

PCA Case No. 2023-22

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

- and -

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

- between -

BACILIO AMORRORTU (USA)

(the “Claimant”)

- and -

THE REPUBLIC OF PERU

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

PROCEDURAL ORDER NO. 5

(Second Decision on Document Production)

Tribunal

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

Registry

Permanent Court of Arbitration

6 February 2025

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I. PROCEDURAL BACKGROUND

1. On 29 August 2024, the Tribunal issued Procedural Order No. 4 (Decision on Document Production) (“**PO4**”), whereby it ruled on the Parties’ requests for document production (“**RFPs**”) set forth in the Redfern Schedules they had filed with the Tribunal on 9 July 2024. In relevant part, PO4 provides as follows:
 - a. Certain members of the Tribunal are concerned that several of the Claimant’s requests for document production as set out in his Redfern Schedule are overly broad (*see* Claimant’s Requests Nos. 2, 3, 4, and 6). However, in view of the potential relevance and materiality of the documents falling under each of these requests, the Tribunal invites the Claimant, if he so wishes, to submit more focused requests for documents falling within the categories of documents referenced in these requests. Any such requests should be filed no later than Friday, 6 September 2024. If it so wishes, the Respondent may thereafter provide a response to the Claimant’s amended requests by Friday, 13 September 2024.
 - b. The Respondent objects to production in respect of several of the Claimant’s requests for document production on the basis of privilege, political and institutional sensitivity and other related grounds. To permit the Tribunal adequately to consider the one request among those that the Tribunal would grant in principle on the grounds of relevance (*see* Claimant’s Request No. 1) the Tribunal requires the Respondent to provide the Claimant with a privilege log for any responsive documents over which it claims privilege and/or confidentiality (Art. 9(2)(b) and (f) IBA Rules) identifying for each document (i) the author(s); (b) the recipient(s) (if any); (c) the subject matter of the document or portion thereof claimed to be privileged or confidential; (d) the date; (e) the basis for the claim of privilege, confidentiality or other grounds on which the responsive documents are withheld (whether under domestic or international law, or otherwise under an applicable legal or ethical standard and citations of the law or standard relied upon); and (f) an indication of which relevant interest(s), if any, might be prejudiced in the event the Tribunal were to order the production of the requested documents. The Respondent must provide such privilege log no later than no later than Tuesday, 10 September 2024. Thereafter, if he so wishes, no later than Tuesday, 17 September 2024 the Claimant may re-submit the requests identified in this sub-paragraph by filing with the Tribunal a copy of any privilege log provided by the Respondent, together with any comments he might have on such privilege log, including what measures should be taken, if any, to safeguard the interests, identified by the Respondent, that may be prejudiced. The Respondent may then provide a response by Friday, 20 September 2024.
 - c. The Claimant objects to production in respect of several of the Respondent’s requests for document production on the basis of commercial privilege (*see* Respondent’s Requests Nos. 4, 8, 9, 10, 11, and 12). To permit the Tribunal adequately to consider these requests, the Tribunal requires the Claimant to provide the Respondent with a privilege log for any responsive documents

over which he claims privilege and/or confidentiality (Art. 9(2)(e) of the IBA Rules) identifying for each document (i) the author(s); (b) the recipient(s) (if any); (c) the subject matter of the document or portion thereof claimed to be privileged or confidential; (d) the date; (e) the basis for the claim of privilege, confidentiality or other grounds on which the responsive documents are withheld (whether under domestic or international law, or otherwise under an applicable legal or ethical standard and citations of the law or standard relied upon); and (f) an indication of which relevant interest(s), if any, might be prejudiced in the event the Tribunal were to order the production of the requested documents. The Claimant must provide such privilege logs no later than Tuesday, 10 September 2024. Thereafter, if it so wishes, no later than Tuesday, 17 September 2024 the Respondent may re-submit the requests identified in this sub-paragraph by filing with the Tribunal a copy of any privilege log provided by the Claimant, together with any comments it might have on such privilege log, including what measures should be taken, if any, to safeguard the interests, identified by the Claimant, that may be prejudiced. The Claimant may then provide a response by Friday, 20 September 2024.

- d. The Claimant objects to production in respect of several of the Respondent's requests for document production on the basis that he is not in the possession, custody or control of any responsive documents (*see* Respondent's Requests Nos. 5, 6, and 7). The Tribunal has granted these requests to the extent that any responsive documents are in the Claimant's possession, custody or control. In this respect, the Tribunal recalls the Claimant's representation that he is the President of Baspetrol (CWS-1, para. 1). In the circumstances, no later than Friday, 6 September 2024, the Claimant is required provide an explanation as to whether these documents were ever in his possession, custody, or control; if not, why not; and if so, how the Claimant came to lose possession, custody or control of these documents. Thereafter, if it so wishes, the Respondent may re-submit those requests to the Tribunal for a final ruling no later than Friday, 13 September 2024.
- e. Aside for the above requests, the Tribunal has granted in whole or in part several of the Parties' requests for document production (*see in particular* Claimant's Requests Nos. 8, 9, 10, 12, and 13 and Respondent's Request No. 1). The Claimant has also agreed partially to production in respect of several of the Respondent's requests (*see* Respondent's Requests Nos. 2, 4, 8, 9, 10, 11, and 12). The Parties are directed to produce the documents as ordered by the Tribunal in respect of the requests identified in this sub-paragraph – to the extent such documents have not already been produced – no later than Friday, 6 September 2024.

- 2. On 6 September 2024, the Claimant filed a submission and Redfern Schedule in response to the Tribunal's orders and instructions as outlined in paragraphs 9(a), (c), (d), and (e) of PO4 (the "**Claimant's First Submission**").
- 3. On 13 September 2024, the Parties informed the Tribunal that they had agreed to extend certain deadlines set out in PO4 for the filing of further submissions regarding the Claimant's RFPs Nos. 1, 8, and 9. The Tribunal approved the Parties' agreement on 24 September 2024.

4. Also on 13 September 2024, the Respondent filed its response to the Claimant's First Submission (the "**Respondent's First Submission**").
5. On 24 September 2024, the Claimant: (i) filed a response to the privilege logs submitted by the Respondent in response to the Claimant's RFPs No. 1 (the "**First Privilege Log**") as well as RFPs Nos. 8 and 9 (the "**Second Privilege Log**"); (ii) resubmitted his RFPs Nos. 1, 8, and 9 in the form of a Redfern Schedule; and (iii) filed the Expert Report of Mr Aníbal Quiroga (the "**Quiroga Report**") (the "**Claimant's Second Submission**").
6. By a letter dated 25 September 2024 (the "**Respondent's Second Submission**"), the Respondent requested the Tribunal to issue an order:
 - (i) Striking the expert report of Mr. Aníbal Quiroga submitted as Exhibit B to Claimant's Response;
 - (ii) Requiring Claimant to re-submit a Response to Respondent's Privilege Log for RFP No. 1 without any reference to Mr. Anibal Quiroga's Expert Report;
 - (iii) Suspending the deadline of 27 September 2024 for Respondent to file its Response to Claimant's comments regarding Respondent's Privilege Log for RFP No. 1; and
 - (iv) Granting Respondent leave to comment on Claimant's Response to Peru's Privilege Log for RFP Nos. 8 and 9.
7. On 27 September 2024, the Tribunal (i) invited the Claimant to submit comments on the Respondent's Second Submission by 30 September 2024; and (ii) suspended the deadline for the filing of the Respondent's comments on the Claimant's Second Submission.
8. By a letter dated 30 September 2024 (the "**Claimant's Third Submission**"), the Claimant requested that the Tribunal:
 - (i) Strike and deny all requests contained in Peru's Correspondence.
 - (ii) To the extent the Tribunal is inclined to allow Peru to submit an expert report to respond to Mr. Quiroga's Report, to limit the same to four pages (the same length of Dr. Quiroga's report), and to require Peru to submit it by October 1, 2024 (i.e. a period not longer than 7 days, which is the same amount of time that Mr. Amorrortu had to sort its expert report to competently respond to Peru's Privilege Log regarding RFP No. 1).
 - (iii) If the Tribunal grants Peru leave to file an expert report, that Mr. Amorrortu be granted leave to provide a response to the same.
 - (iv) Require Peru to provide Privilege Logs that comply with New York rules and specificity requirements; or, in the alternative, require Peru to produce all documents in its possession, custody or control concerning RFPs. Nos. 1 and 8, and 9 ((with the limitation established in the Procedural Order with regard to RFP No. 9).
9. On 14 October 2024, the Tribunal ruled as follows:
 - (i) Grants leave to the Respondent to provide a response to the Quiroga Report no later than Wednesday, 16 October 2024;

(ii) Grants leave to the Respondent to provide a response to the Claimant's 25 September 2024 comments on the Second Privilege Log no later than Wednesday, 16 October 2024; and

(iii) Rejects all remaining requests for relief set out in the [Respondent's Second Submission] and the [Claimant's Third Submission].

10. On 16 October 2024, the Respondent filed a response to the Claimant's Second Submission (the "**Respondent's Third Submission**").

