the Direct Negotiation procedure to which he says he was legally entitled,<sup>148</sup> and, once the Direct Negotiation route was corruptly blocked, and Mr. Amorrortu was deflected into a public bidding procedure, illegal rule changes in the midst of the bidding process denied his eligibility as a bidder. The Respondent then corruptly steered the award of Blocks III and IV to a competitor, Graña y Montero.<sup>149</sup>

114. Mr. Amorrortu’s two distinct allegations are summarized at para. 341 of the Memorial:

Peru’s failure to consider and evaluate the Baspetro Proposal, Peru’s purported rejection of the Proposal [for Direct Negotiations] without any technical, legal basis or justification, **and** Peru’s fabrication of a public bidding plagued with irregularities and corruption to ultimately benefit a hand-picked company (Graña y Montero) by the highest public servants of the government, were decisions taken for purely arbitrary and capricious reasons; and therefore, violate the fair and equitable treatment standard.<sup>150</sup>

115. Mr. Amorrortu’s claims are most easily explained by a chronology of what he asserts are the key events.

116. In 2012, Mr. Amorrortu caused Baspetro to be incorporated expecting to operate oil fields in Peru under contractual rights to operate Block III.<sup>151</sup>

117. On **August 8, 2013**, Mr. Amorrortu, as President of Baspetro, presented to the Chairman of the Board of PeruPetro, Mr. Ortigas, a letter expressing “the interest of [his] Oil Company Baspetro, established in the city of Talara, to operate Block III located in the

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<sup>146</sup> Claimant’s Post-Hearing Brief, para. 53.

<sup>147</sup> Claimant’s Post-Hearing Brief, para. 54.

<sup>148</sup> Memorial, para. 304.

<sup>149</sup> Notice of Arbitration, para. 75.

<sup>150</sup> Memorial, para. 341 (emphasis added).

<sup>151</sup> Memorial, paras. 8, 53; Memorial on Preliminary Objections, para. 15; Answer on Preliminary Objections, para. 23.

area of Talara, Northwest Peru, for which we estimate a sizeable investment in the production of hydrocarbons.”<sup>152</sup> Mr. Amorrortu’s legal expert, Mr. Quiroga, alleges, and the Respondent denies, that this communication initiated the Direct Negotiation procedure to operate Block III.<sup>153</sup>

118. On **August 12, 2013**, Mr. Ortigas replied that Block III “is not an area currently available for direct negotiation.”<sup>154</sup> Mr. Amorrortu says that through 2013 and 2014, “he made several trips to Talara with his team to coordinate the various projects in which Baspetro was trying to participate.”<sup>155</sup>
119. At the end of 2013, Mr. Amorrortu was aware that the original contract to operate Block III was coming to an end and, on **January 16, 2014**, Mr. Amorrortu sent an e-mail to PeruPetro expressing his disagreement with PeruPetro’s decision to extend the current contract for Block III and reiterated that he was willing and capable of operating Block III.<sup>156</sup>
120. On **February 6, 2014**, Mr. Amorrortu held a telephone conference with Mr. Ortigas, in which he gave the latter more details about his plan to modernize the oil industry in Talara.<sup>157</sup>
121. On **March 20, 2014**, PeruPetro approved, and published notice thereof in *El Peruano* [the official register], a 12-month interim operating contract for Blocks III and IV with another oil company, InterOil.<sup>158</sup>
122. On **March 20, 2014**, Mr. Amorrortu, through his company Baspetro, sent an e-mail to PeruPetro reiterating that Baspetro was immediately available to operate Block III.<sup>159</sup>

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<sup>152</sup> **Exhibit C-031**, Letter from Bacilio Amorrortu to Luis Ortigas, July 31, 2013 (Claimant’s translation).

<sup>153</sup> **Exhibit CER-001**, First Quiroga Report, para. 42.

<sup>154</sup> **Exhibit C-006**, Letter from Luis Ortigas to Bacilio Amorrortu, August 12, 2013 (Claimant’s translation).

<sup>155</sup> Memorial, para. 60. *See* **Exhibit CWS-001**, Witness Statement of Bacilio Amorrortu, para. 68.

<sup>156</sup> **Exhibit C-007**, E-mail from Bacilio Amorrortu to Maria Angelica Cobena Memorial; Memorial, para. 69.  
<sup>157</sup> Memorial, para. 70.

<sup>158</sup> **Exhibit C-003**, Directory Agreement No. 034-2014, March 20, 2014; Memorial, para. 71.

<sup>159</sup> **Exhibit C-028**, E-mail from Bacilio Amorrortu to Maria Angelica Cobena, March 20, 2014; Memorial, para. 217.

123. In **April 2014**, PeruPetro’s Board of Directors made a decision to offer Blocks III and IV by public tender.<sup>160</sup>
124. On **May 22, 2014**, Mr. Amorrortu and Mr. Ortigas held a meeting at which, (notwithstanding the April decision of the PeruPetro Board of Directors of which Mr. Ortigas was Chair), Mr. Ortigas as President and CEO of PeruPetro, instructed Mr. Amorrortu to prepare a Direct Negotiation proposal for the operation of Blocks III and IV, advising him that it would be submitted to technical, economic and legal analysis and, subsequently, discussed by the company’s Board of Directors. In this conversation, according to Mr. Amorrortu, Mr. Ortigas “instructed” the terms and conditions that the proposal should contain in relation to technical matters, investment, royalties, and any other term that Baspetro wished to propose.<sup>161</sup> The proposal, according to Mr. Amorrortu, was “instructed” to be submitted within seven days.<sup>162</sup>
125. On **May 28, 2014**, by e-mail and physical delivery, Mr. Amorrortu submitted to PeruPetro the Baspetro Proposal, in terms “instructed” by Mr. Ortigas,<sup>163</sup> expressly stating that:
- Baspetro SAC hereby requests that Perupetro [S.A.] initiate direct negotiations, in order to reach the best Contract Terms, the signing thereof and an orderly and timely transfer of Blocks III and IV from the current operator to Baspetro S.A.C.<sup>164</sup>
126. The Baspetro Proposal was titled and addressed to “SEÑORES PERUPETRO S.A.” Mr. Amorrortu states that the Baspetro Proposal included, among other matters,

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<sup>160</sup> Memorial, fn. 102.

<sup>161</sup> Memorial, paras. 73-74:

73. During the meeting, Ortigas **instructed Amorrortu to prepare a proposal for direct negotiation** ... for the operation of Blocks III and IV. Ortigas further told Amorrortu that the Baspetro Proposal would be subject to a legal-technical-economic analysis by PeruPetro’s Administration and that it would be discussed by PeruPetro’s Board, which is the process required by PeruPetro’s Rules and Procedures.

74. Accordingly and **in compliance with Ortigas’ instructions**, Amorrortu sent the Baspetro Proposal via email to PeruPetro on May 28, 2014. A hard copy of the Proposal was also submitted to PeruPetro at their offices in Lima, Peru. **The Proposal complied with all the requirements as instructed by Ortigas**, including the additional proposal to operate Talara’s Block IV (emphasis added).

<sup>162</sup> Transcript (English), 75:19-20.

<sup>163</sup> Memorial, para. 74.

<sup>164</sup> **Exhibit C-010**, Receipt of Baspetro Proposal Stamped by PeruPetro, May 28, 2014.

(i) “relevant technical information showcasing Amorrortu’s expertise and Baspetro’s qualifications to operate Blocks III and IV;”<sup>165</sup> (ii) a guarantee that Baspetro would engage “a first-class international technical team;”<sup>166</sup> and (iii) an economic framework which “contemplated significant and realistic investments in the drilling of new oil wells, in the reactivation of existing oil wells, and allocated 50% of revenue to PeruPetro.”<sup>167</sup> He states that the Baspetro Proposal met all the requirements, as instructed by Mr. Ortigas, including the additional proposal to operate Block IV.<sup>168</sup>

127. On **June 30, 2014**, PeruPetro announced the terms of an International Bidding Process for Blocks III and IV.<sup>169</sup>
128. On **July 14, 2014**, PeruPetro announced the International Public Tender for the exploitation of Blocks III and IV calling for a Minimum Work Program that included an investment of more than US\$ 200,000,000.00.<sup>170</sup>
129. On **July 16, 2014**, Mr. Ortigas advised Mr. Amorrortu that the Board of PeruPetro had rejected Baspetro’s Proposal for Direct Negotiation of Blocks III and IV in favor of a public tender process.<sup>171</sup>

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<sup>165</sup> Memorial, para. 75; Answer on Preliminary Objections, para. 32. *See also* Memorial on Preliminary Objections, para. 19.

<sup>166</sup> Memorial, para. 76; Answer on Preliminary Objections, para. 33. *See also* Memorial on Preliminary Objections, para. 19.

<sup>167</sup> Memorial, para. 80; Answer on Preliminary Objections, para. 37. *See also* Memorial on Preliminary Objections, para. 19.

<sup>168</sup> Memorial, para. 74.

<sup>169</sup> **Exhibit C-036**, PeruPetro Board Agreement No. 071-2014, June 30, 2014.

<sup>170</sup> **Exhibit C-012**, PeruPetro S.A., Press Release, July 14, 2014. The allegation in the Memorial at paras. 73 and 74 is reproduced here for ease of reference:

During the meeting, Ortigas **instructed Amorrortu to prepare a proposal for direct negotiation** ... for the operation of Blocks III and IV. Ortigas further told Amorrortu that the Baspetro Proposal would be subject to a legal-technical-economic analysis by PeruPetro’ [sic] Administration and that it would be discussed by PeruPetro’s Board, which is the process required by PeruPetro’s Rules and Procedures.

Accordingly and **in compliance with Ortigas’ instructions**, Amorrortu sent the Baspetro Proposal via email to PeruPetro on May 28, 2014. A hard copy of the Proposal was also submitted to PeruPetro at their offices in Lima, Peru. **The Proposal complied with all the requirements as instructed by Ortigas**, including the additional proposal to operate Talara’s Block IV. (emphasis added).

<sup>171</sup> Memorial, para. 83.

130. However, also on **July 16, 2014**, Mr. Amorrortu was told, he says, by the Chief Administrator of PeruPetro, Ms. Tafur, that the Baspetro Proposal was never analyzed by PeruPetro's management, which she oversees.<sup>172</sup>
131. Also on **July 16, 2014**, Mr. Amorrortu sent Ms. Tafur a copy of the Baspetro Proposal of May 28, 2014, and expressed his "surprise and concern" that "our Proposal has not received a formal response from PeruPetro S.A., considering the long time that has elapsed."<sup>173</sup>
132. On **August 20, 2014**, Ms. Tafur informed Mr. Amorrortu that "on July 14, 2014 PeruPetro **initiated** an International Public Tender process to grant license contracts for the exploitation of hydrocarbons in Blocks III and IV, in order for interested companies to participate in said Tenders," and cordially invited him "to participate in these processes in line with the proposal you sent us."<sup>174</sup> The Baspetro Proposal was then sent to Ms. Tafur who confirmed receipt.<sup>175</sup> As will be seen, the fact the International Public Tender was not "initiated" until July 14, 2014 is of significance.
133. On **October 2, 2014**, the bidding rules were changed while the selection process was ongoing<sup>176</sup> to enable, according to Mr. Amorrortu, Graña y Montero to qualify as a bidder.<sup>177</sup> (On December 12, 2014, a second modification was required because, he says, Graña y Montero still did not qualify as a bidder in the International Bidding Process<sup>178</sup> despite the October 2, 2014 amendment.)
134. On **October 31, 2014**, Mr. Amorrortu submitted his bid to the International Public Tender Commission including: (i) his Letter of Interest to participate in the International Public Tender; (ii) Letter of Confidentiality Agreement and User License; and (iii) Sworn Statement of Commitment to Integrity.<sup>179</sup>

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<sup>172</sup> Memorial, para. 84.

<sup>173</sup> **Exhibit C-032**, Letter from Bacilio Amorrortu to Isabel Tafur, July 16, 2014.

<sup>174</sup> **Exhibit C-013**, Letter from PeruPetro, S.A. to Bacilio Amorrortu, August 20, 2014 (emphasis added).

<sup>175</sup> **Exhibit C-010**, Receipt of Baspetro Proposal stamped by PeruPetro, May 28, 2014.

<sup>176</sup> **Exhibit C-050**, Memorandum No. CONT-0107-2014, September 12, 2014; Memorial, para. 160.

<sup>177</sup> Memorial, para. 160.

<sup>178</sup> Memorial, para. 162.

<sup>179</sup> Memorial, para. 86; **Exhibit C-014**, Letter from Bacilio Amorrortu to the International Public Tender Commission No. PeruPetro-001-2014, October 31, 2014.

135. Also on **October 31, 2014**, the same day PeruPetro received Mr. Amorrortu's proposal, PeruPetro amended the Terms and Conditions of the International Public Tender for Block III<sup>180</sup> and Block IV.<sup>181</sup> Mr. Amorrortu says the changes were made corruptly to disqualify all bids but the bid of Graña y Montero (which itself was non-compliant according to the original terms of the public tender).
136. On **November 3, 2014**, the Coordinator of the International Public Tender Commission rejected the Baspetro Proposal for Blocks III and IV because "your client does not comply with any of the Technical Indicators for this Tender."<sup>182</sup>
137. On **December 12, 2014**, it was announced that Graña y Montero was the only qualified bidder.<sup>183</sup>
138. On **December 15, 2014**, and again on February 5, 2014, Mr. Amorrortu, in his capacity as President of Baspetro, wrote to the PeruPetro Chief Administrator, Ms. Tafur, seeking reconsideration of the award to Graña y Montero and asking that the decision be annulled and replaced by a Direct Negotiation with Mr. Amorrortu to operate Block III, pursuant to the Baspetro Proposal submitted on May 28, 2014.<sup>184</sup>
139. On **March 31, 2015**, the contracts respecting Blocks III<sup>185</sup> and IV<sup>186</sup> were officially awarded to Graña y Montero.
140. Taking into consideration these allegations of fact, the Tribunal must determine whether, as contended by the Respondent, Mr. Amorrortu acquired no rights under either the Direct Negotiation Procedure or the International Public Tender procedure.