11. On 18 December 2024, the Claimant requested leave to file a decision issued by the Constitutional Tribunal of the Republic of Peru on 17 December 2024 (the "**Judgment of the Constitutional Court**"). According to the Claimant, said judgment

requires that the Presidency of the Board of Superior Prosecutors of the Lima Central Fiscal District, deliver, within a period of no more than 5 business days, copies of the Benefits and Effective Collaboration Agreement dated February 15, 2019 and the Supplementary Agreement dated May 20, 2019. This Order is relevant and material to the outcome of the case *sub judice* because it nullifies arguments made by the Republic of Peru in the discovery process, and that is why Claimant is requesting leave to produce the same in this case.

12. On 24 December 2024, the Respondent noted that it did not object to the Claimant's request to file the Judgment of the Constitutional Court, so long as it was granted an opportunity to comment on its impact on any of the document production requests that remained outstanding.

13. On 27 December 2024, the Tribunal granted leave to the Claimant to file the Judgment of the Constitutional Court.

14. On 30 December 2024, the Claimant filed the Judgment of the Constitutional Court, as well as his comments thereon.

15. On 6 January 2025, the Respondent filed its comments on the Judgment of the Constitutional Court.

II. THE TRIBUNAL'S ANALYSIS

16. In this section, the Tribunal decides the Parties' outstanding document production requests, after considering the Parties' submissions in response to paragraph 9 of PO4. The Parties' respective positions on each RFP are set out below, followed by the Tribunal's analysis and decision.

17. When ruling on the Parties' document production requests, the Tribunal has taken into account the relevant provisions of the UNCITRAL Rules and Procedural Order No. 1, dated 27 June 2023 ("**PO1**"). In accordance with Section 6.1 of PO1, the Tribunal has also used, as an additional guideline, the *IBA Rules on the Taking of Evidence in International Arbitration 2020* (the "**IBA Rules**").

18. The Tribunal has grouped the Parties' outstanding RFPs by subject matter into six categories: (i) the Claimant's RFPs Nos. 2, 3, 4, and 6; (ii) the Claimant's RFP No. 1; (iii) the Claimant's

RFPs Nos. 8 and 9; (iv) the Respondent's RFP No. 1; (v) the Respondent's RFPs Nos. 5, 6, and 7; and (vi) the Respondent's RFPs Nos. 11 and 12. Each category is addressed in turn.

1. The Claimant's RFPs Nos. 2, 3, 4, and 6

a) Introduction

19. By its PO4, the Tribunal ruled on the Claimant's RFPs Nos. 2, 3, 4, and 6 as follows:

Certain members of the Tribunal are concerned that [*the Claimant's RFPs Nos. 2, 3, 4, and 6 are*] overbroad. The Claimant is therefore invited to reframe [*the Claimant's RFPs Nos. 2, 3, 4, and 6*] in accordance with the Tribunal's directions set out in Sections II and III of Procedural Order No. 4 (Document Production). In particular, the Claimant should direct any reframed request to the purported relationship between Graña y Montero's alleged corruption scheme, as relied upon by the Claimant, and the disposition of Blocks III and IV.

20. In his First Submission, dated 6 September 2024, the Claimant reframed RFPs Nos. 2, 3, 4, and 6 as indicated below. The Respondent provided a response in its First Submission, dated 13 September 2024.

b) Claimant's RFP No. 2

21. As set out in PO4, by its RFP No. 2 the Claimant requested the following documents:

Full copies of any sworn testimony given by Graña y Montero (including, but not limited to, José Graña and Hernando Graña) and Jorge Barata (Director of Odebrecht in Peru), that are in the possession, custody, or control of the Lava Jato Special Team and relate to the corruption scheme that Mr. Amorrotu argues affected the adjudication of Blocks III and IV in favor of Graña y Montero.

22. The Claimant later reframed RFP No. 2 as follows:

Copies of: (i) the Effective Collaboration Agreement ("Acuerdos de Colaboración Eficaz") entered into by the company Graña y Montero with the Peruvian Prosecutor's Office, in the custody of the Public Ministry of Peru, which ended in a Guilty Plea Agreement by Graña y Montero in May of 2021; and (ii) the Guilty Plea Agreement ("Acuerdo de Culpabilidad") entered into by the company Graña y Montero in May 2021, whereby Graña y Montero admitted to participating in acts of corruption involving various public works and government contracts.

This request is limited to two files encompassing agreements entered into by the company Graña y Montero, which detail the methods and practices used by this company and to secure public contracts through corrupt means. The scope of this request includes testimony that discusses or pertains to payments made by Graña y Montero to Nadine Heredia and other public officials (referred to in Peru as "coimas adelantadas") who were involved in, or had influence over, the allocation or adjudication of Blocks III and IV, as well as files which can prove corruption in this case.

23. **The Claimant's Position.** The Claimant asserts that RFP No. 2 as reframed is focused on the specific aspects surrounding the "bribery scheme" as opposed to a "broader (but related) sequence

of corruption activities”.¹ According to the Claimant, the documents he requests describe the methodology of the bribery scheme and the amount allegedly paid by Graña y Montero to Nadine Heredia to be favoured in the tender of contracts in Peru, such as the contracts to operate oil Blocks III and IV of Talara in 2014.²

24. **The Respondent’s Position.** The Respondent requests that the Tribunal reject the Claimant’s reframed RFP No. 2 for three reasons. First, the Respondent submits that it is “an entirely new request”.³ Second, the Respondent argues that the request is not tailored to issues that are relevant and material to the determination of the case pursuant to Article 3(3)(b) and 9(2)(a) of the IBA Rules.⁴ The Respondent explains that the law firm that assisted Graña y Montero in the negotiations with the Prosecutor’s Office indicated that the Plea Agreement involved Graña y Montero’s participation in “5 corrupted projects” executed with Odebrecht and others of the so-called “Construction Club”.⁵ According to the Respondent, as reflected not only in its Statement of Defence but also in the evidence presented by the Claimant itself⁶, none of the “5 corrupted projects” involved Blocks III and IV.⁷ In the Respondent’s view, [REDACTED]⁸
25. Lastly, the Respondent reiterated that the documents requested by the Claimant are subject to legal privilege by virtue of the principle of secrecy of criminal investigations codified under Peruvian law in Article 324 of the Peruvian Code of Criminal Procedure (the “PCCP”), and thus must be excluded from production pursuant to Article 9(2)(b) and 9(2)(f) of the IBA Rules.⁹
26. **The Tribunal’s Analysis.** The Parties’ submissions raise two distinct issues with respect to the Claimant’s RFP No. 2. First, the Parties disagree whether the documents which are requested by the Claimant are relevant and material to the adjudication of this dispute. Second, even if the Tribunal were to consider that such documents are relevant and material, the Respondent asserts that it would still be constrained to withhold the documents and must be permitted to do so by reason of the protection afforded to ongoing criminal investigations. Each of these issues is addressed in turn.
27. The crux of the Parties’ disagreement in respect of the relevance and materiality of the documents falling under Claimant’s RFP No. 2 lies in the relationship between the documents for which the

¹ Claimant’s First Submission, p. 3.

² Claimant’s First Submission, p. 3.

³ Respondent’s First Submission, p. 4.

⁴ Respondent’s First Submission, p. 4.

⁵ Respondent’s First Submission, p. 4.

⁶ Respondent’s First Submission, p. 4, citing “*La Vanguardia, Constructora admite soborno por 3,7 millones de dólares en gobierno de Humala*”, p. 1 (C-81).

⁷ Respondent’s First Submission, p. 4.

⁸ Respondent’s First Submission, p. 4 [REDACTED]

[REDACTED] See also Statement of Defence, 29 April 2024, para. 208.

⁹ Respondent’s First Submission, p. 5.

Claimant requests production and the adjudication of Blocks III and IV to Graña y Montero – a matter lying at the heart of the present arbitration.

28. [REDACTED] ¹⁰ Since the documents described in the original RFP No. 2 “relate to the corruption scheme that Mr. Amorrotu argues affected the adjudication of Blocks III and IV in favor of Graña y Montero”, ¹¹ the Respondent states that such documents, as particularized by the Claimant, “do not exist”. To the extent that the specific plea agreements identified by the Claimant under RFP No. 2 do exist, the Respondent submits that they do not relate to Blocks III and IV and are thus not relevant to any matter in dispute between the Parties. ¹²
29. The Claimant, in turn, submits that the documents he requests under his reframed RFP No. 2 illustrate the methodology of the alleged bribery scheme and are therefore material to the outcome of this case. He is nonetheless yet to disprove the Respondent’s evidence that the corrupt scheme described in the plea agreements, for which he requests production, bears any relation to Blocks III and IV.
30. Critically, however, the Claimant also maintains that he is “entitled to the documents evidencing the referenced sworn testimony and make the determination as to whether this testimony confirms the corruption scheme at issue”. ¹³ The Tribunal considers the Claimant’s request to meet the standard of relevance and materiality in one respect. [REDACTED]
- [REDACTED]. The Respondent has elected to rely upon this evidence. How then is the Claimant to engage this evidence and test its veracity? That can only be done by affording the Claimant’s counsel access to the documentary record that Dr Vela relies upon in support of his testimony. The Claimant is entitled to a fair opportunity to test the veracity of Dr Vela’s testimony, and on this basis, those documents, under this request, that permit the Claimant to do so are relevant and material. The Claimant must therefore be granted an opportunity to test the veracity of Dr Vela’s statement by accessing the documents supporting his testimony. Otherwise, the Claimant would be required to take Dr Vela’s testimony at face value. That would not be congruent with the Tribunal’s duty to ensure its proceedings are fair.
31. For the avoidance of doubt, the Tribunal confirms that the foregoing determination is not based on the premise that the Claimant has established corruption on a *prima facie* basis. The Tribunal also believes that an allegation of State corruption, by itself, cannot serve as a basis for a claimant to gain access to documents in possession of a respondent State by way of a document production request, much less when the request relates to sensitive documents held by the State’s

¹⁰ PO4, Claimant’s RFP No. 2, PDF p. 15; [REDACTED].

¹¹ PO4, Claimant’s RFP No. 2, PDF p. 14.

¹² PO4, Claimant’s RFP No. 2, PDF pp. 15-17.

¹³ PO4, Claimant’s RFP No. 2, PDF p. 17.

prosecutorial authorities. Rather, the Tribunal's determination seeks only to ensure that the Claimant has a fair opportunity to test the Respondent's evidence. In other words, it is the Respondent's decision to offer witness testimony on the content of the documents falling under the Claimant's reframed RFP No. 2 that has rendered these documents relevant to the case and material to its outcome.

32. While the preceding conclusion disposes of the question on the relevance and materiality of the documents for which the Claimant requests production, the Respondent has also objected to production by relying on the principle of secrecy of criminal investigations enshrined in Article 324 of the PCCP, which reads: "the investigation has a reserved character. Only the parties directly involved and their duly accredited lawyers can have access to its contents".¹⁴ According to the Respondent, this provision presents a legal impediment for production, as well as a basis for privilege, under Article 9(2)(b) of the IBA Rules. Article 324 of the PCCP also renders the documents of any ongoing investigation "reserved", in the Respondent's view, and thus also "sensitive information" for the purposes of Article 9(2)(f) of the IBA Rules.
33. The Tribunal starts its analysis with Article 10.22 (Governing Law) of the USPTPA, which reads: "Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." This provision requires the Tribunal to apply "the Agreement and applicable rules of international law" not only when considering a "claim" – that is, a claim on its merits – but more broadly when deciding any "issues in dispute" pending before it.
34. The Parties have not referred in this connection to any provisions of the USPTPA or any rules of international law: they rely essentially on the IBA Rules, from which the Tribunal may draw guidance under Section 6.1 of PO1. Accordingly, the Tribunal will have regard to the IBA Rules for the purposes of this decision.
35. Article 9(2), subparagraphs (b) and (f), of the IBA Rules read:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:

...

- (b) legal impediment or privilege under the legal or ethical rules **determined by the Arbitral Tribunal to be applicable** (see Article 9.4 below);

...

- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) **that the Arbitral Tribunal determines to be compelling** ...¹⁵

¹⁴ PO4, Claimant's RFP No. 2, PDF pp. 15-16.

¹⁵ Emphasis by the Tribunal.

36. In the circumstances of this case, where the Respondent has accessed the record of the investigation and offered the testimony of Dr. Vela regarding its contents in support of its position in this arbitration, the Claimant should have an opportunity to access the documents that support Dr. Vela's testimony. In the Tribunal's view, the Respondent's reliance of such documents in this arbitration amounts to a form of affirmative use of the documents, making any form of privilege or legal impediment in respect of those documents fail (*see* IBA Rules, Article 9(4)(d)). Consequently, Article 324 PCCP cannot support the Respondent's claim of legal impediment or privilege in this arbitration under Article 9(2)(b) of the IBA Rules.
37. The Tribunal must also assess whether by declaring the secrecy of the *Lava Jato* investigation, the Respondent seeks to protect politically or institutionally sensitive information within the meaning of Article 9(2)(f) of the IBA Rules. The Respondent may validly refuse the production of documents to the extent that the Tribunal determines such grounds for non-production to be "compelling". Unlike Article 9(2)(b) of the IBA Rules, Article 9(2)(f) allows the Tribunal to strike a proper balance between any relevant public interests which may require protection and the competing interest in disclosure for the purposes of this arbitration, as well as the proper administration of justice.
38. In order to determine whether Article 324 of the PCCP provides sufficiently compelling grounds to justify non-production, the Tribunal must ascertain which relevant interests such provision seeks to protect in this case. Thereafter, the Tribunal shall assess whether it might prejudice such interests by ordering the production of the documents requested by the Claimant.
39. In its full version, Article 324 of the PCCP reads as follows:
- Article 324. – Reservation [Privilege] and secrecy of [criminal] investigations-
1. The investigation has a reserved character. Only the parties may find out about its contents directly or through their lawyers duly accredited in the case. The proceedings ordered by the Public Prosecutor's Office or resulting from a judicial order are informed, as appropriate, when they are in progress or at the end of the proceedings. At any time they can obtain a simple copy of the proceedings.
 2. The Prosecutor may order that any action or document be kept secret for a period of not more than twenty days, which may be extended by the Preparatory Investigation Judge for a period of not more than twenty days, when their knowledge may hinder the success of the investigation. The provision of the Prosecutor declaring secrecy shall be notified to the parties.
 3. Copies obtained are for the defense's use. The lawyer who receives them is obliged to maintain the reservation of law, under disciplinary responsibility. If an offense occurs by the lawyer, the same will be notified for replacement within two days of notification. If it does not, one will be appointed *ex officio*.¹⁶
40. While the Parties have extensively debated the content and scope of application of Article 324 of the PCCP, there is no disagreement on the fact that this provision, at its core, seeks to prevent any disclosure of documents to third parties that may jeopardize an ongoing investigation. This is confirmed by the express terms of paragraph 2 of Article 324 of the PCCP, which grants a Prosecutor the power to extend the secrecy of "any action or document" even from the parties in

¹⁶ Quiroga Report, para. 1.2 (Claimant's translation).

circumstances where disclosure “may hinder the success of the investigation”. Albeit not expressly referenced in this provision, the Tribunal remains mindful of other relevant interests Peru may wish to protect when ordering that certain documents remain under seal, such as the individual rights, legal strategies, and the reputation of the persons under investigation. Similarly, placing documents under seal may seek to ensure that no potential witness or law enforcement officer is placed in danger while an investigation is still ongoing. All of these considerations apply to the *Lava Jato* investigations, which the Parties agree remain pending.

41. The Tribunal must not undermine these legitimate public interests when exercising its power to order document production. Such interests may nonetheless be adequately protected by subjecting production to appropriate safeguards seeking to eliminate the risk of undue disclosure of documents under seal to third parties, as permitted under Article 9(5) of the IBA Rules. The Tribunal is of the view that with a rigorous confidentiality regime in place, the Claimant’s interests in confronting the evidence adduced by the Respondent can be vindicated, while also protecting the legitimate interests of the Respondent to preserve the integrity of the ongoing criminal investigation. Subject then to such a regime being put in place, the Tribunal orders that the documents requested under RFP No. 2 as reformulated, must be produced.
42. In view of the stated importance of protecting the sensitive information currently under seal, the Tribunal believes that exceptional measures are required in order properly to address the risk of undue disclosure in the circumstances of this case. Among other arrangements that may be necessary, the Tribunal considers that the following measures must be put in place:
 - a. Any responsive documents shall be designated and labelled as “attorney’s eyes only”;
 - b. No more than two of the most senior members of the Claimant’s outside counsel team shall be granted access to responsive documents;
 - c. Any responsive documents shall be made available to Claimant’s counsel at a secure location provided by the Respondent;
 - d. Claimant’s counsel may examine responsive documents at the secure location and may take notes, but shall not make copies of the documents;
 - e. No other person shall be granted access to responsive documents;
 - f. Should Claimant’s counsel wish to introduce any responsive documents into the record, or share them with specific persons for the purpose of seeking instructions or witness/expert testimony, an application should be filed with the Tribunal as necessary; and
 - g. Before accessing any responsive documents, Claimant’s counsel shall execute a confidentiality undertaking confirming that they shall maintain the confidentiality of such material, shall not copy or disclose the material or any portion thereof to any non-authorised person and shall ensure that they and any persons acting under their supervision shall not use the material for any purpose other than in connection with this arbitration.