### **1. The Direct Negotiation Procedure**

141. The Respondent's legal expert, Mr. Vizquerra, and the Claimant's legal expert, Mr. Quiroga, agreed that the relevant procedure in respect of direct negotiations is Direct

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<sup>180</sup> See First Quiroga Report, para. 52.

<sup>181</sup> See First Quiroga Report, para. 53.

<sup>182</sup> **Exhibit C-015**, Letter from Roberto Guzman to Bacilio Amorrortu, November 3, 2014 (Claimant's translation); Memorial, para. 87.

<sup>183</sup> Memorial, para. 87. See First Quiroga Report, para. 56.

<sup>184</sup> **Exhibit C-017**, Letter from Bacilio Amorrortu to Isabel Tafur, December 15, 2014.

<sup>185</sup> **Exhibit CLA-039**, *Decreto Supremo* No. 004-2015-EM, March 31, 2015, Article. 2.

<sup>186</sup> **Exhibit CLA-040**, *Decreto Supremo* No. 005-2015-EM, March 31, 2015, Article 2.

Negotiation Procedure 8.<sup>187</sup> The Direct Negotiation Procedure is “started” by an applicant’s letter of intent.<sup>188</sup> The “qualification” of oil companies, on the other hand is governed by internal procedure GFCN-006 (hereinafter “**Qualification Procedure 6**”).<sup>189</sup>

142. The Respondent’s objection can largely be disposed of on the basis of the evidence of the Respondent’s own legal expert, Mr. Vizquerra, who presented a concise picture of the law and procedures governing Direct Negotiation.

143. Mr. Vizquerra explained that Qualification Procedure 6 is independent from Direct Negotiation Procedure 8,<sup>190</sup> but is connected at Step 13 of Direct Negotiation 8, which requires a Qualification Certificate to allow the application to proceed further. As Mr. Vizquerra explained at the Hearing on Preliminary Objections:

Clearly, that letter of interest does not implement the qualification process of an oil company. In the context of a Direct Negotiation procedure, that **qualification only comes into play when the prior activities have been conducted, activities prior to Step 13 of the Direct Negotiations procedure.**<sup>191</sup>

144. The steps to be taken under Direct Negotiation Procedure 8 after the applicant oil company’s expression of interest but prior to “Step 13,” when “Qualification” of the oil company comes “into play,” are set out in Direct Negotiation Procedure 8 and described by Mr. Vizquerra as follows:

- (i) it must first be verified that the area is available for Direct Negotiation;<sup>192</sup>
- (ii) second, PeruPetro “has to determine a minimum program of work in connection with hydrocarbon activities;”<sup>193</sup>

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<sup>187</sup> First Quiroga Report, para. 109; **Exhibit CLA-044**, PeruPetro Procedure GFCN-008, Contracting Through Direct Negotiation, August 13, 2012.

<sup>188</sup> Transcript (English), 117:19-25.

<sup>189</sup> First Quiroga Report, para. 110; **Exhibit Quiroga-15**, PeruPetro Procedure GFCN-006, Qualification of Oil Companies, Version 3.0, February 7, 2013.

<sup>190</sup> Transcript (English), 120:23.

<sup>191</sup> Transcript (English), 118:2-7 (emphasis added).

<sup>192</sup> Transcript (English), 119:10-13. Mr. Vizquerra stated: “First, when there is an interest, the Company – rather, the State Company, PeruPetro, has to verify whether the area or Block that is being requested is available for Direct Negotiation.”

<sup>193</sup> Transcript (English), 119:13-15.

(iii) third, prior to Qualification “coming into play,” PeruPetro must determine “the economic, technical, and financial indicators [it is] going to use to evaluate the capacity of the candidates.”<sup>194</sup> (Mr. Amorrortu notes that these indicators track the legal-technical-economic factors referenced in the instruction given by Mr. Ortigas.)<sup>195</sup>

145. Mr. Vizquerra explained that the preliminary steps to define the “available area” and the “tentative working program” must be done **before** the Qualification Process (at Step 13) because “without that,” he says, “one cannot establish the indicators that the Company has to abide by and that will show that it has a legal, technical, economic and financial [capability] to participate in the Direct Negotiations Process.”<sup>196</sup> In other words, PeruPetro cannot decide whether an oil company is “qualified” for a contract until the “indicators that the Company has to abide by” have been established.

146. After establishment of the “indicators,” according to Mr. Vizquerra, “Qualification ... comes into play” at Step 13.

147. With this background, it is convenient for the Tribunal to turn to the points in issue.

2. **The Legal Experts are Agreed that the Direct Negotiation Procedure is Started by An Applicant’s “Letter of Interest”**

148. As Mr. Vizquerra explains:

According to Step 1 [of the Direct Negotiation] Procedure, the procedure starts with the presentation of a letter of interest from the person interested in conducting exploration and exploitation activities, or the exploitation of hydrocarbons within a given surface area.<sup>197</sup>

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<sup>194</sup> Transcript (English), 119:15-17.

<sup>195</sup> Memorial, para. 73.

<sup>196</sup> Transcript (English), 122:12-15 (emphasis added). In contrast, Mr. Vizquerra explains:

And the third case in which a Procedure 6 applies, qualification of an oil company, has to do with a Direct Negotiation Process if and only if PeruPetro has delimited and defined the Block or the available area, the available area that is the subject matter of the expression of interest. Also, the minimum tentative working program has to be established. Without that, one cannot establish the indicators that the Company has to abide by and that will show that it has a legal, technical, economic and financial [capability] to participate in the Direct Negotiation Process.

If the Block is not available, and if the minimum working program has not been determined, then it would be impossible for an oil company to become qualified in the context of Procedure 8. (Transcript (English), 122:5-19)

<sup>197</sup> Transcript (English), 117:21-25.

149. In the Tribunal’s view, it is clear that Mr. Amorrortu’s letter of May 28, 2014 expressed “an interest in conducting exploration and exploitation activities” within Blocks III and IV.

**3. The Respondent’s Expert, Mr. Vizquerra, Acknowledged that After Receipt of a “Letter of Interest” the Direct Negotiation Procedure Obligated PeruPetro to Take a Number of Administrative Steps**

150. The Respondent argues that Direct Negotiation could not proceed until Mr. Amorrortu/Baspetrol was “qualified” but, as stated, PeruPetro never took the administrative steps necessary to reach Step 13 where, according to Mr. Vizquerra, “Qualification only comes into play.”<sup>198</sup>

151. In particular, the legal-technical-economic analysis referenced by Mr. Ortigas to Mr. Amorrortu on May 22, 2014 was not carried out because, despite his “instruction” to Mr. Amorrortu<sup>199</sup> and Mr. Amorrortu’s evidence of his compliance with that instruction, PeruPetro declined to treat the May 28, 2014, letter as a “letter of interest” within the scope of Direct Negotiation Procedure and did nothing.

152. Mr. Amorrortu contends that this refusal was part of the “Corrupt Plan.”

153. Mr. Amorrortu pleads “the evidence of corruption discovered by this [government] investigation” confirms that “Amorrortu’s Direct Negotiation Process was aborted by order of [First Lady] Nadine Heredia because Blocks III and IV had been requested by Graña y Montero.”<sup>200</sup> He says, “in other words, Peru had no intention to engage in the direct negotiation of Blocks III and IV, because it had already **promised** them to Graña y Montero – a company with an established and consistent corruption profile.”<sup>201</sup>

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<sup>198</sup> Transcript (English), 118:2-7:

Clearly, that letter of interest does not implement the qualification process of an oil company. In the context of a Direct Negotiation procedure, that **qualification only comes into play when the prior activities have been conducted, activities prior to Step 13 of the Direct Negotiations Procedure.** (emphasis added)

<sup>199</sup> Memorial, para. 73:

During the meeting, Ortigas **instructed Amorrortu to prepare a proposal for direct negotiation** ... for the operation of Blocks III and IV. Ortigas further told Amorrortu that the Baspetrol Proposal **would be subject to a legal-technical-economic analysis by PeruPetro’ [sic] Administration** and that it would be discussed by PeruPetro’s Board, which is the process required by PeruPetro’s Rules and Procedures (emphasis added).

<sup>200</sup> Memorial, para. 148.

<sup>201</sup> Memorial, para. 152 (emphasis in the original).

154. In the Tribunal’s view, it is unnecessary to address the alleged “corrupt scheme” on this preliminary objections application. It is sufficient to conclude that, according to the Direct Negotiation Procedure 8, for which Mr. Amorrortu says he was “instructed” by Mr. Ortigas to make application, a number of initial steps were required in response to the “letter of interest” (including the “legal-technical-economic” analysis referenced by both Mr. Ortigas and Mr. Vizquerra) and none of these steps was taken by PeruPetro.
155. The Tribunal is obliged for present purposes to accept Mr. Amorrortu’s factual description of events as correct, and based on those facts, it would be open to the Tribunal to conclude that the refusal of PeruPetro to take these (or any) steps in a procedure which Mr. Amorrortu says PeruPetro through its President instructed him to pursue, constituted a denial of FET in the application of Direct Negotiation Procedure 8 as promised by the President himself, thereby justifying an award in Mr. Amorrortu’s favor. It would be open to the Tribunal to conclude, based on the facts stated by Mr. Amorrortu, that he stood in a different position *vis-à-vis* the Respondent than other oil companies contemplating application because of the express instruction of Mr. Ortigas to participate in the very process that failed him.

**4. In the Circumstances, the Respondent’s Argument that PeruPetro Never Issued a “Qualification Certificate” to Mr. Amorrortu or Baspetro Would Not Prevent an Award in the Claimant’s Favor**

156. Mr. Vizquerra explains that the “qualification application has to be accompanied by all of the documents established in the Regulations for the Qualification of Oil Companies. Any communication that contains good intentions or allusions cannot be considered a request for the qualification of an oil company.”<sup>202</sup> For that reason, in his view, Mr. Amorrortu never made a proper application for the Qualification Certificate.<sup>203</sup>

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<sup>202</sup> Transcript (English), 123:4-9.

<sup>203</sup> Transcript (English), 124:24-125:2; 123:14-124:20. Mr. Vizquerra explains that:

[T]he qualification process will begin with the presentation of a request from the oil company to PeruPetro, S.A., together with the documents provided for in Article 5 of this Regulation.” He goes on to explain that “Article 5 indicates the documents that need to be attached: First, an uncertified copy of the document of incorporation of the oil company; also, there has to be a sworn statement indicating that the oil company is not in bankruptcy, insolvency, or has some kind of impediment to enter into contracts with the State of Peru; the oil company has to attach to the application a sworn statement indicating that it has managerial, professional and specialized staff in the field of hydrocarbons. Also, the Company has to attach the financial statements of the Company for the last three years, showing the economic and financial capabilities. How else it is going to show its condition?

157. However, as Mr. Vizquerra explained earlier, Direct Negotiation Procedure 8 is “independent” of Qualification Procedure 6 and the latter does not come “into play” until Step 13 of the former – which PeruPetro never reached. In fact, on the evidence, PeruPetro did nothing in response to Mr. Amorrortu’s letter of interest except to acknowledge receipt.

**5. The Respondent Contends that PeruPetro’s President, Mr. Ortigas, Did Not Have the Authority to Give the Instructions Alleged by Mr. Amorrortu**

158. In the Tribunal’s view, the President had at least the ostensible authority to bind the company. He was the President, the corporation’s most senior officer, and Chairman of the Board of Directors. It would be open to the Tribunal to find that Mr. Ortigas was PeruPetro’s “directing mind” and, as such, in a position to bind the company. The Respondent argues that the alleged “instructions” were contrary to the regulatory requirements. At this stage, the Tribunal does not have the benefit of Mr. Ortigas’ recollection of what he said or why he said it. On the present record, Mr. Amorrortu was entitled to rely on “the instructions” and representations by the President of PeruPetro and did rely on them by submitting a proposal within seven days which Mr. Amorrortu says “complied with all the requirements as instructed by Ortigas.”<sup>204</sup>

**6. The Respondent Contends that Direct Negotiations Never Actually Began**

159. The Respondent rejects Mr. Amorrortu’s reliance on what the Respondent describes as the “central facts” of his meeting with Mr. Ortigas on May 22, 2014, because, according to the Respondent, nothing in Mr. Amorrortu’s allegations indicate that negotiations **were** ever actually commenced, or that meetings were ever held to discuss a possible contract.

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And last, but not least, it has to show its experience by showing information in connection with the experience it has related to the carrying out of hydrocarbon activities. The experience has to date back three years – only the last three years ... [a]nd it also has to detail every year’s works of exploration, the number and type of wells, oil wells, drilled, what is the production level and the proven crude reserves, natural gas, investments.

Also, the Company has to show PeruPetro the License Agreements, and also the technical evaluation agreements, that it has entered into.

Also, it has to show the activities that it is carrying out in the different areas it is exploiting and the activities carried out in investments and the results, as well as the participation interest that it has in each one of those Blocks and whether it is an operator or not of those Blocks, because the Applicant will have a different qualification if it is an operator or if it is not an operator.

<sup>204</sup> Memorial, para. 74.