43. The Tribunal invites the Parties to confer and attempt to seek agreement on the terms of an appropriate confidentiality order in accordance with the Tribunal's above directions. They should revert to the Tribunal on this matter no later than **Monday, 17 February 2025**. Should the Parties fail to reach agreement, the Tribunal will issue a confidentiality order upon an application by either Party.
44. Lastly, while the Tribunal has taken due note of the Judgment of the Constitutional Court, it is ultimately not of assistance to resolve the questions of legal impediment or privilege before it. First, the Claimant has failed to establish any connection between the documents for which the Constitutional Court ordered disclosure (an effective collaboration agreement and supplementary agreement between "the Supraprovincial Corporate Prosecutor's Office Specialized [*sic*] in Officer's Corruption Crimes' Special Team and Constructora Norberto Odebrecht SA, Constructora Norberto Odebrecht SA Perú's branch office, and Odebrecht Perú Ingeniería y Construcción SAC, and the collaborators Jorge Henrique Simões Barata, Ricardo Boleira Sieiro, Renato Ribeiro Bortoletti and Antonio Carlos Nostre Junior") and the effective collaboration agreement and supplementary agreement falling under the Claimant's reformulated RFP No. 2.
45. Second, the Judgment of the Constitutional Court does not concern the personal journal, agendas, or diaries that the Claimant requests the Respondent to produce under other RFPs. In particular, the Tribunal observes that nothing in the judgment indicates that the Constitutional Court's decision would extend to other documents in the so-called Prosecutorial Files (*i.e.*, the record of the *Lava Jato* investigation), such as the requested journals, agendas or diaries.

c) Claimant's RFP No. 3

46. As set out in PO4, by his RFP No. 3 the Claimant requested the following documents:

Full copies of all the Efficient Collaboration Prosecutorial Files ("Carpetas Fiscales de Colaboración Eficaz") in the custody of the Public Ministry of Peru, including, but not limited to, investigation reports, evidentiary documents, and other proofs, that relate to acts of corruption in the award of government contracts involving former President Ollanta Humala, Nadine Heredia, Luis Ortigas (both as Vice-Minister of Energy and then President of PeruPetro), Graña y Montero (including, but not limited to, José Graña and Hernando Graña), Jorge Barata (Director of Odebrecht in Peru), and Odebrecht since the beginning of 2011.

47. The Claimant later reframed his RFP No. 3 as follows:

Copies of the Prosecutorial File ("Carpeta Fiscal") in the possession of the Public Ministry of Peru concerning the Preparatory Investigation and Accusation for corruption from 2006 to 2015 against President Ollanta Humala and his wife Nadine Heredia.

This request is limited to documents that discuss or relate to any payment of money by Graña y Montero to Nadine Heredia ("coimas adelantadas") in relation with the disposition or adjudication of public works and government contracts.

48. **The Claimant's Position.** The Claimant asserts that his reframed RFP No. 3 is narrower than the original because it focuses on the Prosecutorial File related to the corruption investigation and

accusation against President Ollanta Humala and Nadine Heredia from 2006 to 2015;¹⁷ in other words, his request is limited to the file that deals with the payments made by Graña y Montero to Nadine Heredia in connection with the grant of government contracts.¹⁸ Moreover, the Claimant submits that the information he requests is available via oral testimony within the judicial system of Peru.¹⁹

49. **The Respondent's Position.** The Respondent submits that the Tribunal should reject the Claimant's RFP No. 3 because it is not tailored to issues that are relevant and material to the determination of the case.²⁰ In the Respondent's view, the Claimant has failed to explain how the documents he seeks relate to the disposition of Blocks III and IV.²¹ [REDACTED]
50. Moreover, the Respondent criticizes the Claimant's reformulation of the request's temporal scope because he could not demonstrate that between 2006 and 2015 there was any investigation concerning Blocks III and IV.²³ The Respondent emphasizes that, according to the evidence relied upon by the Claimant in connection with his RFP No. 1, the 2006 investigations against Ollanta Humala and Nadine Heredia concerned illegal campaign funds.²⁴ Furthermore, the Respondent observes that the *Lava Jato* Special Team was established in December 2016: accordingly, no evidence illustrating the connection between the investigation and Blocks III and IV could possibly be found in the file that the Claimant is requesting.²⁵
51. Lastly, the Respondent reiterates that the documents requested by the Claimant are subject to legal privilege by virtue of the principle of secrecy of criminal investigations codified under Peruvian law in Article 324 of the PCCP, and must therefore be excluded from production pursuant to Article 9(2)(b) and 9(2)(f) of the IBA Rules.²⁶

¹⁷ Claimant's First Submission, p. 4.

¹⁸ Claimant's First Submission, p. 4.

¹⁹ Claimant's First Submission, p. 4.

²⁰ Respondent's First Submission, p. 6.

²¹ Respondent's First Submission, p. 6.

²² Respondent's First Submission, p. 7.

²³ Respondent's First Submission, p. 7.

²⁴ Respondent's First Submission etter, p. 7, citing El Comercio, "*Nadine Heredia busca excluir sus agendas del juicio oral, mientras Alejandro Toledo pide ir a una clínica: sus argumentos ante el TC*" (available at: <https://elcomercio.pe/politica/actualidad/mientras-nadine-heredia-busca-excluir-sus-agendas-del-juicio-oral-alejandro-toledo-pide-ir-a-una-clinica-particular-cuales-fueron-sus-argumentos-ante-el-tc-informe-noticia/>).

²⁵ Respondent's First Submission, p. 7; Resolución de la Fiscalía de la Nación No. 5050-2016-MP-FN, *Conforman Equipo Especial de Fiscales, para que se avoquen a las investigaciones vinculadas con delitos de corrupción de funcionarios y conexos*, 26 December 2016 (RV-3). See also Vela WS, para. 11 (noting that the *Lava Jato* Special Team was formed in 2016).

²⁶ Respondent's First Submission, pp. 7-8.

52. **The Tribunal's Analysis.** The Tribunal observes that the Respondent denies that the documents falling under the scope of the Claimant's reframed RFP No. 3 are relevant to the case and material to its outcome because they bear no relation to the disposition of Blocks III and IV. [REDACTED]

[REDACTED] p.²⁷ Accordingly, the Tribunal determines that the documents falling under the Claimant's reframed RFP No. 3 are relevant to the case and material to its outcome for the same reasons set out at paragraphs 27-31 above in respect of the Claimant's RFP No. 2.

53. Furthermore, the Respondent objects to production on the basis of Article 324 of the PCCP and Article 9(2), paragraphs (b) and (f) of the IBA Rules. In this respect, the Tribunal reiterates its ruling at paragraphs 32-45 above. The Tribunal will allow the production of documents responsive to the Claimant's reframed RFP No. 3 upon the issuance of an appropriate confidentiality order, following consultations with the Parties.

d) Claimant's RFP No. 4

54. As set out in PO4, by its RFP No. 4 the Claimant requested the following documents:

Full copies of the Effective Collaboration agreements ("acuerdos de Colaboración Eficaz") entered into by Graña y Montero (including, but not limited to, José Graña and Hernando Graña) and Jorge Barata (Director of Odebrecht in Peru) as part of the Lava Jato and/or any other corruption-related investigations, and any declarations provided pursuant to such agreements.

55. The Claimant later reframed RFP No. 3 as follows:

Copies of: (i) the Effective Collaboration Agreement ("Acuerdo de Colaboración Eficaz") entered into by the executive José Graña, which either contributed to or is directly related to José Graña's guilty plea in January 2023 for public corruption; (ii) the Guilty Plea Agreement ("Acuerdo de Culpabilidad") entered into by the executive José Graña; (iii) the Effective Collaboration Agreement ("Acuerdo de Colaboración Eficaz") entered into by the executive Hernando Graña; and (iv) the Guilty Plea Agreement ("Acuerdo de Culpabilidad") entered into by the executive Hernando Graña.

This request is limited to documents in the possession of the Public Ministry of Peru that discuss or relate to individuals José Graña and Hernando Graña's involvement in the corrupt adjudication of public contracts, including the details and amounts of payments made by Graña y Montero to public officials ("coimas adelantadas"). This includes, but is not limited to, the \$3 million payment to Nadine Heredia in 2011 and the specific benefits or advantages these payments were intended to secure for Graña y Montero.

56. **The Claimant's Position.** The Claimant asserts that this request targets specifically the Effective Collaboration Agreements of José Graña and Hernando Graña that contributed or are directly

²⁷ PO4, Claimant's RFP No. 3, PDF p. 23; Respondent's First Submission, p. 10; [REDACTED].

connected to José Graña's January 2023 guilty plea for public corruption.²⁸ In the Claimant's submission, his RFP No. 4 as reframed focuses on details of payments made by Graña y Montero, including a purported \$3 million payment to Nadine Heredia in 2011, as well as the benefits sought with said payments.²⁹ The Claimant submits that these files contain details regarding why José Graña declared himself corrupt as well as details of the alleged bribery scheme.³⁰ In turn, the files of José Graña's cousin, Hernando Graña, would "serve to complement the extent of the bribes and corruption".³¹

57. **The Respondent's Position.** The Respondent requests the Tribunal to reject the Claimant's RFP No. 4 on the basis of lack of relevance and materiality.³² According to the Respondent, "instead of attempting to establish any connection between the documents sought and the 'disposition of Blocks III and IV', Claimant continues to seek documents and information unrelated to the adjudication of the Oil Blocks in 2014".³³ The Respondent also observes that the request seeks documents related to public contracts, not the licenses for Blocks III and IV specifically.³⁴ The Respondent therefore characterizes this RFP as a "fishing expedition".³⁵
58. Lastly, the Respondent reiterates that the documents requested by the Claimant are subject to legal privilege by virtue of the principle of secrecy of criminal investigations codified under Peruvian law in Article 324 of the PCCP, and must therefore be excluded from production pursuant to Article 9(2)(b) and 9(2)(f) of the IBA Rules.³⁶
59. **The Tribunal's Analysis.** The Tribunal observes that the Respondent denies that the documents falling under the scope of the Claimant's reframed RFP No. 4 are relevant to the case and material to its outcome because they bear no relation to the disposition of Blocks III and IV. In this respect, [REDACTED]".³⁷ Accordingly, the Tribunal determines that the documents falling under the Claimant's reframed RFP No. 4 are relevant to the case and material to its outcome for the reasons set out at paragraphs 27-31 above in respect of the Claimant's RFP No. 2.
60. Furthermore, the Respondent objects to production on the basis of Article 324 of the PCCP and Article 9(2), paragraphs (b) and (f) of the IBA Rules. In this respect, the Tribunal reiterates its

²⁸ Claimant's First Submission, p. 5.