160. The Tribunal accepts that Direct Negotiations never actually commenced. That is Mr. Amorrortu's complaint. As the Respondent's legal expert, Mr. Vizquerra explained, PeruPetro was required to ask the oil company at a later stage in Direct Negotiation Procedure 8 to appoint its representative for the negotiation "because these negotiations are to be carried out by specific individuals representing the Companies for the License Agreement."<sup>205</sup> At that point, Mr. Vizquerra says, PeruPetro will also ask the oil company "to establish the date of the start of the first meeting, the kickoff meeting" and, Mr. Vizquerra explains, "**this is when the Direct Negotiation begins**, and this has to be done within 60 days."<sup>206</sup>
161. This comment by Mr. Vizquerra ["This is when the Direct Negotiation begins"] reflects his distinction between the "Direct Negotiation **Process**" which begins with the first meeting of negotiators and the Direct Negotiation **Procedure** which starts with receipt of the Letter of Interest.
162. Mr. Amorrortu claims an award in his favor based on PeruPetro's alleged non-compliance with the Direct Negotiation **Procedure**. The fact the Direct Negotiation **Process** never began (to adopt Mr. Vizquerra's nomenclature) is the essential subject matter of Mr. Amorrortu's complaint.

7. **The Respondent Contends that the Facts Alleged by Mr. Amorrortu Concerning the International Public Tender, Even if Established, Do Not Constitute a Claim for Which an Award in his Favor May be Made Under USPTPA Article 10.26**

163. The Respondent acknowledges that allegations are made by Mr. Amorrortu concerning corruption of the public tender. As stated, the Memorial contends that PeruPetro made certain modifications to the bidding rules and requirements which were "ostensibly neutral" but actually intended to rig the process in favor of Graña y Montero by disqualifying all other bidders. However, the Respondent argues that conduct related to the public tender is at most an "ancillary factual allegation" and should not be construed as a separate and distinct breach of the USPTPA.<sup>207</sup>

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<sup>205</sup> Transcript (English), p. 120:9-13.

<sup>206</sup> Transcript (English), 120:10-13 (emphasis added).

<sup>207</sup> Transcript (English), 26:6-27:7.

164. The Respondent notes that the Memorial identifies the appropriate date of valuation for damages as “the date PeruPetro announced the International Public Bidding Process,”<sup>208</sup> i.e., July 14, 2014, and that this pre-dated any of the alleged irregularities in the International Public Tender. In light of the fact Mr. Amorrortu claims that on July 14, 2014, “breaches to the USPTPA led to an irreversible and substantial deprivation of the value of Amorrortu’s investment,”<sup>209</sup> the Respondent says, this arbitration is only about the failure of Direct Negotiations, in respect of which Mr. Amorrortu has no case. According to Mr. Amorrortu, the pleading of July 14, 2014, is correct but does not preclude the Respondent’s accountability for subsequent breaches in the International Public Tender.
165. The onus is on the Respondent to establish as a matter of law that on the facts alleged in Mr. Amorrortu’s attack on the International Public Tender an award could not be made in his favor.
166. In the Tribunal’s view, the Respondent has failed to meet the USPTPA Article 10.26.4 threshold in this respect.
167. The prayer for relief seeks declaratory and substantive relief related generally to “failure” to accord Mr. Amorrortu’s investment in Peru FET.<sup>210</sup> The prayer for relief is not tied to the “Direct Negotiation” claim.
168. While Mr. Amorrortu certainly puts emphasis in his Memorial on his “Direct Negotiation” complaint as the Respondent points out, he wraps this complaint in a more

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<sup>208</sup> Transcript (English), 120:14-17.

<sup>209</sup> Memorial, para. 377.

<sup>210</sup> Memorial, paras. 408-412:

Prayer for Relief:

408. On the basis of the foregoing, without limitation and reserving Amorrortu’s rights to supplement these prayers for relief, including without limitation in the light of further action by Peru, Amorrortu respectfully requests that the Tribunal:

409. **DECLARE** that Peru has breached Article 10.5 of the USPTPA by failing to accord Amorrortu’s investment in Peru fair and equitable treatment; and

410. **ORDER** Peru to pay damages to Amorrortu for its breaches of the USPTPA in the amount of USD \$96,900,000, plus interest.

411. **AWARD** such other relief as the Tribunal deems appropriate; and

412. **ORDER** Peru to pay all of the costs, attorneys’ fees, and expenses of this arbitration, including ...

general allegation of corruption which, he says, affected **both** the Direct Negotiation **and** the “rigged” International Public Tender as follows:

145. [Peru] cannot seriously dispute that corruption drove the decision to abort Amorrortu’s Direct Negotiation Process for Blocks III and IV, in favor of the rigged International Public Bidding designed to favor Graña y Montero.<sup>211</sup>

coupled with the allegations in para. 341 concerning:

[Peru’s] fabrication of a public bidding plagued with irregularities and corruption to ultimately benefit a hand-picked company (Graña y Montero) by the highest public servants of the government, were decisions taken for purely arbitrary and capricious reasons; and therefore, violate the fair and equitable treatment standard.<sup>212</sup>

169. Mr. Amorrortu pleads that it is “inescapable” that “Blocks III and IV were part of the package of government contracts that Graña y Montero received in exchange for its multimillion dollar bribes.”<sup>213</sup> His Memorial alleges that “[t]here is no question that the Public Bidding Process for Blocks III and IV was staged and plagued with corruption to benefit Graña y Montero.”<sup>214</sup>

170. In the Tribunal’s view, the Respondent has failed to establish that the express invitation of PeruPetro to Mr. Amorrortu by Chief Administrator Ms. Tafur to participate in the International Public Tender could not give rise to rights of procedural fairness on which an award might be made in Mr. Amorrortu’s favor.

171. The exclusion of Mr. Amorrortu and other bidders was accomplished, he pleads, by the unlawful modification of the bidding rules at least twice while the selection process was ongoing.<sup>215</sup> An initial change on October 2, 2014, was designed to allow Graña y Montero to qualify as a bidder.<sup>216</sup> On December 12, 2014, a second modification was

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<sup>211</sup> Memorial, para. 145.

<sup>212</sup> Memorial, para. 341.

<sup>213</sup> Memorial, para. 149.

<sup>214</sup> Memorial, para. 157.

<sup>215</sup> Memorial, para. 160.

<sup>216</sup> Memorial, para. 162.

required because Graña y Montero did not qualify as a bidder in the International Public Tender.<sup>217</sup>

172. Mr. Amorrortu contends that the second modification enabled Graña y Montero to exceed the minimum production by improperly allowing it to include production of LGN not linked to Block III, but to the Cryogenic Plant that Graña y Montero has in the district of Parinas. Yet, Mr. Amorrortu says, the International Bid Commission unlawfully declared Graña y Montero's wrongful calculation to be valid<sup>218</sup> because otherwise it would have had to exclude Graña y Montero from the International Public Tender and thereby frustrate the alleged "corruption scheme."
173. Given the nature of Mr. Amorrortu's claims, it follows that the Respondent cannot demonstrate at this stage of the proceedings and as a matter of law that these are not claims for which an award in favor of Mr. Amorrortu may be made under Article 10.26 of the USPTPA.

**8. Conclusion with Respect to the Respondent's Application Under Article 10.26.4 of the USPTPA**

174. For the foregoing reasons, the USPTPA Article 10.26.4 application (Objection 1) is dismissed.

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<sup>217</sup> Memorial, paras. 161-162.

<sup>218</sup> Memorial, para. 162.

**PART 5 - OBJECTION UNDER ARTICLE 10.18.2 OF THE TREATY (OBJECTION 4)**

175. The Respondent submits that the Claimant has presented an invalid waiver under USPTPA Article 10.18.2(b), pursuant to which:

[n]o claim may be submitted to arbitration under this Section unless:

- (b) the notice of arbitration is accompanied,
  - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's 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.

176. For this reason, the Respondent asserts that the Tribunal lacks jurisdiction and the Claimant's claims must be dismissed.

**A. THE RESPONDENT'S POSITION**

177. The Respondent argues that the Claimant's waiver does not comply with the formal and substantive requirements set out in the USPTPA. In the Respondent's view, such defective waiver cannot be cured by the Claimant, as the submission of a valid waiver is a precondition to the Respondent's consent to arbitrate and to the Tribunal's jurisdiction.

178. Further, the Respondent rejects the Claimant's proposition that it is estopped from arguing that it did not consent to arbitration because it failed to reserve its rights to submit jurisdictional objections in its Request for Disclosure of the Funding Agreement.

**1. Formal Requirements**

179. The Respondent considers that the waiver provided by the Claimant is invalid as a matter of form because it was incorporated as a paragraph into the Notice of Arbitration and was signed by Claimant's counsel, instead of filing it as a separate document signed by the Claimant himself.<sup>219</sup> Such requirements are enshrined in Article 10.18.2 of the USPTPA, which the Respondent reads as requiring that the waiver must (i) accompany the notice

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<sup>219</sup> Notice of Arbitration, para. 88; Memorial on Preliminary Objections, para. 80.

of arbitration as a separate document; and (ii) be signed and submitted by the claimant himself, and not his counsel.<sup>220</sup>

180. In respect of the first requirement, the Respondent notes that the USPTPA uses the word “accompanied,” which, according to the Respondent, should be understood to mean “[p]rovide (something) as a complement or addition to something else.”<sup>221</sup> The Respondent recalls that the United States has amended the waiver language in its treaties “to expressly state that the waiver must accompany the ‘notice of arbitration’.”<sup>222</sup> In particular, the Respondent refers to the change from the word “included” in the North America Free Trade Agreement (the “NAFTA”), to the word “accompany” in the USPTPA and the Dominican Republic-Central America Free Trade Agreement (the “CAFTA-DR”).<sup>223</sup> Additionally, the Respondent submits that arbitral 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 “*effet utile*” of the treaty’s provisions.<sup>224</sup>
181. As to the signature requirement, the Respondent considers that “the best way to prove an agreement, and current and future compliance to the waiver, is to put one’s signature on it.”<sup>225</sup> In support of such proposition, the Respondent notes that in every past case arising under the CAFTA-DR, which shares identical language and is derived from the same U.S. Model Treaty as the USPTPA,<sup>226</sup> the claimants submitted their waiver as a separate document that they personally signed.<sup>227</sup>

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<sup>220</sup> Memorial on Preliminary Objections, para. 76.

<sup>221</sup> Memorial on Preliminary Objections, para. 77; **Exhibit R-002**, Lexico, ‘Accompany,’ available at <https://www.lexico.com/en/definition/accompany> (last accessed February 4, 2021); **Exhibit R-001**, Oxford English Dictionary, Third Edition (December 2011), ‘Accompany,’ Definition 2.a.

<sup>222</sup> Reply on Preliminary Objections, para. 69; **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 141.

<sup>223</sup> Memorial on Preliminary Objections, para. 77; Reply on Preliminary Objections, para. 69; **Exhibit RLA-002**, NAFTA, Chapter 11, Investment (1994), Article 1121(3).

<sup>224</sup> Respondent’s Post-Hearing Brief, para. 37; **Exhibit RLA-017**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011, para. 81.

<sup>225</sup> Reply on Preliminary Objections, para. 70.

<sup>226</sup> Memorial on Preliminary Objections, para. 79; **Exhibit RLA-007**, U.S. Model Bilateral Investment Treaty, 2004, Article 26.

<sup>227</sup> Memorial on Preliminary Objections, para. 79, fn. 144.

## 2. Substantive Requirements

182. The Respondent further contends that, under the USPTPA, a waiver cannot be qualified or conditioned.<sup>228</sup> The Respondent derives such conclusion from the repeated use of the word “**any**” in Article 10.18 of the USPTPA, which requires that the waiver extend to “**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.”<sup>229</sup> The Respondent notes that both State parties to the USPTPA are in agreement that “a waiver containing any conditions, qualifications or reservations ... will be ineffective.”<sup>230</sup>
183. The Respondent rejects the Claimant’s interpretation that “a claimant that ‘may [not] submit a claim to arbitration,’ because such a claim is outside of the jurisdiction of the tribunal, does not have to provide ... a waiver.”<sup>231</sup> It also rejects the Claimant’s reliance on *Renco Group v. Peru [I]*, which concerns the interpretation of the words “any objection” in the context of Article 10.20.4, and is therefore “wholly unrelated to the issue under discussion here.”<sup>232</sup>
184. The Respondent also rejects the Claimant’s assertions that the lack of a “warning” that the choice of forum is definite in Article 10.18.2(b) supports his interpretation.<sup>233</sup> First, the Respondent posits that there is no obligation under international law to provide a “warning” to investors as to the consequences of treaty provisions.<sup>234</sup> Second, the purpose of the purported “warning” contained in Article 10.18.4 of the USPTPA is not to advise investors, but to “clarify the rather convoluted text in sub-clause (a).”<sup>235</sup> The Respondent

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<sup>228</sup> Memorial on Preliminary Objections, para. 82.

<sup>229</sup> Memorial on Preliminary Objections, para. 82 (emphasis in original); **Exhibit CLA-001**, USPTPA Investment Chapter, Article 10.18.2; **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 79.

<sup>230</sup> Respondent’s Post-Hearing Brief, para. 38; Submission of the United States, para. 19.

<sup>231</sup> Reply on Preliminary Objections, para. 77; Answer on Preliminary Objections, para. 117.

<sup>232</sup> Reply on Preliminary Objections, para. 80; Answer on Preliminary Objections, para. 121; **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 79.

<sup>233</sup> Answer on Preliminary Objections, para. 119; **Exhibit CLA-001**, USPTPA Investment Chapter, Article 10.18.4(b).

<sup>234</sup> Reply on Preliminary Objections, para. 83.