²⁹ Claimant's First Submission, p. 5.

³⁰ Claimant's First Submission, p. 5.

³¹ Claimant's First Submission, pp. 5-6.

³² Respondent's First Submission, pp. 9-10.

³³ Respondent's First Submission, p. 10.

³⁴ Respondent's First Submission, p. 10.

³⁵ Respondent's First Submission, p. 10.

³⁶ Respondent's First Submission, p. 10.

³⁷ [REDACTED] O4, Claimant's RFP No. 4, PDF p. 28; Respondent's First Submission, p. 13; [REDACTED].

ruling at paragraphs 32-45 above. The Tribunal will allow the production of documents responsive to the Claimant's reframed RFP No. 4 upon the issuance of an appropriate confidentiality order, following consultations with the Parties.

e) Claimant's RFP No. 6

61. As set out in PO4, by its RFP No. 6 the Claimant requested the following documents:

All documents discussing, or relating to, the process by which the construction contract for the Talara Refinery was awarded to Técnicas Reunidas—project in which Graña y Montero was a major subcontractor. This refinery contract was approved by President Ollanta Humala and was signed on May 29, 2014, in Talara for an investment that is now valued at more than eight billion dollars.

62. The Claimant later reframed RFP No. 6 as follows:

Copies of documents detailing the contractual relationship between Técnicas Reunidas and Graña y Montero in relation to the construction of the Talara Refinery from May 2014 to 2022.

This request is limited to documents that reflect the contractual terms of the commercial relationship between Técnicas Reunidas and Graña y Montero in connection with the refinery, including amounts of monies paid to Graña y Montero during the relevant time period.

The Talara Refinery was approved by President Ollanta Humala and Nadine Heredia in May 2014, at a cost that has now surpassed eight billion U.S. dollars. According to a public notice by the PetroPeru Board dated August 27, 2024, the Talara Refinery has been a major cause of the severe economic crisis affecting PetroPeru and the Peruvian economy. The notice highlights that the refinery "has cost double the originally budgeted amount," reflecting serious irregularities, akin to those implicated during the adjudication of Blocks III and IV (and during a relevant time period).

63. **The Claimant's Position.** The Claimant submits that his reframed RFP No. 6 request is narrower than the original because it only targets documents concerning the contractual relationship between Técnicas Reunidas and Graña y Montero from May 2014 to 2022.³⁸ The RFP is limited to contractual terms, excluding broader aspects of the contract award process.³⁹
64. **The Respondent's Position.** The Respondent rejects the Claimant's reframed RFP No. 6 on the basis that it is not tailored to issues that are relevant and material to the determination of the case, as required by Articles 3(3)(b) and 9(2)(a) of the IBA Rules. In particular, the Respondent submits that the Claimant did not bring any claims related to a contract involving Técnicas Reunidas in his Statement of Claim and has also failed to explain whether or how a relationship exists between the alleged irregularities in such contract and the award of Blocks III and IV.⁴⁰
65. **The Tribunal's Analysis.** Unlike in the case of the Claimant's reframed RFPs 2, 3, and 4, the Claimant's reframed RFP No. 6 does not concern documents that were referenced in Dr Vela's testimony. The Claimant has also failed to establish a connection between the documents falling

³⁸ Claimant's First Submission, p. 6.

³⁹ Claimant's First Submission, p. 6.

⁴⁰ Respondent's First Submission, p. 12.

under the scope of his reframed RFP No. 6 and the disposition of Blocks III and IV. Accordingly, the Tribunal rejects the Claimant's RFP No. 6 as speculative as to the documents requested and insufficiently relevant.

2. The Claimant's RFP No. 1

66. As set out in PO4, by its RFP No. 1 the Claimant requested the following documents:

Full copies of all personal journals or agendas belonging to José Graña, Hernando Graña, and Nadine Heredia, in the possession, custody, or control of the Lava Jato Special Team, and which memorialize, or relate to, any meetings between Graña y Montero and Nadine Heredia (including, but not limited to, those held at the Government Palace) during the years 2014 and 2015.

67. The Tribunal's decision in respect of the Claimant's RFP No. 1 is as follows:

The Respondent does not question the relevance and materiality of the personal journals or agendas belonging to José Graña and Hernando Graña. In his witness statement, [REDACTED]

[REDACTED]. Therefore, the Tribunal considers that the requested documents are relevant to the case and material to its outcome. However, the Tribunal has taken note of the Respondent's indication that any responsive documents are subject to legal impediment or privilege and special political or institutional sensitivity.

Accordingly, as more fully set out in Sections II and III of Procedural Order No. 4 (Document Production), Claimant's RFP No. 1 is granted to the extent only that the Respondent is required to provide the Claimant with a privilege log for any responsive documents over which it claims privilege and/or confidentiality (Art. 9(2)(b) and (f) IBA Rules) identifying for each document (i) the author(s); (b) the recipient(s) (if any); (c) the subject matter of the document or portion thereof claimed to be privileged or confidential; (d) the date; (e) the basis for the claim of privilege, confidentiality or other grounds on which the responsive documents are withheld (whether under domestic or international law, or otherwise under an applicable legal or ethical standard and citations of the law or standard relied upon); and (f) an indication of which relevant interest(s), if any, might be prejudiced in the event the Tribunal were to order the production of the requested documents.

68. Under paragraph 9(b) of PO4, as amended by the Parties on 13 September 2024 and approved by the Tribunal on 24 September 2024, the Parties were ordered to proceed as follows in respect of Claimant's RFP No. 1:

The Respondent must provide such privilege log no later than no later than [17 September 2024]. Thereafter, if he so wishes, no later than [24 September 2024] the Claimant may re-submit the requests identified in this sub-paragraph by filing with the Tribunal a copy of any privilege log provided by the Respondent, together with any comments he might have on such privilege log, including what measures should be taken, if any, to safeguard the interests, identified by the Respondent, that may be prejudiced. The Respondent may then provide a response by [27 September 2024].

69. The Respondent filed its First Privilege Log, covering the Claimant's RFP No. 1, on 17 September 2024. On 24 September 2024, the Claimant resubmitted RFP No. 1 to the Tribunal for decision, accompanied by his Second Written Submission and the Quiroga Report. On 14 October 2024, the Tribunal granted leave to the Respondent to provide a response to the Quiroga Report, noting that such report fell within the remit of the Tribunal's order to permit the Claimant to comment

on the Respondent's assertion of privilege in the First Privilege Log. Accordingly, on 16 October 2024, the Respondent filed a response to the Claimant's Second Submission (*i.e.*, the Respondent's Third Submission).

70. **The First Privilege Log.** The Respondent refuses production of the personal agendas of José Graña and Hernando Graña for the 2014-2015 period on two grounds: (i) the principle of secrecy of criminal investigations under Peruvian law and (ii) institutional sensitivity under Article 9(2)(f) of the IBA Rules.⁴¹
71. First, the Respondent submits that, under Article 324 of the PCCP, criminal investigations have a “reserved character”, meaning that “[o]nly the parties directly involved and their duly accredited lawyers can have access to its contents”.⁴² In the Respondent's view, the personal agendas requested by the Claimant fall squarely within the purview of this provision, as they amount to “contents” of the ongoing criminal investigation by the *Lava Jato* Special Team against Odebrecht and others.⁴³ In particular, [REDACTED]
[REDACTED]⁴⁴ According to the Respondent, “because the criminal investigations by the *Lava Jato* special team against Odebrecht and others are still ongoing and Mr. Amorrortu is not a party in those proceedings, the documents requested cannot be produced.”⁴⁵
72. According to the Respondent, the tribunals in *Elliot v. Korea* and *Merrill and Ring Forestry L.P. v. Canada* recognized the application of the principle of secrecy of criminal investigations in this context.⁴⁶
73. Second, the Respondent posits that the “reserved character” of the personal agendas pursuant to Article 324 of the PCCP would result in them containing “sensitive information” within the meaning of Article 9(2)(f) of the IBA Rules.⁴⁷ In this regard, the Respondent cites to *Global Telecom v. Canada* and *Bilcon v. Canada*, in which two investment tribunals rejected requests for

⁴¹ First Privilege Log, p. 1.

⁴² First Privilege Log, p. 2, citing Article 324 of the PCCP (in the Spanish original: “*Reserva y secreto de la investigación. La investigación tiene carácter reservado. Sólo pueden enterarse de su contenido las partes de manera directa o a través de sus abogados debidamente acreditados en autos. [...]*”) (available at: <https://lpderecho.pe/nuevo-codigo-procesal-penal-peruano-actualizado/>).