<sup>235</sup> Reply on Preliminary Objections, para. 84.

considers that such clarification is not necessary in view of the “clear and express” language of Article 10.18.2(b) of the USPTPA.<sup>236</sup>

185. Lastly, the Respondent considers that the reservation of rights included in the waiver renders it invalid.<sup>237</sup> It relies in this regard on *Renco I*, where the claimant submitted a waiver “with the exact same reservation of rights” and “the tribunal held that it was conditional and therefore invalid.”<sup>238</sup>

### **3. Whether the Waiver May Be Cured**

186. The Respondent contends that the submission of a valid waiver is a precondition to the State’s consent to arbitrate and to the Tribunal’s jurisdiction. Thus, the decision as to whether the waiver may be cured lies within the discretion of the Respondent.<sup>239</sup> Since the Respondent “did not [and] does not” consent to such a cure, it requests that the Tribunal dismiss the case for lack of jurisdiction.<sup>240</sup>
187. As support for the proposition that any cure to an invalid waiver is conditional upon the respondent’s consent,<sup>241</sup> the Respondent relies on *Renco I*,<sup>242</sup> *Railroad Development Corporation v. Guatemala*<sup>243</sup> and *Corona Materials v. Dominican Republic*.<sup>244</sup> The Respondent further notes that the United States has taken the formal position that “[t]he discretion whether to permit a claimant to ... remedy an ineffective waiver lies with the respondent as a function of the respondent’s general discretion to consent to

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<sup>236</sup> Reply on Preliminary Objections, paras. 86-87.

<sup>237</sup> Memorial on Preliminary Objections, paras. 82, 86; Notice of Arbitration, para. 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”).

<sup>238</sup> Memorial on Preliminary Objections, para. 86; **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, paras. 78, 119.

<sup>239</sup> Memorial on Preliminary Objections, para. 88; **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 142; **Exhibit RLA-017**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011, para. 115.

<sup>240</sup> Memorial on Preliminary Objections, para. 96.

<sup>241</sup> Memorial on Preliminary Objections, para. 93.

<sup>242</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, paras. 152, 158.

<sup>243</sup> Memorial on Preliminary Objections, paras. 93-94; Reply on Preliminary Objections, para. 91, fn. 143; **Exhibit RLA-010**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008, para. 61.

<sup>244</sup> Reply on Preliminary Objections, para. 88; **Exhibit RLA-031**, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, May 31, 2016, para. 191.

arbitration.”<sup>245</sup> The Respondent adds that the Claimant was “well aware” of this rule, as demonstrated by the fact that he first inquired whether Peru would consent to the cure of his invalid waiver before presenting his Motion for Leave to Amend the Notice of Arbitration as an attempt, according to the Respondent, to circumvent Peru’s necessary consent.<sup>246</sup>

188. The Respondent acknowledges that the Claimant may have been able to amend his notice of arbitration and submit a valid waiver prior to the submission of his Memorial,<sup>247</sup> but he failed to do so.<sup>248</sup> It notes, however, that the United States has formally declared that under its interpretation a defective waiver can only be cured prior to the constitution of the Tribunal.<sup>249</sup> Likewise, the Treaty and UNCITRAL Rules provisions cited by the Claimant, which contemplate the possibility of amending a notice of arbitration and the statement of claim, are distinct from those concerning the presentation of a valid waiver and are therefore inapplicable.<sup>250</sup>

189. Lastly, the NAFTA cases relied upon by the Claimant are, in the Respondent’s view, irrelevant, as the language of the waiver provisions in the USPTPA and the CAFTA-DR “significantly differ[]” from NAFTA.<sup>251</sup> The Respondent observes that the titles of the waiver provisions in the USPTPA, the DR-CAFTA and the US Model BIT were amended to include the word “consent.”<sup>252</sup>

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<sup>245</sup> Memorial on Preliminary Objections, para. 94; **Exhibit RLA-030**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Second Non-Disputing State Party Submission of the United States of America, September 1, 2015, para. 16.

<sup>246</sup> Memorial on Preliminary Objections, para. 95.

<sup>247</sup> The Respondent indicates that, according to Article 10.18 of the USPTPA, “no claim may be submitted” unless the notice of arbitration is accompanied by an effective waiver. In addition, the Respondent explains that, under Article 10.16.4 of the USPTPA, a claim is deemed submitted when the notice of arbitration and the statement of claim are received by the respondent. The Respondent concludes that, once a claim is deemed to be submitted, claimant is no longer able to cure a jurisdictional defect caused by an improper waiver. *See* Letter from the Respondent to the Tribunal, January 15, 2021, p. 5. *See also* Memorial on Preliminary Objections, para. 95, fn. 166; Reply on Preliminary Objections, paras. 90, 92.

<sup>248</sup> Reply on Preliminary Objections, paras. 90, 92. The Respondent further submits that the Tribunal’s inherent powers to set a procedural calendar do not and cannot extend “so far” as to modify the text of the USPTPA. *See* Respondent’s Post-Hearing Brief, paras. 45, 131, 133.

<sup>249</sup> Respondent’s Post-Hearing Brief, para. 44; Submission of the United States, para. 24.

<sup>250</sup> Reply on Preliminary Objections, para. 92.

<sup>251</sup> Memorial on Preliminary Objections, para. 89.

<sup>252</sup> Memorial on Preliminary Objections, para. 89; **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 141.

#### 4. Estoppel

190. The Respondent maintains that its Request for Disclosure of the Funding Agreement cannot be construed as consent to jurisdiction, “let alone to support an estoppel from raising jurisdictional objections.”<sup>253</sup>
191. First, the Respondent states that it timely submitted its jurisdictional objections before the filing of the Statement of Defense, as permitted under the UNCITRAL Rules.<sup>254</sup> It also recalls that it had already reserved the right to argue lack of jurisdiction, including on the basis of lack of consent,<sup>255</sup> in its Response to the Notice of Arbitration.<sup>256</sup>
192. Second, the Respondent submits that nothing in the USPTPA or the UNCITRAL Rules suggests that a party is barred from objecting to the jurisdiction of an arbitral tribunal by participating in the proceedings,<sup>257</sup> or that a respondent must assert or reserve its rights to make jurisdictional objections before taking part in the proceedings.<sup>258</sup> The integrity of the arbitral process, the Respondent says, is separate and independent from the Tribunal’s jurisdiction to decide the merits of the dispute.<sup>259</sup> The Respondent cites several decisions where the tribunal did not consider that preliminary requests submitted by the respondent constituted an acceptance of their jurisdiction.<sup>260</sup> Additionally, and contrary to the Claimant’s allegations, the Respondent notes that the relief sought in its Request for Disclosure of the Funding Agreement was procedural rather than substantive.<sup>261</sup>

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<sup>253</sup> Reply on Preliminary Objections, para. 59.

<sup>254</sup> Reply on Preliminary Objections, para. 60; UNCITRAL Rules, Article 23(2).

<sup>255</sup> Respondent’s Post-Hearing Brief, para. 107.

<sup>256</sup> Reply on Preliminary Objections, para. 60.

<sup>257</sup> Reply on Preliminary Objections, para. 61; UNCITRAL Rules, Article 23(2) (“A party is not precluded from raising [jurisdictional objections] by the fact that it has appointed, or participated in the appointment of, an arbitrator”).

<sup>258</sup> Reply on Preliminary Objections, para. 61; Respondent’s Post-Hearing Brief, para. 109.

<sup>259</sup> Reply on Preliminary Objections, para. 61.

<sup>260</sup> Reply on Preliminary Objections, para. 62; **Exhibit RLA-053**, *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, December 13, 2019; **Exhibit RLA-006**, *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Case Details, October 12, 2018, to April 16, 2021; **Exhibit RLA-046**, *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Canada’s Submission on Place of Arbitration, January 15, 2013; **Exhibit RLA-047**, *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Canada’s Statement on Jurisdiction and Admissibility, February 22, 2013.

<sup>261</sup> Respondent’s Post-Hearing Brief, paras. 112-117.

193. Finally, the Respondent claims that none of the elements of the doctrine of estoppel are present in this case.<sup>262</sup> First, there is no “clear and unequivocal statement or conduct,” as the Respondent had reserved its right to submit jurisdictional objections. Second, the Respondent characterizes the Claimant’s suggestion that he would not have complied with the Tribunal’s order had he known Peru’s reservation on jurisdiction as “incredible.” Finally, the Claimant has failed to show any detriment from having relied on Peru’s conduct.<sup>263</sup>

## **B. THE CLAIMANT’S POSITION**

194. The Claimant disputes the Respondent’s interpretation of the formal and substantive requirements that must be fulfilled to submit a valid waiver under USPTPA Article 10.18.2(b). Should his waiver be considered defective, the Claimant considers that he should be granted leave by the Tribunal to cure it.

195. In any event, the Claimant submits that the Respondent is estopped from arguing that it did not consent to this arbitration, as it obtained “significant” relief from the Tribunal before objecting to the Tribunal’s jurisdiction.

### **1. Formal Requirements**

196. The Claimant considers that the Respondent’s interpretation of Article 10.18.2(b) of the USPTPA is not supported by the ordinary meaning of its terms or by its object and purpose.<sup>264</sup>

197. First, the Claimant notes that there is nothing in Article 10.18.2(b) explicitly requiring a waiver to be filed in a separate form signed by the claimant.<sup>265</sup> The word “accompany” in that provision, the Claimant argues, is better understood as meaning “to be present or occur at the same time as.”<sup>266</sup> In the Claimant’s view, the Respondent “chooses the

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<sup>262</sup> The Respondent agrees with the Claimant on the three elements of the doctrine of estoppel. *See* Answer on Preliminary Objections, para. 95; Reply on Preliminary Objections, para. 63.

<sup>263</sup> Reply on Preliminary Objections, para. 63.

<sup>264</sup> Answer on Preliminary Objections, para. 107; **Exhibit RLA-001**, VCLT, Article 31(1).

<sup>265</sup> Answer on Preliminary Objections, paras. 106, 109, 111, 112.

<sup>266</sup> Answer on Preliminary Objections, para. 110; **Exhibit R-001**, Oxford English Dictionary, Third Edition (December 2011), ‘Accompany,’ Definition 1.c.

definition that best suits its argument to the prejudice of other” equally valid definitions.<sup>267</sup>

198. Additionally, the Claimant considers that none of the decisions in the DR-CAFTA decisions relied upon by the Respondent “go as far as saying that a physical separate waiver signed by the claimant (and not its counsel) was the exclusive and sole manner to comply with the waiver requirement.”<sup>268</sup>
199. Lastly, the Claimant submits that the object and purpose of Article 10.18.2(b) (“to avoid duplicative litigation and inconsistent verdicts”) is accomplished irrespective of whether the waiver is in a separate form signed or included in the text of any pleading or signed by the claimant or his representative.<sup>269</sup> The Claimant notes that the Respondent has avoided any reference to the object and purpose of the provision.<sup>270</sup>

## **2. Substantive Requirements**

200. The Claimant also contends that neither the ordinary meaning of Article 10.18.2(b) nor its object and purpose supports the Respondent’s interpretation that the USPTPA requires an absolute waiver.<sup>271</sup>
201. First, the Claimant notes that the waiver requirement is triggered after a claim has been submitted to arbitration under Article 10.16.1(a), which, in turn, provides that “the claimant, on its own behalf, may submit to arbitration ... a claim that the respondent has breached an obligation.”<sup>272</sup> Thus, the Claimant concludes that “a claimant that ‘may [not] submit a claim to arbitration’ because such a claim is outside of the jurisdiction of the tribunal, does not have to provide such waiver.”<sup>273</sup>
202. In the Claimant’s view, the Respondent’s contrary interpretation is not consistent with other provisions of the USPTPA. The Claimant explains that Article 10.18.4 of the

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<sup>267</sup> Answer on Preliminary Objections, para. 110.

<sup>268</sup> Answer on Preliminary Objections, para. 113; Memorial on Preliminary Objections, para. 77.

<sup>269</sup> Answer on Preliminary Objections, para. 114.

<sup>270</sup> Answer on Preliminary Objections, para. 114.

<sup>271</sup> Answer on Preliminary Objections, para. 115.

<sup>272</sup> Answer on Preliminary Objections, para. 116; **Exhibit CLA-001**, USPTPA Investment Chapter, Articles 10.18.2(b), 10.16.1(a).

<sup>273</sup> Answer on Preliminary Objections, para. 117.

USPTPA, the so called “fork in the road” provision, expressly “warns” the claimant that its election of forum is definite.<sup>274</sup> Since USPTPA Article 10.18.2(b) contains no such “warning”, it is consistent with the interpretation that such provision “does not require the type of forfeiture” that the Respondent invokes.<sup>275</sup>

203. In respect of the use of the word “any” in USPTPA Article 10.18.2(b), the Claimant maintains, as concluded by the tribunal in *Renco I*, that “the qualifier ‘any’, must be construed in the appropriate statutory context and does not automatically mean all claims.”<sup>276</sup>

204. Finally, the Claimant asserts that the object and purpose of the provision is equally accomplished under the Claimant’s interpretation, as a dismissal for lack of jurisdiction would not result in inconsistent verdicts.<sup>277</sup>

### **3. Whether the Waiver May Be Cured**

205. Alternatively, if the Tribunal accepts the interpretation of the waiver suggested by the Respondent, the Claimant asserts that there is no reason to reject his Motion for Leave to Amend the Notice of Arbitration, which is still pending.

206. First, the Claimant submits that the USPTPA explicitly contemplates the possibility of filing an amended notice of arbitration and the UNCITRAL Rules allow for the amendment of the statement of claim.<sup>278</sup> The Claimant also recalls that it has filed a declaration complying with the Respondent’s demands together with the aforesaid Motion.<sup>279</sup>

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<sup>274</sup> Answer on Preliminary Objections, paras. 119-120; **Exhibit CLA-001**, USPTPA Investment Chapter, Article 10.18.4(b), (“For greater certainty, if a claimant elects to submit a claim ... to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedures, that election shall be definite, and the claimant may not thereafter submit the claim to arbitration under Section B.”).

<sup>275</sup> Answer on Preliminary Objections, para. 120.

<sup>276</sup> Answer on Preliminary Objections, para. 121.

<sup>277</sup> Answer on Preliminary Objections, para. 124.

<sup>278</sup> Answer on Preliminary Objections, paras. 127-128; **Exhibit CLA-001**, USPTPA, Investment Chapter, Articles 10.20.4(a), 10.20.4(c); UNCITRAL Rules, Article 22.

<sup>279</sup> Answer on Preliminary Objections, para. 129.

207. Second, the Claimant contends that the Tribunal has the power to allow the Claimant to cure a purportedly defective waiver because the Claimant gave control to the Tribunal to determine the date of acceptance of the offer to arbitrate by both Parties.<sup>280</sup>
208. Third, the Claimant explains that, under Article 10.17 of the USPTPA, it is considered that a claimant accepts Peru's offer to arbitrate when the claim is submitted to arbitration.<sup>281</sup> In turn, under Article 10.16.4(c) of the USPTPA, a claim may be deemed submitted to arbitration when the notice of arbitration, together with the statement of claim, is received by the respondent.<sup>282</sup> In this case, the Claimant notes that (i) he filed his Notice of Arbitration in February 2020; (ii) the Tribunal was then constituted; and (iii) thereafter, the Tribunal, "using its inherent powers under the Treaty," set the date for the filing of the Memorial.<sup>283</sup>
209. The Claimant maintains that the powers of the Tribunal to set the date of acceptance of Peru's offer to arbitrate include the power to allow him to supplement or amend the Memorial and, therefore, to amend a purportedly defective waiver.<sup>284</sup> The Claimant insists that this differentiates the present case from *Renco I*, where the investor filed the notice of arbitration together with the statement of claim, before the tribunal was even constituted.<sup>285</sup>

#### **4. Estoppel**

210. The Claimant submits that the Respondent is estopped from objecting to the Tribunal's jurisdiction because it obtained relief from this Tribunal without making any objection regarding its consent to arbitrate.<sup>286</sup>
211. According to the Claimant, the doctrine of estoppel requires the presence of three elements: (i) a clear and unequivocal statement or conduct; (ii) reliance on that statement or conduct by one party; and (iii) detriment to the party invoking the estoppel or an

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<sup>280</sup> Claimant's Post-Hearing Brief, para. 68.

<sup>281</sup> Transcript (English), 96:23-97:8.

<sup>282</sup> Transcript (English), 97:23-98:4.

<sup>283</sup> Transcript (English), 100:1-4.

<sup>284</sup> Transcript (English), 100:5-11.

<sup>285</sup> Transcript (English), 99:13-21.

<sup>286</sup> Answer on Preliminary Objections, para. 94.

advantage to the party who made the statement.<sup>287</sup> The Claimant determines that the doctrine of estoppel applies with equal force to a statement or conduct in litigation (judicial estoppel).<sup>288</sup> In the Claimant's view, all three elements are satisfied in this case.

212. First, the Claimant asserts that, until the submission of the Notice of Intent to Submit Preliminary Objections, the Respondent's conduct in the proceedings "clearly and unequivocally" established its consent to this arbitration. In particular, the Claimant avers that the Respondent "availed itself of the jurisdiction of this Tribunal" by submitting the Request for Disclosure of the Funding Agreement without raising any objection to the jurisdiction of the Tribunal or denying Peru's arbitral consent.<sup>289</sup> The Claimant notes that "other than a vague reference purportedly reserving the right to argue lack of jurisdiction ... in the [Response to the Notice of Arbitration]," the Respondent never indicated that it had not given its consent to the arbitration.<sup>290</sup>
213. Second, the Claimant avers that he complied with the Tribunal's disclosure order relying on the Respondent's "decision to avail itself of the Tribunal's jurisdiction" by submitting the disclosure request.<sup>291</sup> It is irrelevant, in the Claimant's view, whether he would have adopted a different course of action if the Respondent "had objected to its arbitral consent" before requesting relief from the Tribunal.<sup>292</sup> The Claimant notes, however, that he could have requested the Tribunal to adjudicate a hypothetical objection from the Respondent before ruling on its request for relief.<sup>293</sup>
214. Finally, the Claimant concludes that the Respondent benefitted from the Claimant's reliance, as the Respondent has now obtained the name and identity of the Claimant's third party funder.<sup>294</sup>

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<sup>287</sup> Answer on Preliminary Objections, para. 95; Claimant's Post-Hearing Brief, para. 62; **Exhibit CLA-107**, *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, para. 261.

<sup>288</sup> Answer on Preliminary Objections, para. 96; Claimant's Post-Hearing Brief, para. 63; **Exhibit CLA-108**, *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, March 30, 2010, para. 350.

<sup>289</sup> Answer on Preliminary Objections, para. 94; Request for Disclosure of Funding Agreement, para. 8.

<sup>290</sup> Answer on Preliminary Objections, para. 98.

<sup>291</sup> Answer on Preliminary Objections, para. 99; Rejoinder on Preliminary Objections, para. 40.

<sup>292</sup> Rejoinder on Preliminary Objections, para. 40.

<sup>293</sup> Rejoinder on Preliminary Objections, para. 40.

<sup>294</sup> Answer on Preliminary Objections, para. 99.

**C. THE POSITION OF THE UNITED STATES OF AMERICA**

215. The United States recalls that, in the absence of a disputing party’s consent to arbitrate, a tribunal lacks jurisdiction.<sup>295</sup> Accordingly, the United States submits, “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.”<sup>296</sup>
216. With regard to the waiver requirements under USPTPA Article 10.18.2(b), the United States indicates that they are among the requirements upon which the Contracting Parties have conditioned their consent. Thus, the United States considers that a valid waiver is a precondition to the parties’ consent to arbitrate claims and, accordingly, to the tribunal’s jurisdiction.<sup>297</sup> The United States avers that the date of submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Article 10.18.1 of the USPTPA.<sup>298</sup>
217. The United States considers that any valid waiver must be in writing and also be “clear, explicit and categorical.”<sup>299</sup> It must also be “definit[e] and irrevocabl[e],” as evidenced from the language requiring the investor to provide a waiver of “**any** right to initiate or continue before any [forum] **any** proceeding with respect to **any** measure alleged to constitute a breach.”<sup>300</sup> Citing the decision in *Renco I*, the United States concludes that USPTPA Article 10.18.2(b) is “intended to operate as a ‘once 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).”<sup>301</sup>

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<sup>295</sup> Submission of the United States, para. 11.

<sup>296</sup> Submission of the United States, para. 15.

<sup>297</sup> Submission of the United States, para. 17.

<sup>298</sup> Submission of the United States, para. 18.

<sup>299</sup> Submission of the United States, para. 19.

<sup>300</sup> Submission of the United States, para. 19 (emphasis in original).

<sup>301</sup> Submission of the United States, para. 19; **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 99.

218. According to the United States, if the waiver does not comply with the requirements under USPTPA Article 10.18.2(b), “the waiver is ineffective and will not engage the respondent State’s consent to arbitration or the tribunal’s jurisdiction *ab initio* under the Agreement.”<sup>302</sup> In the United States’ submission, such compliance should be determined by the tribunal, which, nevertheless, does not have the authority to remedy an ineffective waiver,<sup>303</sup> thus agreeing with the Respondent that an invalid waiver can only be remedied with the consent of the respondent State.<sup>304</sup>
219. Lastly, citing to customary international law principles of treaty interpretation, as reflected in Article 31(1)(a)-(b) of the Vienna Convention on the Law of Treaties (“VCLT”), the United States invites the Tribunal to take into account the United States’ and Peru’s common understanding, as evidenced by their submissions.<sup>305</sup>

#### **PART 6 - THE TRIBUNAL’S ANALYSIS OF OBJECTION 4 BASED ON NON-COMPLIANCE WITH ARTICLE 10.18.2**

220. As noted earlier, USPTPA Article 10.18.2(b) provides that:

[n]o claim may be submitted to arbitration under this Section unless:

- (b) the notice of arbitration is accompanied,
  - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s 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.

221. The Tribunal must interpret USPTPA Article 10.18.2(b) in accordance with the rules of treaty interpretation as codified in Article 31 of the VCLT. In particular, the text must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>306</sup>

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<sup>302</sup> Submission of the United States, para. 24.

<sup>303</sup> Submission of the United States, para. 24.

<sup>304</sup> Submission of the United States, para. 25.

<sup>305</sup> Submission of the United States, para. 25; **Exhibit RLA-001**, VCLT, Article 31(1).

<sup>306</sup> **Exhibit RLA-001**, VCLT, Article 31(1).

**A. THE FORMAL AND SUBSTANTIVE REQUIREMENTS FOR A VALID WAIVER**

222. The Parties disagree over the formal and substantive requirements for a valid waiver. The Respondent argues that the waiver must: (i) be included in a separate document accompanying the Request for Arbitration; (ii) be signed by the Claimant himself; and (iii) be unqualified and not subject to any condition. The Claimant, for his part, contends that USPTPA Article 10.18.2(b): (i) does not require that the waiver be filed in a separate document and be signed by the Claimant (a signature by the claimant's counsel should suffice); and (ii) does not require that the waiver be absolute (e.g., given even in instances where claims are outside the treaty tribunal's jurisdiction).
223. In its Submission, the United States interprets Article 10.18.2(b) to require that the waiver be in writing and "clear, explicit and categorical."<sup>307</sup> However, the United States does not agree with the Respondent's interpretation that the waiver must be signed by the Claimant himself and must be included in a separate document.
224. The Tribunal sees no support in the text of USPTPA Article 10.18.2(b) for the Respondent's position that the waiver must be included in a document separate from the Request for Arbitration and must be signed personally by the Claimant. The use of the word "accompanied" is insufficient to support such an interpretation. In this regard, the Tribunal agrees with the Claimant that the ordinary meaning of the word "accompanied" is "to be present or occur at the same time as."<sup>308</sup> In any event, the word itself says nothing about the validity of a signature provided by the Claimant's counsel.
225. The Tribunal however agrees with the Respondent that USPTPA Article 10.18.2(b) requires an unqualified and unconditional waiver, including for instances where the claims may be dismissed by the treaty tribunal for lack of jurisdiction.
226. In this regard, the Tribunal notes that the language employed in USPTPA Article 10.18.2(b) is very broad indeed, requiring a claimant to waive "**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

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<sup>307</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 74; *see also* **Exhibit CLA-028**, *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, para. 71.

<sup>308</sup> **Exhibit R-001**, Oxford English Dictionary, Third Edition (December 2011), 'Accompany,' Definition 1.c.

constitute a breach referred to in Article 10.16 (emphasis added).” The intent of the Contracting Parties to be comprehensive in respect of the scope of the waiver could not be any clearer. There is simply no textual support for the Claimant’s attempt to carve out of USPTPA Article 10.18.2(b) claims that may eventually be dismissed by the treaty tribunal for lack of jurisdiction or otherwise (i.e., without deciding on the merits). Such an interpretation would in fact amount to an impermissible rewriting of the text of the USPTPA. A similar argument was heard and dismissed by the *Renco I* tribunal, with whose views on this point this Tribunal also aligns:

79. ... [T]he repeated references to the word ‘any’ in Article 10.18 demonstrate that an investor’s waiver must be comprehensive: waivers qualified in any way are impermissible.

80. Renco has purported to qualify its written waiver by reserving its right to bring claims in another forum for resolution on the merits if this Tribunal were to decline to hear any claims on jurisdictional or admissibility grounds.

81. In the Tribunal’s opinion, this qualification is not permitted by the express terms of Article 10.18(2)(b). ...

82. In the considered judgment of this Tribunal, the term ‘any proceeding’ in Article 10.18(2)(b) must be interpreted to cover proceedings which are or may be ‘initiated or continued’ either:

- (a) At the time the notice of arbitration is filed;
- (b) During the pendency of the arbitration; and/or
- (c) After the arbitration has concluded, whether or not the investor’s claims are dismissed on jurisdictional or admissibility grounds or on the merits.

83. The Tribunal considers that this interpretation is clear from the ordinary meaning of the words ‘any proceeding’ in Article 10.18(2)(b). There is no basis in the text of the Treaty for qualifying the temporal scope of the ‘proceeding[s]’ in respect of which a written waiver must be provided, for example by excluding future proceedings which may be ‘initiated’ by the investor if the Tribunal were to decide that it lacked jurisdiction or that Renco’s claims were inadmissible.<sup>309</sup>

227. The Tribunal further aligns itself with the detailed reasoning of the *Renco I* tribunal with regard to the object and purpose of Article 10.18.2(b), and its “No U-turn” structure,<sup>310</sup>

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<sup>309</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, paras. 79-83.

<sup>310</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, paras. 84-118.

which explains why the Claimant's argument that the provision must permit a reservation with regard to claims that are not within the Tribunal's jurisdiction is incorrect.

228. The fact that Article 10.18.4 of the USPTPA expressly warns investors, “[f]or greater certainty” that, once they submit a claim to a different forum than the treaty tribunal, “that election shall be definitive” is not a sufficient argument in support of a different interpretation of USPTPA Article 10.18.2(b). There is absolutely no requirement for international treaties to expressly warn investors of the consequences of their choice of forum. Moreover, the clarification in Article 10.18.4 of the USPTPA is provided “[f]or greater certainty,” which implies that, in instances where the text is sufficiently clear, no such clarifications are called for.
229. The Tribunal thus concludes that USPTPA Article 10.18.2(b) requires that the Claimant provide an unqualified waiver that is clear, explicit and categorical, but also definitive.

**B. HAS THE CLAIMANT PROVIDED A VALID WAIVER?**

230. Mr. Amorrortu provided with his Notice of Arbitration a waiver that was both limited and conditional: “to the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds,” Mr. Amorrortu said, “Claimant reserves the right to bring such claims in another forum for resolution on the merits.”<sup>311</sup>
231. The Tribunal has no hesitation in concluding that the Claimant's waiver is conditional. For this reason, it does not comply with the requirement in USPTPA Article 10.18.2(b).
232. The question to be answered next concerns the consequences of submitting an invalid waiver and whether this invalidity may be cured.