⁴³ First Privilege Log, pp. 1-2.

⁴⁴ First Privilege Log, p. 1; [REDACTED].

⁴⁵ First Privilege Log, p. 2.

⁴⁶ First Privilege Log, p. 2. See, *Elliott Associates, L.P. (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-51, Procedural Order No. 14, 24 June 2020, para. 72; *Merrill and Ring Forestry L.P. v. Government of Canada*, NAFTA/UNCITRAL, Decision of the Tribunal on Production of Documents, 18 July 2008, paras. 17-18.

⁴⁷ First Privilege Log, p. 3.

the production of documents that were deemed privileged or sensitive under the law of the respondent State.⁴⁸

74. **The Claimant's Comments on the First Privilege Log.** In essence, the Claimant denies that the Respondent may refuse production of the personal agendas of José Graña, Hernando Graña, and Nadine Heredia on the basis of the principle of secrecy of criminal investigations.⁴⁹ Relying on the Quiroga Report, the Claimant submits, first, that the principle of secrecy of criminal investigations is not absolute or applied in the abstract to all investigations.⁵⁰ Rather, the Claimant asserts that such principle “is limited by the countervailing principles of reasonableness and proportionality”.⁵¹ In this respect, Mr Quiroga refers to a judgment of the Peruvian Court of Cassation holding that the declaration that a document is “reserved” should be made through a reasoned resolution which, once the secrecy is lifted, allows the affected party to verify the reasons and, specifically, whether a balancing exercise was performed between the right of defence and the effective administration of justice.⁵² Moreover, relying on several judgments of the Peruvian Constitutional Court, the Claimant submits that (i) the reservation of criminal investigations is only applicable “at the pre-trial stage” to protect any external factor from potentially hindering the success of the investigation; and (ii) the declaration of reservation, which is not to be presumed but must rather be express, is “subject to a reasonable period of time”, which is contingent upon a case-by-case assessment of reasonableness and proportionality.⁵³
75. Against this backdrop, the Claimant submits that the requested agendas are not documents of a private nature “on which an express reservation had been declared, in accordance with the principles of temporality, reasonableness, and proportionality required for this purpose”.⁵⁴ Rather, in the Claimant's view, the principle of secrecy of criminal investigations does not justify withholding these documents because their content was made public before they were incorporated to the criminal investigation.⁵⁵ According to the Claimant, the personal agenda of Nadine Heredia had already been revealed in the journalistic show Panorama in August 2015 and was recognized live by Ms. Heredia herself in a broadcast of the same program that was produced in November 2015.⁵⁶ According to Mr Quiroga, these materials were incorporated at a later point

⁴⁸ First Privilege Log, pp. 3-4; *Global Telecom Holding S.A.E. v. Government of Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 4 - Decision on the Claimant Objections to the Respondent Claims of Privilege, 3 November 2018, para 39; *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Procedural Order No. 13, 11 July 2012, paras. 22-26, 55.

⁴⁹ Claimant's Second Submission, p. 3.

⁵⁰ Claimant's Second Submission, p. 3; Quiroga Report, para. 2.1.

⁵¹ Claimant's Second Submission, p. 3; Quiroga Report, para. 2.2.

⁵² Quiroga Report, para. 2.1, *citing* Casación 373-2018-NACIONAL.

⁵³ Claimant's Second Submission, p. 3; Quiroga Report, para. 2.3.

⁵⁴ Quiroga Report, para. 2.6.

⁵⁵ Claimant's Second Submission, p. 4; Quiroga Report, paras. 2.4-2.5.

⁵⁶ Claimant's Second Submission, p. 4; Quiroga Report, para. 2.4.

in time into the criminal investigation.⁵⁷ In turn, the Claimant submits that the personal agendas of José Graña and Hernando Graña, despite being part of the casefile of the *South Peruvian Gas Pipeline* case, were disclosed to the press by the Peruvian public authorities themselves.⁵⁸ Thus, the Claimant asserts that the alleged confidentiality covering these agendas was breached by its own guardian institution.⁵⁹ Finally, the Claimant considers that any secrecy concerns may be addressed by way of a confidentiality agreement between the Parties.⁶⁰

76. **The Respondent's Response.** As a threshold issue, the Respondent clarifies that the First Privilege Log does not include the personal agenda of Ms. Nadine Heredia because it records meetings that took place between 2006 and 2011, thus falling outside the temporal scope of the Claimant's RFP No. 1, which is limited to the years 2014 and 2015.⁶¹
77. On the substance, the Respondent reiterates that, contrary to the Claimant's submission, the personal agendas of José Graña and Hernando Graña cannot be disclosed. First, the Respondent avers that the principle of secrecy of criminal investigations is absolute with respect to third parties.⁶² The Respondent considers that the Claimant mischaracterizes the holding of the Peruvian Court of Cassation: the principle of secrecy of criminal investigations would only allow for *inter-partes* publicity.⁶³ Being a third party, the Claimant is not entitled to access the documents of the criminal investigation led by Dr Vela.⁶⁴
78. Second, the Respondent rejects the Claimant's argument that secrecy is limited to the pre-trial stage of investigations.⁶⁵ The Respondent explains that the Constitutional Court judgments relied upon by the Claimant do not hold that secrecy should be lifted after the pre-trial stage of investigations; rather, they hold that the application of secrecy is left to the discretion of the prosecutors and courts.⁶⁶ The Respondent further clarifies that the Peruvian Constitutional Court has asserted that after the conclusion of the pre-trial stage the proceeding, including the information contained in the casefile, becomes public "unless it affects the person, the national defense or in exceptional circumstances determined by the law, as valued on a case by case

⁵⁷ Quiroga Report, para. 2.4.

⁵⁸ Claimant's Second Submission, p. 4; Quiroga Report, para. 2.5.

⁵⁹ Claimant's Second Submission, p. 4; Quiroga Report, para. 2.5.

⁶⁰ Claimant's Second Submission, p. 5.

⁶¹ Respondent's Third Submission, p. 3.

⁶² Respondent's Third Submission, p. 4.

⁶³ Respondent's Third Submission, p. 4.

⁶⁴ Respondent's Third Submission, p. 4.

⁶⁵ Respondent's Third Submission, p. 5.

⁶⁶ Respondent's Third Submission, p. 5.

basis”.⁶⁷ In any case, the Respondent submits that the personal journals of José Graña and Hernando Graña are part of an investigation in its pre-trial phase.⁶⁸

79. Third, the Respondent denies that the disclosure of the agendas was authorized by the *Lava Jato* Special Team.⁶⁹ In any event, the Respondent submits that only part of the content of the agendas was revealed in the program.⁷⁰ Consequently, in the Respondent’s view, the personal agendas remain privileged and confidential.⁷¹
80. Lastly, the Respondent rejects the Claimant’s assertion that the non-disclosure of documents would deny the Claimant his day in court.⁷² The Respondent recalls that the Claimant is not a party to the criminal proceedings related to Odebrecht or the *Lava Jato* case by his own volition.⁷³ In this connection, the Respondent submits that the Claimant never filed a criminal complaint because the alleged corruption scheme for the adjudication of Blocks III and IV did not exist.⁷⁴
81. **The Tribunal’s Analysis.** The Parties agree that all documents falling within the scope of Claimant’s RFP No. 1 pertain to the *Lava Jato* investigation. The Respondent objects to production on the basis of Article 324 of the PCCP and Article 9(2), paragraphs (b) and (f) of the IBA Rules. In this respect, the Tribunal reiterates its ruling at paragraphs 32-45 above. The Tribunal will allow the production of documents responsive to the Claimant’s RFP No. 1 upon the issuance of an appropriate confidentiality order, following consultations with the Parties.

3. The Claimant’s RFPs Nos. 8 and 9

82. As set out in PO4, the Claimant’s RFP No. 8 reads as follows:

Full copies of the bidding files generated, utilized, and/or received by PeruPetro in connection with the international public bidding processes for Blocks III and IV of 2014 and 2015, as well as all documents related to PeruPetro’s evaluation of each of the companies that participated in the bidding processes; namely: (i) Graña y Montero S.A.A., (ii) Perenco S.A., (iii) Olympic Perú Inc., (iv) Sucursal del Perú, (v) Omega Energy International S.A., (vi) Pacifica Rubiales Energy Corp., (vii) Baspetro SAC, (viii) Upland Oil & Gas LLC, Sucursal del Perú, (ix) Petronas Carigali SDN BHD, BPZ Exploración & Producción SRL, (x) Staatsolie Maatschappij Suriname NV.

83. In turn, by its RFP No. 9 the Claimant requests the following documents:

⁶⁷ Respondent’s Third Submission, p. 5, *citing* Constitutional Court Judgment in Case No. 04181-2017-PHD/TC (Respondent’s translation; in the Spanish original: “*Culminada la etapa de instrucción, el proceso penal se convierte en público, incluyendo la información que forma parte de la carpeta fiscal o expediente judicial, salvo la que afecta la intimidad personal, la defensa nacional o la exceptuada por ley, lo cual será evaluada caso por caso*”).

⁶⁸ Respondent’s Third Submission, p. 5.

⁶⁹ Respondent’s Third Submission, p. 5.