**C. DECISION OF THE TRIBUNAL MAJORITY PROFESSOR BERNARD HANOTIAU AND MR. TOBY LANDAU, Q.C. UPHOLDING THE RESPONDENT'S OBJECTION 4 BASED ON THE CLAIMANT'S INVALID WAIVER**

233. The Tribunal by majority notes that Article 10.18 of the USPTPA, of which Article 10.18.2(b) is a part, is entitled “Conditions and Limitations on Consent of Each Party.” As the Respondent points out, the choice of wording is not accidental. Indeed, the titles

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<sup>311</sup> Notice of Arbitration, para. 88.

of the waiver provisions in the USPTPA, the DR-CAFTA and the US Model BIT were amended to include the word “consent” – a significant point of difference from NAFTA’s Article 1121. The Tribunal by majority finds, similarly to the *Renco I* tribunal,<sup>312</sup> that the submission of a compliant waiver is not a condition for the admissibility of claims, but a precondition for the very existence of the State’s consent to arbitrate, and, by way of necessary implication, to this Tribunal’s jurisdiction. This is also confirmed by the United States’ position in this arbitration.

(i) *When Does the USPTPA Require That a Compliant Waiver be Submitted?*

234. The critical question here is one of timing. According to Article 10.18.2 (b) of the USPTPA, “[n]o claim may be submitted to arbitration ... unless ... (b) the notice of arbitration is accompanied ... by the claimant’s written waiver.” Article 10.16 of the USPTPA, entitled “Submission of a Claim to Arbitration,” provides in subparagraph 4 that “[a] claim shall be submitted to arbitration ... when the claimant’s notice of or request for arbitration ... together with the statement of claim ... are received by the respondent.” The Tribunal by majority recalls that the Notice of Arbitration was filed on February 13, 2020. The Claimant’s Memorial was filed on September 11, 2020. Therefore, in accordance with Article 10.16.4, the claim was deemed submitted to arbitration on September 11, 2020. However, on September 11, 2020, no compliant waiver existed. Only the Claimant’s conditional (and invalid) waiver had been submitted. Since a valid waiver is a pre-condition to consent, as at September 11, 2020, the Respondent’s consent was lacking and no arbitration agreement existed.

235. The Claimant is now seeking to cure his defective waiver. Significantly, faced with the Respondent’s jurisdictional objection, the Claimant (i) filed an application on December 22, 2020, requesting the Tribunal’s leave to amend his Notice of Arbitration; and (ii) submitted a compliant (i.e., an unqualified) waiver on April 25, 2021. The Respondent expressly refused to give its consent to such a cure and argues that, absent such consent, the Tribunal does not have the power to cure the defective waiver. According to the Respondent, such power is solely within the discretion of a respondent State, since – without a further consent – there is no arbitration agreement. This

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<sup>312</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 142.

corresponds to the position of the United States, which argues that if the waiver does not comply with USPTPA Article 10.18.2(b), “the waiver is ineffective and will not engage the respondent State’s consent to arbitration or the tribunal’s jurisdiction *ab initio* under the Agreement.”<sup>313</sup> Hence the United States also submits that an invalid waiver can only be remedied with the consent of the respondent State.

236. The Tribunal by majority agrees with the Respondent. In view of the express and unequivocal language of Article 10.18.2(b) providing that the submission of a valid waiver is a precondition to a State’s consent to arbitration, it follows that, if an invalid or non-compliant waiver is submitted, a State’s offer of arbitration and an investor’s acceptance of the same do not meet. No arbitration agreement is formed and, by way of necessary implication, any arbitral tribunal that is constituted on the basis of such non-existent arbitration agreement will be deprived of jurisdiction *ab initio*. Since this Tribunal has been constituted on the basis of such a non-existent arbitration agreement, the Tribunal has no jurisdiction over the Parties and has in fact never had any jurisdiction from the very beginning of these proceedings.

237. The Claimant argues that, because the Tribunal has the power to allow him to amend or supplement the Notice of Arbitration and/or Memorial under the UNCITRAL Rules, this also includes the power to grant him leave to amend a defective waiver. The Tribunal is not persuaded. A tribunal’s power to grant leave to amend or modify a notice of arbitration and/or statement of claim is part of the general power of a tribunal over arbitral proceedings. It is a matter of case management and sound administration of justice. In contrast, granting leave to cure a defective waiver, over the objection of the Respondent, would be tantamount to the Tribunal creating consent to arbitration where no such consent existed when the Tribunal was constituted. The Tribunal simply fails to see how, despite having been constituted on the basis of an invalid arbitration agreement, and hence not having jurisdiction over the Parties from the beginning of these proceedings, it could purport to exercise a power to cure the Claimant’s defective waiver over the objection of the Respondent, and thereby endow itself with jurisdiction.

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<sup>313</sup> Submission of the United States, para. 24.

238. The *Renco I* tribunal by majority reached a similar conclusion and found that a claimant could not cure a defective waiver absent the respondent's consent:

152. In the present case, however, the jurisdictional defect (Renco's non-compliance with Article 10.18(2)(b)) remains uncured. This jurisdictional defect could only be cured (a) if Renco took the positive step of withdrawing the reservation of rights, or submitting a new waiver without the reservation of rights, **and Peru consented to this by way of a variation of Article 10.18(2)(b) of the Treaty**, or (b) if Renco commenced a new arbitration together with a waiver without any reservation of rights.

...

160. ... [T]he Tribunal has concluded that Renco **cannot unilaterally cure its defective waiver** by withdrawing the reservation of rights.<sup>314</sup>

239. The *Renco I* tribunal also found that Article 10.18 of the USPTPA represented a *lex specialis*, which prevailed over the *Mavrommatis Palestine Concessions* doctrine. In other words, even if a compliant waiver were submitted before a tribunal had had the opportunity to rule on its jurisdiction, the tribunal would remain deprived of jurisdiction:

157. The Tribunal is faced with an apparent conflict between the interpretation of Article 10.18 adopted by the United States and Peru and the jurisprudence of the International Court of Justice as evidenced in the *Mavrommatis* doctrine. 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...

158. Under Article 10.18, the submission of a valid waiver is a condition and limitation on Peru's consent to arbitrate. This is a precondition to the initial existence of a valid arbitration agreement, and as such leads to a clear timing issue: if no compliant waiver is served with the notice of arbitration, Peru's offer to arbitrate has not been accepted; there is no arbitration agreement; and the Tribunal is without any authority whatsoever. If the Tribunal applied the *Mavrommatis* doctrine, the Tribunal would be exercising powers it simply does not have (because there is no arbitration agreement, and so the Tribunal is not a tribunal). In effect, it would be creating, retrospectively, an arbitration agreement for the Parties when no agreement had ever come into existence. To put it colloquially, the Tribunal would be 'pulling itself up by its own bootstraps' in order to create jurisdiction where none existed. In the Tribunal's considered

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<sup>314</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, paras. 152, 160 (emphasis added).

opinion, this would be entirely unprincipled and obviously impermissible.<sup>315</sup>

240. The majority of this Tribunal agrees with the above conclusion of the *Renco I* tribunal. While certainly it would have been more efficient if the *Mavrommatis* doctrine applied, the Tribunal simply lacks the power to go against the special agreement reached by the United States and Peru in Article 10.18 of the USPTPA as to what will constitute a valid basis to proceed to arbitration and (necessarily) constitute a tribunal.
241. In this regard, it must be emphasized that, unlike the International Court of Justice (“**ICJ**”) and the Permanent Court of International Justice (“**PCIJ**”), this Tribunal is not a standing body with its own independent existence or powers. It was appointed and constituted pursuant to a particular arbitration agreement, and its entire existence depends upon the validity of that arbitration agreement. It obviously cannot be constituted validly pursuant to a future, but yet to be concluded, arbitration agreement. As recognized by the tribunal in *Renco I*, it is the specific requirements for a valid arbitration agreement, upon which a tribunal may be constituted, that is the *lex specialis* here.
242. The arbitration agreement in question here was never concluded, because a specifically negotiated condition was never met. It necessarily follows that the Tribunal was never validly constituted. Because the Tribunal has no existence or authority independent of the arbitration agreement on the basis of which it was purportedly appointed, it has no power to direct a party to cure a defect in that agreement, in order – retrospectively – to endow itself with jurisdiction.
243. Indeed, if the defect in the arbitration agreement were cured, a new tribunal would have to be appointed and constituted (which, depending on the Parties’ consent, might or might not comprise the same members as the previous panel).
244. The minority criticizes the majority’s analysis on the basis that it freezes the evidentiary record as of the date of Mr. Amorrortu’s deficient filing,<sup>316</sup> and means, in effect, “one strike and you’re out.”<sup>317</sup> But this – again – overlooks the fact that the standing and

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<sup>315</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, paras. 157-158.

<sup>316</sup> Para. 268 below.

<sup>317</sup> Para. 269 below.

authority of the Tribunal must necessarily be tested as of the date of its purported constitution. It cannot be tested from a later date, retrospectively, and on the basis of steps the (invalidly constituted) panel has taken in the meantime.<sup>318</sup>

245. To put this another way, the minority considers that there is nothing in the text of the Treaty to preclude the Tribunal from receiving evidence in the ordinary way of dealing with interlocutory matters,<sup>319</sup> including a revised acceptance by the Claimant of the Respondent's offer to arbitrate. But as of the date the Claimant submitted his revised acceptance, there was no valid "tribunal" to receive it.
246. As to this, the minority counters that "[i]t is not clear how a tribunal that does not exist can nevertheless pronounce on its own existence unless, like Schrödinger's famous cat, it is simultaneously both alive and dead."<sup>320</sup> But this is to ignore the doctrine of *kompetenz-kompetenz*. The Tribunal, having been purportedly constituted and faced with jurisdictional objections, has a mandate to rule upon its own jurisdiction – and indeed "pronounce on its own existence" (albeit not finally). In order to discharge this mandate, it must conduct an arbitral procedure, with all steps, orders and directions that may be necessary in order to ensure a fair and legally compliant process. But this mandate obviously does not mean that the Tribunal is in fact "alive," or is in fact a valid Tribunal for any purpose beyond *kompetenz-kompetenz*. Whether or not the Tribunal is "alive" or "dead" will ultimately depend on the ruling of a competent court. In the meantime, it may continue in order to rule on its own jurisdiction and (if it considers itself "alive," subject to a court's final ruling) the merits.
247. The minority states that "[i]n dealing with interlocutory or procedural issues including *kompetenz-kompetenz*, the Tribunal is master of its own procedure including ... determining the evidentiary record it considers relevant to the validity of

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<sup>318</sup> The minority comments on this, at para. 286(vi), below as follows: "... it is not clear what steps our 'validly constituted' panel has taken 'in the meantime' (unless reference is made to the third party funding disclosure order, in which the Tribunal was unanimous) because in fact the Tribunal has taken no 'steps' in respect of Objection 4 until now apart from setting a schedule." To be clear, the "step" referred to here would be the (requested) admission by the (invalidly constituted) Tribunal of the Claimant's subsequent waiver, as a means to give retrospective validity to the arbitration agreement upon which the Tribunal was purportedly constituted.

<sup>319</sup> Para. 282 below.

<sup>320</sup> Para. 279 below.

Objection 4”<sup>321</sup> and the evidence now comprises a (subsequently introduced) valid waiver. But it is important to recall the nature of the “*kompetenz* issue.” In particular, it must encompass the question whether this Tribunal was constituted pursuant to a valid arbitration agreement.

248. This limited mandate certainly does not authorize the panel to take steps to create retrospectively its own jurisdiction (such as curing an invalid arbitration agreement). If this were not so, as the *Renco I* tribunal noted, every tribunal would have a license to “pull itself up by its own bootstraps.”<sup>322</sup>
249. Equally, the UNCITRAL Rules, which allow a tribunal to “decide the scope of admissible evidence on which to base its decision on Objection 4,”<sup>323</sup> are of no assistance. Like the *kompetenz-kompetenz* principle, which only permits a tribunal to determine for itself if it has jurisdiction but is not and cannot be a sufficient basis for a tribunal to create such jurisdiction, the UNCITRAL Rules cannot create consent where consent did not already exist at the relevant time – in this case, at the time when the claim was submitted to arbitration pursuant to the express terms of the USPTPA.
250. For these reasons, the majority of the Tribunal finds that the Claimant’s defective waiver cannot be cured as the Respondent has refused to give its consent thereto.
251. The final question that the Tribunal needs to address is whether the Respondent should be estopped from raising this jurisdictional objection as a result of its conduct during these proceedings (i.e., applying for relief from the Tribunal).

(ii) *Is the Respondent Estopped from Raising Jurisdictional Objections?*

252. The Claimant argues that, because the Respondent availed itself of the jurisdiction of the Tribunal for purposes of obtaining the disclosure of the Claimant’s third party funder, it is now estopped from raising jurisdictional objections premised on its lack of consent to arbitration. The Respondent takes strong exception to this argument, contending that the

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<sup>321</sup> Para. 281 below.

<sup>322</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 158.

<sup>323</sup> Para. 280 below.

Request for Disclosure of the Funding Agreement cannot be construed as consent to the Tribunal's jurisdiction or support an estoppel argument.