⁷⁰ Respondent’s Third Submission, p. 6.

⁷¹ Respondent’s Third Submission, p. 6.

⁷² Respondent’s Third Submission, p. 6.

⁷³ Respondent’s Third Submission, p. 6.

⁷⁴ Respondent’s Third Submission, p. 6.

All documents related to PetroPeru's initial decision in January 2015 to participate in the operation of Blocks III and IV, as well as to its subsequent decision not to participate in the operations of the Blocks and to cede the entirety of its participation interest in Blocks III and IV to Graña y Montero.

84. In its PO4, the Tribunal granted in full the Claimant's RFP No. 8. Claimant's RFP No. 9, however, was only granted in part, as follows:

Claimant's RFP No. 9 is granted only to the extent it refers to documents that provide reasons and justification for PetroPeru's initial decision in January 2015 to participate in the operation of Blocks III and IV, as well as to its subsequent decision not to participate in the operations of the Blocks and to cede the entirety of its participation interest in Blocks III and IV to Graña y Montero.

85. In accordance with paragraphs 9(e) and 10(b) of PO4, the Respondent was directed to produce all documents in response to Claimant's RFPs Nos. 8 and 9 by 6 September 2024.
86. On 10 September 2024, the Respondent produced the Second Privilege Log in response to Claimant's RFPs Nos. 8 and 9. On 25 September 2024, the Claimant filed with the Tribunal his comments on the Second Privilege Log as part of his Second Submission. On 14 October 2024, the Respondent was granted leave to provide a response to Claimant's comments on the Second Privilege Log, which it did on 16 October 2024 as part of its Third Submission.
87. **The Respondent's Second Privilege Log.** The Respondent identified six documents in the Second Privilege Log in response to the Claimant's RFP No. 8 (listed as Items Nos. 1-6). The Respondent withholds production of these documents on the basis of attorney-client privilege as enshrined in Article 9(4) of the IBA Rules.⁷⁵ Pursuant to Article 9(4)(c) of the IBA Rules, says the Respondent, when assessing privilege the Tribunal should take into consideration "the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen".⁷⁶ These "expectations", in turn, should be assessed by reference to the home jurisdiction of the individual parties involved.⁷⁷ Consequently, the Respondent relies on Article 2.18 of the Peruvian Constitution (establishing the right of all individuals to maintain the professional secret); Article 288 of the Organic Law of the Judicial Power (concerning the lawyer's duty to maintain the professional secret); and Article 30 of the Lawyer Code of Ethics (requiring "the most strict confidentiality" in an attorney-client relationship).⁷⁸ Moreover, the Respondent also relies on the notion of attorney-client privilege as established under New York

⁷⁵ Second Privilege Log, pp. 1-2.

⁷⁶ Second Privilege Log, pp. 1-2, citing R. Khodykin et al., *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Article 9: Admissibility and Assessment of Evidence, para. 12.143.

⁷⁷ Second Privilege Log, p. 3, citing R. Khodykin et al., *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Article 9: Admissibility and Assessment of Evidence, para. 12.192.

⁷⁸ Second Privilege Log, p. 3, citing Constitution of Peru, Article 2.18 (in the Spanish original: "*Toda persona tiene derecho [...] A mantener reserva sobre sus convicciones políticas, filosóficas, religiosas o de cualquiera otra índole, así como a guardar el secreto profesional.*"); Organic Law of the Judicial Power, Article 288 (in the Spanish original: "*288 Son deberes de los abogados [...] 4. Guardar el secreto profesional.*").

State Law.⁷⁹ In connection with Items Nos. 2, 3, and 4 in the Second Privilege Log, the Respondent submits that the fact that the communications for which production is requested were sent by a lawyer (Upland's attorneys) to a third party (PeruPetro) does not detract from their confidential and privileged nature. In this sense, the Respondent argues that the Tribunal should give weight to the applicable Peruvian law on privilege and to the parties' expectation that the document would not be divulged to third parties.⁸⁰

88. In respect of the Claimant's RFP No. 9, the Respondent listed eight documents (listed as Items Nos. 7-14 in the Second Privilege Log). The Respondent refuses production of all of these documents on the same basis as that asserted in respect of the Claimant's RFP No. 8. Concerning specifically the documents corresponding to Items Nos. 9, 10, 11, and 12, the Respondent asserts that the fact that those documents contain in-house legal advice, as opposed to external advice, does not defeat their confidential and privileged nature.⁸¹
89. **The Claimant's Comments on the Second Privilege Log.** The Claimant submits that regardless of whether the documents he requests contained discussions with counsel, they are mainly reflective of business decisions⁸² and, in the terms in which they have been described by the Respondent, do not reflect legal advice or evince an intention to obtain legal advice.⁸³ In this connection, the Claimant avers that "[t]ransactional documents do not become privileged, just because an attorney is copied or participates in the communication".⁸⁴ Finally, the Claimant considers that any concerns regarding confidentiality can be sorted by way of a confidentiality agreement.⁸⁵
90. **The Respondent's Response.** The Respondent submits that it was only "procedurally efficient", "proper", and "reasonable" for it to review the relevant files pertaining to the Claimant's RFPs Nos. 8 and 9 after the Tribunal issued PO4,⁸⁶ given the voluminous files, risk of increasing costs, and limited resources.⁸⁷ It is for this reason that the Respondent maintains that its assertion of privilege and confidentiality in respect of the Claimant's RFPs Nos. 8 and 9 was timely, as it was

⁷⁹ Second Privilege Log, p. 4 *citing* CPLR § 4503(A)(1) ("*Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local government or by the legislature or any committee or body thereof.*")

⁸⁰ Second Privilege Log, p. 6.

⁸¹ Second Privilege Log, p. 12 *citing* *In re Aenergy, S.A.*, 451 F. Supp. 3d 319, 324 (S.D.N.Y. 2020).

⁸² Claimant's Second Submission, p. 5.

⁸³ Claimant's Second Submission, p. 5.

⁸⁴ Claimant's Second Submission, p. 5.

⁸⁵ Claimant's Second Submission, p. 5.

⁸⁶ Respondent's Third Submission, p. 7.

⁸⁷ Respondent's Third Submission, p. 7.

made “at the first opportunity it had after ascertaining the existence of confidentiality and privilege concerns”.⁸⁸

91. Second, the Respondent reiterates that confidentiality is a legitimate basis to refuse document production under the IBA Rules, as recognized by numerous investment tribunals.⁸⁹
92. Third, the Respondent rejects the Claimant’s suggestion that a confidentiality agreement could adequately address the Respondent’s concerns underlying its refusal to produce the requested documents.⁹⁰ The Respondent criticizes the Claimant’s failure to explain how any such agreement would function in practice and how it would alleviate its confidentiality concerns.⁹¹
93. Fourth, in the Respondent’s submission, whether the document was used in the context of a business decision is irrelevant: to the extent a document contains legal advice, it falls under the scope of attorney-client privilege.⁹² In this connection, the Respondent rejects the Claimant’s assertion that the documents contained in the Second Privilege Log are merely “transactional”:⁹³ all of the documents identified in the Second Privilege Log either contain legal advice or are themselves legal memoranda.⁹⁴
94. **The Tribunal’s Analysis.** At the outset, the Tribunal observes that the Respondent relies upon the IBA Rules, Peruvian law and New York law to justify its assertion of privilege over the documents identified in the Second Privilege Log. The Claimant does not dispute the application of such rules to the question of privilege; rather, he denies that the documents listed in the Second Privilege Log “reflect legal advice or evince an intention to obtain legal advice”, for which reason privilege fails.⁹⁵
95. The Tribunal’s analysis must proceed once again from the guidance of Article 9(2)(b) of the IBA Rules, which requires the Tribunal to determine the legal or ethical rules applicable to the question of privilege. In considering issues of privilege, including the determination of the law governing privilege, Article 9(4)(c) of the IBA Rules calls for the Tribunal to take into account “the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen”. Since all documents identified in the Second Privilege Log were produced in Peru and were exchanged between Peruvian parties, the rules governing any privilege over those documents should be Peruvian law and ethical rules as a matter of principle.
96. The Respondent, however, has not properly established how Peruvian law or ethical rules apply in the present case to the questions of privilege at issue. It cited two provisions of Peruvian law and one provision of the Peruvian Lawyer’s Code of Ethics. According to the Respondent:

⁸⁸ Respondent’s Third Submission, p. 8.

⁸⁹ Respondent’s Third Submission, p. 8.

⁹⁰ Respondent’s Third Submission, p. 9.

⁹¹ Respondent’s Third Submission, p. 9.

⁹² Respondent’s Third Submission, p. 9.

⁹³ Respondent’s Third Submission, p. 10.

⁹⁴ Respondent’s Third Submission, p. 10.

⁹⁵ Claimant’s Second Submission, p. 5.

(i) “Article 2.18 of the Constitution, establishes that ‘all persons have the right to ... maintain the professional secret’”;⁹⁶ (ii) “Article 288 of the Organic Law of the Judicial Power (“*Ley Orgánica del Poder Judicial*”) provides that lawyers have the duty to maintain their professional secret”;⁹⁷ and (iii) “Article 30 of The Lawyer Code of Ethics requires ‘the most strict confidentiality of the facts and information referred to a client or potential client that the lawyer is in contact with because of a professional relationship’”.⁹⁸ However, the Respondent did not submit the text of the rules that it relies on or show whether the Respondent may validly resist the production of the documents identified in the Second Privilege Log on that basis.