253. The Tribunal agrees with the Respondent.
254. Article 23(2) of the UNCITRAL Rules establishes that “[a] plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence” and that “[a] party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator.” These provisions establish two important principles: (i) a jurisdictional objection raised in the statement of defense is timely, and no such objection need be raised earlier than the statement of defense; and (ii) by simply participating in the appointment of an arbitrator, a respondent does not lose the right to contest the jurisdiction of the tribunal.
255. Given principle (i) above, it would take something more than the simple participation in proceedings before filing of the statement of defense for a respondent to be construed as consenting to jurisdiction. The Tribunal considers that a respondent would have to engage in an act or an omission which would unquestionably show that it has decided to avail itself of the power of the tribunal to decide the case on the merits.
256. In the case before the Tribunal, the Respondent expressly reserved its right to contest jurisdiction *ratione voluntatis*, *ratione personae*, *ratione materiae* and *ratione temporis* in its Response to the Notice of Arbitration dated March 21, 2020.<sup>324</sup> On December 9, 2020, after the Claimant had filed its Memorial, the Respondent gave Notice of Intent to Submit Preliminary Objections, which it then duly filed on March 15, 2021. The Tribunal considers that the Respondent filed its jurisdictional objections in a timely manner.
257. The Claimant however argues that, prior to its Notice of Intent to Submit Preliminary Objections, the Respondent conducted itself in a manner that “clearly and unequivocally”<sup>325</sup> established its consent to arbitration. The Claimant refers in particular to the Respondent's Request for Disclosure of the Funding Agreement, dated September 25, 2020, where the Respondent availed itself of the Tribunal's jurisdiction but did not clearly indicate that it was contesting jurisdiction. According to the Claimant, the

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<sup>324</sup> Response to the Notice of Arbitration, para. 5.

<sup>325</sup> Answer on Preliminary Objections, para. 94.

Respondent's reservation of rights in the Response to the Notice of Arbitration was too vague to be interpreted as containing jurisdictional objections.

258. The Tribunal is not persuaded.
259. First, as shown above, the UNCITRAL Rules are such that a respondent is within its rights to raise jurisdictional objections as late as the statement of defense. In these proceedings, the Respondent expressly reserved the right to raise jurisdictional objections in its Response. The Claimant was thus on notice that such objections would indeed be raised thereafter, and in accordance with the UNCITRAL Rules. The fact that the Respondent's objections were not yet articulated in the Response cannot be construed as consent to jurisdiction. The Respondent was perfectly entitled to reserve the right to formulate proper jurisdictional objections after having seen the full arguments of the Claimant in the Memorial.
260. Second, there is nothing in the UNCITRAL Rules or in the USPTPA that requires a respondent to reaffirm its intention to raise jurisdictional objections at every instance it addresses the Tribunal. It was thus unnecessary for the Respondent to reiterate in the Request for Disclosure of the Funding Agreement that it was objecting to the Tribunal's jurisdiction. In any event, the Respondent had already indicated in its Response to the Notice of Arbitration that it would be contesting jurisdiction, and the nature and breadth of that statement naturally conditioned every statement thereafter.
261. Third, while the Request for Disclosure of the Funding Agreement certainly did request some form of relief from the Tribunal, that relief was intended to protect the integrity of the proceedings and did not in any way signal consent to the Tribunal's jurisdiction. Even though this Tribunal did not have jurisdiction *ab initio*, it was nevertheless empaneled. By virtue of simply being constituted, the Tribunal had a duty to protect the integrity of the arbitral proceedings and the Parties' due process rights. One important aspect of due process is the right to an independent and impartial tribunal, which is free of conflicts. This right exists regardless of whether a tribunal were ultimately to find that it does not have jurisdiction. Indeed, in circumstances where jurisdictional objections had been raised, the Tribunal was authorized to conduct an arbitral process to rule upon its own jurisdiction (i.e., to exercise *kompetenz-kompetenz*), and each Party was entitled to ensure the Tribunal's independence and impartiality even for this (limited) arbitral process.

Consequently, by formulating the Request for Disclosure of the Funding Agreement, the Respondent availed itself of the Tribunal's power to protect the integrity of these proceedings, and not of the Tribunal's power to decide the merits of this case. Indeed, in order to rule on the Respondent's application, the Tribunal was not required to express any view or to make any finding in any way connected to the substance of the dispute. Consequently, the Request for Disclosure of the Funding Agreement did not evidence the Respondent's consent to the Tribunal's jurisdiction with regard to the merits of this case.

262. Fourth, the fact that the Request for Disclosure of the Funding Agreement was filed before the Respondent could articulate its jurisdictional objections is immaterial. It was within the Respondent's right to ascertain from the very beginning of these proceedings that the Tribunal was free of conflicts. Moreover, a delay in the filing of the application could have entailed risks, such as a potential argument that the application had to be dismissed on the basis of delay alone.
263. Fifth, the fact that the Request for Disclosure of the Funding Agreement referred to a possible future request for security for costs or an adverse costs award does not in any way signal consent to this Tribunal's jurisdiction. Indeed, it is perfectly reasonable for a respondent to consider a request for security for costs when it objects to a tribunal's jurisdiction: if a tribunal were to uphold jurisdictional objections and dismiss the case on that basis, it would be in a respondent's interest to be able to collect on any costs award in its favor issued by the tribunal.
264. For all these reasons, the Tribunal considers that the Respondent's filing of its Request for Disclosure of the Funding Agreement did not in any way evidence the Respondent's consent to the Tribunal's jurisdiction. By way of necessary implication, the Claimant's estoppel argument is also dismissed, as there is nothing in the Respondent's conduct that could be construed as a clear and unequivocal statement or conduct in support of the Tribunal's jurisdiction.
265. The Tribunal has concluded that the Claimant has failed to provide a compliant waiver within the deadline provided in the USPTPA. Consequently, the Tribunal by majority concludes that no arbitration agreement was ever formed, and this Tribunal lacked jurisdiction *ab initio*. Moreover, the Claimant cannot unilaterally cure its defective waiver. For its part, the Respondent never consented, either expressly or impliedly, to

this Tribunal’s jurisdiction. For all these reasons, the Tribunal by majority concludes that it does not have jurisdiction to hear the present dispute and dismisses the Claimant’s claims on this basis.

**D. DISSENTING OPINION OF THE HONOURABLE IAN BINNIE, C.C., Q.C., ON OBJECTION 4**

266. I agree with my colleagues that the issue of consent is jurisdictional and that, as they state, “in circumstances where jurisdictional objections had been raised, the Tribunal was authorized to conduct an arbitral process to rule upon its own jurisdiction (i.e. to exercise *kompetenz-kompetenz*).”<sup>326</sup> This jurisdiction is rooted in Article 23 of the UNCITRAL Rules, which is made applicable by Article 10.16.3(c) of the Treaty, and provides that ‘the arbitral tribunal shall have the power to rule on its own jurisdiction ...’ My dissent concerns how this undoubted power is to be exercised.
267. My colleagues state that the dispositive question is “one of timing.”<sup>327</sup> However, in their view the only timing question has to do with whether the compliant waiver was filed with the Notice of Arbitration on April 4, 2020 or, at the latest, with the Memorial which was delivered on September 11, 2020. Having not been so filed or delivered, they say, “[s]ince a valid waiver is a pre-condition to consent, as of September 11, 2020, the Respondent’s consent was lacking and no arbitration agreement existed.”<sup>328</sup>
268. I agree that in the absence of a compliant waiver “no arbitration agreement” was formed **at that time**. I also agree that no arbitration agreement can be formed unless and until the claimant’s notice of arbitration or statement of claim “is accompanied by” (to quote the USPTPA) a compliant waiver. The jurisdictional facts must be conjoined at the same time. Hence the real “timing” issue, in my view, is whether jurisdiction is to be judged on the evidentiary record frozen as of the date of Mr. Amorrortu’s deficient filing as my colleagues insist or (in accordance with applicable principles of international law), as of the date the Tribunal makes its decision on the jurisdictional objections, which is now. The Tribunal has had in the evidentiary record Mr. Amorrortu’s compliant waiver since

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<sup>326</sup> Para. 261 above.

<sup>327</sup> Para. 234 above.

<sup>328</sup> Para. 234 above.

April 25, 2021, and as of that date all of the jurisdictional facts were collectively present and correct.

269. My colleagues proceed on the basis that once Mr. Amorrortu delivered a non-compliant waiver, Peru's "offer to arbitrate" was exhausted and spent and somehow became incapable of acceptance. My colleagues adopt the view of the *Renco I* majority (Landau, Moser, Fortier dissenting) that Mr. Amorrortu's initial misstep is not curable unless Peru consents.<sup>329</sup> In my view, on the contrary, there is nothing in the Treaty to support this "one strike and you're out" limitation. Peru's "offer to arbitrate" remained open (and remains open to this day) for acceptance and was in fact accepted by Mr. Amorrortu when he supplemented his initial filing with a compliant waiver on April 25, 2021. At that point, in line with *Renco I*'s references to the judgment of the ICJ in the *Genocide Convention* case, "the unmet condition is met."<sup>330</sup> In that judgment, while acknowledging that the prerequisites for jurisdiction are generally assessed as of the time an application is filed, the Court declared its preference for a different timing when the issues "governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, **before the Court ruled on its jurisdiction.**"<sup>331</sup>
270. Article 10.22.1 of the Treaty requires the Tribunal to decide "the issues in dispute in accordance with this Agreement and applicable principles of international law." The *Renco I* majority, on whose analysis my colleagues rely almost entirely, considered the *Genocide Convention* decision as laying down one of the "applicable principles of international law" but concluded that the Tribunal faced a conflict between those international law authorities "and the interpretation of Article 10.18 adopted by the United States and Peru," and giving the matter "careful consideration," the majority in *Renco I* said they felt "constrained to conclude that the parties' interpretation" of Article 10.18 established "a *lex specialis* which must prevail over" international law principles.

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<sup>329</sup> Para. 236 above.

<sup>330</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 147, fn. 29, citing *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, [2008] ICJ Reports 412, Judgment, November 18, 2008.

<sup>331</sup> **Exhibit RLA-032**, **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 149 (emphasis added).

271. The “principles of international law” accepted as relevant and material (but not followed) by the tribunal majority in *Renco I* included not only the judgment of the ICJ in *Genocide Convention* but the earlier judgment of the PCIJ in *Mavrommatis*.<sup>332</sup> The *Mavrommatis* doctrine states that jurisdiction is to be assessed “at the latest by the date when the court decides on its jurisdiction ... and it is preferable, **except in special circumstances**, to conclude that the condition has, **from that point on**, been fulfilled.”<sup>333</sup> The question under “applicable principles of international law” was whether **at that time**, and not at the time proceedings were initiated, all the preconditions for jurisdiction had been met. The *Renco I* tribunal considered the *Mavrommatis* doctrine to be relevant and applicable to investor-state arbitration. The question before this Tribunal, as it was before the *Renco I* tribunal, is whether “special circumstances” exist to displace the ordinarily applicable *Mavrommatis* rule.

(i) *The lex specialis Issue*

272. Stripped to its essentials, this case is therefore about whether the *lex specialis* created by the Treaty contains words of limitation tying the hands of the Tribunal in its task of defining the relevant evidentiary record on which Peru’s jurisdictional objection is to be decided.

273. I agree with my colleagues that the Treaty creates a *lex specialis* in terms of jurisdictional prerequisites, but in my view there is nothing *specialis* in the USPTPA to bar the Tribunal from assessing the existence or non-existence of the jurisdictional prerequisites based on the whole of the evidentiary record as it presently stands.

274. The framers of the USPTPA were willing and able to give direction to tribunals about evidentiary matters where they thought it appropriate to do so. For example, as we have just seen with respect to Peru’s Objection 1, the Treaty expressly precludes the reception of any fact evidence in applications under Article 10.20.4 where a state contends that, as a matter of law, the claimant cannot succeed and “the tribunal shall assume to be true claimants’ factual allegations.” There are no such words of limitation in the USPTPA

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<sup>332</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 145, fn. 28, citing *Case of the Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, PCIJ Series A, No. 2, Judgment, August 30, 1924, para. 34.

<sup>333</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 149 (emphasis added).

applicable to evidence that may be considered in relation to Objection 4. The Tribunal is to apply its ordinary authority to “determine the admissibility, relevance, materiality and weight of the evidence offered.”<sup>334</sup>

(ii) *The “Accompanied By” Issue*

275. The Treaty says the notice of arbitration or statement of claim must be “accompanied by” a compliant waiver. The condition was not met with the original filing but as of now “the unmet condition is met” and, if the Tribunal’s jurisdiction is to be determined as of now (when for the first time Peru’s objection is presented for decision) all of the jurisdictional prerequisites are satisfied.

276. In my respectful opinion, the analysis of the *Renco I* majority conflated the questions of **what** must be proven to establish jurisdiction with the separate question of **when** the relevant evidentiary record is to be considered perfected. The Treaty established a *lex specialis* with respect to the **what** (being the substantive requirements) but contains no direction (or limitation) as to **when** the evidentiary record must be taken as ripe for adjudication.

(iii) *The Non-Existent Tribunal Issue*

277. My colleagues’ theory seems to be that the *kompetenz* tribunal is different from the merits tribunal and if the *kompetenz* tribunal makes a negative decision then the merits tribunal never comes into existence.

278. Then, at para. 239, my colleagues adopt the conclusion of the *Renco I* majority that “there is no arbitration agreement, and so the Tribunal is not a tribunal.” This theory adopts the somewhat different approach that the Tribunal is “alive” for purposes of *kompetenz-kompetenz*, then dead if no *kompetenz*, but continues in life if there is *kompetenz*, but if dead then “the Tribunal is not a tribunal.” This exclusive focus on the disputed arbitration agreement fails to identify where, in the absence of a valid arbitration agreement, Peru

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<sup>334</sup> UNCITRAL Rules, Article 27(4).

consented to the Tribunal exercising *kompetenz-kompetenz* jurisdiction in the first place.<sup>335</sup>

279. It is not clear how a tribunal that does not exist can nevertheless pronounce on its own existence unless, like Schrödinger’s famous cat, it is simultaneously both alive and dead. Elsewhere the majority acknowledge that at least for present purposes the Tribunal is a tribunal and

... has a mandate to rule upon its own jurisdiction – and indeed “pronounce on its own existence” (albeit not finally). In order to discharge this mandate, it must conduct an arbitral procedure, with all steps, orders and directions that may be necessary in order to ensure a fair and legally compliant process. But this mandate obviously does not mean that the Tribunal is in fact “alive,” or is in fact a valid Tribunal for any purpose beyond *kompetenz-kompetenz*.<sup>336</sup>

In the end, therefore, we all agree the Tribunal is “alive” and is a “valid Tribunal” for purposes of *kompetenz-kompetenz* which is the only jurisdiction being exercised at this stage. At issue, as mentioned, is the Tribunal’s authority to determine the evidentiary record relevant to this limited mandate.

280. In my view the source of *kompetenz-kompetenz* jurisdiction lies outside the agreement to which Peru is said never to have consented and the obvious source is the Treaty and its authorization of the UNCITRAL process including *kompetenz-kompetenz*. As Peru’s consent to the application of the UNCITRAL Rules is the basis for the present (limited) mandate the Tribunal has under the UNCITRAL Rules the usual procedural authority to decide the scope of admissible evidence on which to base its decision on Objection 4, including taking into account Mr. Amorrortu’s April 25, 2021 compliant waiver.
281. In carrying out its duties under the UNCITRAL Rules, a tribunal can and does receive evidence except where directed not to do so (as in respect of Peru’s Objection 1 under Article 10.20.4 of the USPTPA). In dealing with interlocutory or procedural issues including *kompetenz-kompetenz*, the Tribunal is master of its own procedure including, in my view, determining the evidentiary record it considers relevant to the validity of

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<sup>335</sup> My colleagues state at para. 246 above: “... Whether or not the Tribunal is ‘alive’ or ‘dead’” will ultimately depend on ruling of a competent court. In the meantime, it may continue in order to rule on its own jurisdiction and (if it considers itself ‘alive,’ subject to a court’s final ruling) the merits.”

<sup>336</sup> Para. 246 above.

Objection 4. Evidence can be received on jurisdictional issues in UNCITRAL arbitrations just as it may be received by the international courts. If *Mavrommatis* was not the general rule applicable except in “special circumstances,” the *Renco I* majority (and my colleagues at para. 239) would not have found it necessary to contend that in the case of the USPTPA the *lex specialis* “prevails” over *Mavrommatis*. If, however, the USPTPA does not provide evidentiary instructions inconsistent with *Mavrommatis*, then Mr. Amorrotu’s compliant waiver should be taken into consideration just as in the *Genocide Convention* case the ICJ had no trouble taking cognizance of the fact Serbia had subsequent to the deficient initiation of proceedings, become a member of the United Nations.

282. My colleagues take comfort from the fact that the United States agrees “with the Respondent that an invalid waiver can only be remedied with the consent of the respondent State.”<sup>337</sup> While the Tribunal is to take into account the views of the Treaty Parties as to what they intended,<sup>338</sup> the Tribunal is not bound by their views, particularly as their submissions in this case are based on the text of the USPTPA and the Tribunal can see for itself that there is nothing in the text of the Treaty to impose a “frozen record” theory or a “one strike and you’re out” limitation to terminate Peru’s “open offer” to arbitrate, nor is there anything in the Treaty to preclude the Tribunal from receiving evidence in the ordinary way into the evidentiary record that is probative of whether or not Mr. Amorrotu has waived other potential remedies.
283. The *Renco I* tribunal majority took the view that while in the *Mavrommatis*<sup>339</sup> and *Genocide Convention* cases, “the jurisdictional defect was **cured** as a result of a

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<sup>337</sup> Para. 218 above.

<sup>338</sup> **Exhibit RLA-001**, VCLT, Article 31(3)(a)-(b).

<sup>339</sup> See **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 146:

The Court rejected the submission of the United Kingdom and held as follows: Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant’s suit. **The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications** (emphasis added).

subsequent event during the proceedings<sup>340</sup> ... in the present case, the jurisdictional defect ... remains **uncured**.<sup>341</sup> Of course, the only reason the jurisdictional defect remained “uncured” was because the *Renco I* majority refused Renco’s request to file a compliant waiver. The *Renco I* majority froze the jurisdictional record once Renco had made its misstep. Similarly, in this case, my colleagues agree with *Renco I* that the Tribunal is not allowed to take into account Mr. Amorrortu’s compliant waiver even though it has been part of the Tribunal evidentiary record for more than a year and Peru has not sought to have it struck. Peru says the compliant waiver is irrelevant but relevance is a decision for the Tribunal.

(iv) *More Than Just “Efficiency” Is at Stake*

284. My colleagues acknowledge that “it would have been more efficient if the *Mavrommatis* doctrine applied”<sup>342</sup> but the ICJ did not adopt the *Mavrommatis* doctrine purely for the sake of efficiency (although of course it is more efficient) but because “it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew.”<sup>343</sup> The relevant passage in *Genocide Convention* reads as follows,

What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew – or to initiate fresh proceedings – and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.<sup>344</sup>

285. As in *Mavrommatis* and *Genocide Convention*, the missing jurisdictional link in the present case arrived late but it arrived in time for the Tribunal’s current deliberations on jurisdiction. Peru’s offer to arbitrate under the UNCITRAL Rules was never withdrawn.

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<sup>340</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 151.

<sup>341</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 152 (emphasis added).

<sup>342</sup> Para. 240 above.

<sup>343</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 149.

<sup>344</sup> **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 149, fn. 29, citing *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, [2008] ICJ Reports 412, Judgment, November 18, 2008, para. 441.

*Genocide Convention* asks the question “is the unmet condition now met” and the answer in the present case is yes because if, instead of contesting the jurisdictional objection, Mr. Amorrortu had withdrawn his claim, he could forthwith have filed a fresh Notice of Arbitration “accompanied by” a compliant waiver and there would have been no objection under Article 10.18.2 of the Treaty. Mr. Amorrortu thus meets the *Genocide Convention* test for the application of *Mavrommatis*. Accordingly, in the absence of any “special circumstances” compelling a “frozen record” or “one strike and you’re out” limitation, and rejecting the *lex specialis* argument of the *Renco I* majority (adopted by my colleagues) which reads into the Treaty words that are not there, my view is that this Tribunal has jurisdiction to proceed to decide Mr. Amorrortu’s claim on its merits and ought to do so.

(v) *Areas of Agreement with the Majority*

286. It is convenient to summarize areas of agreement and disagreement:

- (i) The Tribunal is unanimous that the foundation of its jurisdiction is consent. There is no doubt that “unlike the [ICJ] and the [PCIJ], this Tribunal is not a standing body with its own independent existence or powers.”<sup>345</sup> However, in my view, the fact this Tribunal is not “a standing body with its own independent existence and powers” is not relevant to the ruling once it is recognized that the Treaty and the UNCITRAL Rules, to which Peru consented, provide the basis for the Tribunal’s *kompetenz-kompetenz* jurisdiction.
- (ii) My colleagues assert that “the Tribunal has no existence or authority independent of the arbitration agreement on the basis of which it was purportedly appointed”<sup>346</sup> and that the Tribunal cannot “endow itself with jurisdiction” because it was “constituted on the basis of an invalid arbitration agreement.”<sup>347</sup> But in my view, the Tribunal does have “existence and authority” under the Treaty and the UNCITRAL Rules to determine its *kompetenz-kompetenz*, which is the only subject

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<sup>345</sup> Para. 241 above.

<sup>346</sup> Para. 242 above.

<sup>347</sup> Para. 237 above.

matter of the present deliberations, including the identification of the relevant evidentiary record.

- (iii) My colleagues then write that the “UNCITRAL Rules cannot create consent where consent did not already exist at the relevant time,”<sup>348</sup> which is true, but the UNCITRAL Rules permit the *kompetenz* tribunal to determine when is the “relevant time,” namely whether it is when Mr. Amorrortu made his initial misstep or, as the *Mavrommatis* doctrine holds, at the time the Tribunal decides on the validity of Peru’s jurisdictional objection, which is now.
- (iv) My colleagues state that “as of the date the Claimant submitted his revised acceptance, there was no valid ‘Tribunal’ to receive it.”<sup>349</sup> The assertion that there was no “valid tribunal” in existence in April 2021 seems to me inconsistent with our shared view that now, more than a year later, and from the time Mr. Amorrortu filed his claim, there has been a Tribunal validly seized of the *kompetenz* issue. Under the *Mavrommatis* doctrine, there could be no objection to the filing of a claimant’s “revised acceptance,” just as evidence of changed circumstances was received and acted upon in the *Mavrommatis* and the *Genocide Convention* cases when the courts were similarly faced with (and rejected) the argument that the “unmet condition” could not be subsequently met.
- (v) There is nothing retrospective about the application of the *Mavrommatis* doctrine. It simply identifies the relevant evidentiary record at the time jurisdiction is ripe for adjudication and that time is now.
- (vi) My colleagues then state that jurisdiction to determine the merits of Mr. Amorrortu’s claim is fixed and determined as of his initial deficient filing date and not “from a later date, retrospectively, and on the basis of steps the (invalidly constituted) panel has taken in the meantime.”<sup>350</sup> But the majority had earlier stated that the panel is **validly** constituted for purposes of *kompetenz-kompetenz* and it is not clear what steps our “validly constituted” panel has taken “in the meantime” (unless reference is made to the third party funding disclosure order, in which the

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<sup>348</sup> Para. 249 above.

<sup>349</sup> Para. 245 above.

<sup>350</sup> Para. 244 above.

Tribunal was unanimous) because in fact the Tribunal has taken no “steps” in respect of Objection 4 until now apart from setting a schedule.

- (vii) My colleagues assert that the “mandate to rule upon its own jurisdiction ... does not mean that the Tribunal is in fact ‘alive,’ or is in fact a valid Tribunal for any purpose beyond *kompetenz-kompetenz*.”<sup>351</sup> However, it is precisely *kompetenz-kompetenz* that we are engaged upon and in my view, in the absence of any “special circumstances,” the Tribunal can and should apply the *Mavrommatis* doctrine.
- (viii) My colleagues take the view that if the Tribunal determines that it has no *kompetenz* to rule on Mr. Amorrortu’s claim, it “will be deprived of jurisdiction *ab initio*.”<sup>352</sup> If what is meant is that in that situation the Tribunal never had jurisdiction **to adjudicate on the validity of Mr. Amorrortu’s claim on the merits**, it would be true, but a tribunal’s decision to reject jurisdiction to try the ultimate issue does not mean the Tribunal never had **any** jurisdiction under Peru’s consent to the Treaty and the UNCITRAL Rules. The present application engages only the exercise of *kompetenz-kompetenz* jurisdiction, which in turn requires the Tribunal to determine the relevant evidentiary record to be considered in that exercise.
- (ix) My colleagues assert that “if the defect in the arbitration agreement were cured, a new tribunal would have to be appointed and constituted ...”<sup>353</sup> However, according to the *Mavrommatis* doctrine, the effect of its application is not a new claim but simply a determination by the Tribunal that the initial claim proceeds because “the unmet condition is met.” In neither *Mavrommatis* nor the *Genocide Convention* cases were claims considered new as opposed to the original claims which were permitted to proceed on the merits based on the evidentiary record as of the relevant date.
- (x) My colleagues’ contention that “the Tribunal has no jurisdiction over the Parties and has in fact never had any jurisdiction from the very beginning of these

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<sup>351</sup> Para. 246 above.

<sup>352</sup> Para. 236 above.

<sup>353</sup> Para. 243 above.

proceedings”<sup>354</sup> will come as a surprise to Mr. Amorrortu, who was obliged to comply with the Tribunal’s third party funding disclosure order.

- (xi) My colleagues then assert that “the standing and authority of the Tribunal must necessarily be tested as of the date of its purported constitution.”<sup>355</sup> Even if the statement were limited to the “standing and authority of the Tribunal **to decide the ultimate merits of Mr. Amorrortu’s claim,**” it merely restates the frozen record theory which was rejected in *Mavrommatis* and the *Genocide Convention* judgments.

(vi) *The Preferred Disposition*

287. I conclude that Mr. Amorrortu’s compliant waiver forms part of the relevant evidentiary record, and thus that all of the jurisdictional prerequisites were in place before (to paraphrase the ICJ) the Tribunal “rules on its jurisdiction.” As a result (in my view) Mr. Amorrortu’s claim can proceed to the merits and I need not deal with the Claimant’s alternative arguments on waiver and estoppel. However I agree with the disposition of the estoppel/waiver issue proposed by my colleagues for the reasons they have given.
288. I would dismiss the Respondent’s objection in respect of Article 10.18.2, without, of course, forming any view at this early stage about the strengths or weaknesses of Mr. Amorrortu’s claim.

## **PART 7 - DECISION**

289. For the reasons outlined above, the Tribunal by majority:
- (i) finds that the Claimant has failed to comply with the requirement of Article 10.18.2(b) of the USPTPA by not providing a compliant waiver within the deadline specified in Article 10.16.4 of the USPTPA;
  - (ii) finds that the Claimant has failed to establish the requirements for the Respondent’s consent to arbitrate under the USPTPA;

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<sup>354</sup> Para. 236 above.

<sup>355</sup> Para. 244 above.

- (iii) rejects the Claimant's request for leave to amend his Notice of Arbitration in order to attempt to cure his defective waiver;
- (iv) dismisses the Claimant's claims for lack of jurisdiction; and
- (v) reserves the issue of costs pending receipt of the submissions from the Parties, after which the Tribunal will render a Final Award.

Seat of the arbitration: Paris, France

Date: August 5, 2022

The Arbitral Tribunal



Prof. Bernard Hanotiau



Mr. Toby Landau, QC



Hon. Ian Binnie, CC, QC  
(Presiding Arbitrator)