97. Notwithstanding the above, the Respondent has also relied on Article 9(4) of the IBA Rules as a basis for privilege. This provision requires the Tribunal to take into account “any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice” when considering issues of privilege under Article 9(2) of the IBA Rules. In the Tribunal’s view, Article 9(4) of the IBA Rules recognizes the need to protect attorney-client communications, which is widely acknowledged and applied by international tribunals. As such, it provides a sufficient basis for the Tribunal to decide the issues of privilege raised in the Second Privilege Log.
98. Having regard to Article 9(4) of the IBA Rules, the Tribunal notes that the documents in Items Nos. 1 and 5-14 of the Second Privilege Log, as particularized by the Respondent, were authored by lawyers or legal advisors and contain legal advice to PeruPetro or the Ministry of Energy and Mines (MINEM) regarding various matters.⁹⁹ This is a sufficient basis for the Tribunal to conclude that the Respondent has validly invoked attorney-client privilege over such documents.
99. The Claimant, however, is critical of the Respondent’s assertion of attorney-client privilege over the documents listed in the Second Privilege Log that are responsive to the Claimant’s RFP No. 9 (*i.e.*, Items Nos. 7-14). According to the Claimant, these are “transactional documents” reflecting

⁹⁶ Second Privilege Log, p. 3. In the Spanish original according to the Respondent: “*Toda persona tiene derecho ... A mantener reserva sobre sus convicciones políticas, filosóficas, religiosas o de cualquiera otra índole, así como a guardar el secreto profesional*”.

⁹⁷ Second Privilege Log, p. 3. In the Spanish original according to the Respondent: “*Son deberes de los abogados ... Guardar el secreto profesional*”.

⁹⁸ Second Privilege Log, p. 3. In the Spanish original according to the Respondent: “*El secreto profesional es el deber de reserva que tiene el abogado para proteger y mantener en la más estricta confidencialidad los hechos e información referidos a un cliente o potencial cliente que conoce con ocasión de la relación profesional*”.

⁹⁹ See Second Privilege Log, Item 1: “Legal advice regarding the qualification of a national company in the same way as a foreign company in the context of a bidding process”; Item 2: “Legal communication regarding the evaluation of Upland in the bidding process”; Item 3: “Legal communication regarding the Upland’s Appeal to PeruPetro’s decision in the context of the bidding process”; Item 4: “Attachments to Upland’s appeal and observations”; Items 5 and 6: “Legal and technical report regarding the tender for the contract to exploit the hydrocarbons in Block IV”; Items 7 and 8: “Legal advice from GRAU Law Firm to the PetroPeru Legal Counsel regarding the viability of PetroPeru’s Participation in the License Contracts for the Exploitation of Hydrocarbons in Blocks III and IV”; Items 9-12: “Legal advice regarding compliance with current regulatory framework”; Item 13: “Legal memorandum regarding PetroPeru’s participation as non-operating partner in the License Contract for the Exploitation of Block IV”; Item 14: “Legal memorandum regarding PetroPeru’s participation as non-operating partner in the License Contract for the Exploitation of Block III”.

a “business/strategic decision” and do not “reflect the advice of counsel or were intended to obtain the advice of counsel”.¹⁰⁰

100. The Tribunal disagrees with the Claimant’s characterization. By its decision on the Claimant’s RFP No. 9, the Tribunal ordered the Respondent to produce “documents that provide reasons and justification for PetroPeru’s initial decision in January 2015 to participate in the operation of Blocks III and IV, as well as to its subsequent decision not to participate in the operations of the Blocks and to cede the entirety of its participation interest in Blocks III and IV to Graña y Montero”.¹⁰¹ Contrary to what the Claimant asserts, PetroPeru may well have based such decisions on legal, as well as business, considerations. Indeed, all documents corresponding to Claimant’s RFP No. 9 contain legal advice seeking to support such decisions, including: (i) legal advice “regarding the viability of PetroPeru’s Participation in the License Contracts for the Exploitation of Hydrocarbons in Blocks III and IV”;¹⁰² (ii) “[l]egal advice regarding compliance with current regulatory framework”;¹⁰³ (iii) a legal memorandum concerning “PetroPeru’s participation as non-operating partner in the License Contract for the Exploitation of Block IV”;¹⁰⁴ and (iv) a legal memorandum concerning “PetroPeru’s participation as non-operating partner in the License Contract for the Exploitation of Block III”.¹⁰⁵ Accordingly, the Tribunal determines that the Claimant has failed to defeat the Respondent’s assertion of attorney-client privilege.
101. Lastly, the Claimant asserts that any concerns regarding confidentiality can be sorted by way of a confidentiality agreement. The Tribunal disagrees with this proposition. By its own nature, attorney-client privilege is a form of absolute immunity from disclosure. Ordering production, even subject to confidentiality protections, would defeat the purpose of the privilege.
102. In sum, for the above reasons, the Tribunal declines to order production of the documents listed in Items Nos. 1 and 5-14 of the Respondent’s Second Privilege Log.
103. In contrast, documents in Items Nos. 2-4 of the Respondent’s Second Privilege Log are communications from an attorney acting for Upland, a participant in the bidding process for Blocks III and IV, to the Peru Petro Commission in charge of carrying out the public international tender. They are not attorney-client communications, but rather documents submitted to the PeruPetro Commission by an attorney on behalf of Upland during the bidding process. Therefore, they are not protected by legal professional privilege or secrecy.
104. The documents concern the evaluation of Upland during the bidding process and a related appeal filed by Upland. They are marked as confidential. Therefore, the Respondent argues that the documents in question were made with the expectation that they would remain so. Other than the rules that govern professional secrecy (on which, as already noted, the Tribunal has not been sufficiently briefed), the Respondent has not cited to provisions of Peruvian law on

¹⁰⁰ Claimant’s Second Submission, p. 5.

¹⁰¹ PO4, Claimant’s RFP No. 9, PDF p. 42.

¹⁰² Second Privilege Log, Items Nos. 7, 8.

¹⁰³ Second Privilege Log, Items Nos. 9-12.

¹⁰⁴ Second Privilege Log, Item No. 13.

¹⁰⁵ Second Privilege Log, Item No. 14.

confidentiality. The Tribunal also notes that the proceeding was a public international tender and that it has concluded. According to the Respondent, the documents are “legal” communications regarding the evaluation of Upland during the tendering process and a subsequent appeal. It appears to the Tribunal that the communications may contain legal argument. Although the Respondent has not indicated that the documents contain business, commercial, technical or other confidential information of Upland, that may well be the case. It is not clear to the Tribunal whether the Respondent has produced such documents in part, as the Respondent refers in its Second Privilege Log to “the withheld portion of the document”¹⁰⁶. To the extent that documents in Items 2-4 of the Second Privilege Log contain business, commercial, technical or other confidential information of Upland, those portions of the documents may be redacted or withheld. Otherwise, the documents must be produced. However, since the documents have been marked as confidential by or on behalf of Upland, the Tribunal invites the Parties to confer and attempt to seek agreement on the terms of an appropriate confidentiality order concerning the unredacted documents. They should revert to the Tribunal on this matter no later than **Monday, 17 February 2025**. Should the Parties fail to reach agreement, the Tribunal will issue a confidentiality order upon an application by either Party.

4. The Respondent’s RFP No. 1

105. As set out in PO4, the Respondent’s RFP No. 1 reads:

Letter dated 6 February 2015 from Bacilio Amorrotu and/or Baspetrol to the United States Department of State complaining about irregularities in the bidding process for Blocks III and IV, including any documents attached thereto.

106. By its PO4, the Tribunal granted this request in full.

107. **The Claimant’s Position.** The Claimant asserts that the document requested by Peru does not exist.¹⁰⁷ Instead, the Claimant submits that the letter the Respondent has requested is in fact dated 5 February 2015 and is cited in both the Claimant’s Statement of Claim and witness statement (*i.e.*, a letter from Bacilio Amorrotu to Isabel Tafur, marked as exhibit C-16 in the record).¹⁰⁸ The Claimant further asserts that “despite conducting a thorough due diligence research” he was unable to locate correspondence indicating that he forwarded such letter to the U.S. government.¹⁰⁹

108. **The Respondent’s Position.** The Respondent considers that the Claimant’s explanation is “not convincing”,¹¹⁰ as he should have raised this issue as part of his objections to the Respondent’s RFPs.¹¹¹ In the Respondent’s submission, the Claimant has simply ignored the Tribunal’s

¹⁰⁶ Second Privilege Log, Item No. 2, p. 6.

¹⁰⁷ Claimant’s First Submission, p. 7.

¹⁰⁸ Claimant’s First Submission, para. 7.

¹⁰⁹ Claimant’s First Submission, para. 7.

¹¹⁰ Respondent’s First Submission, p. 2.

¹¹¹ Respondent’s First Submission, p. 2.

order.¹¹² As such, the Respondent notes that it will invite the Tribunal to draw appropriate inferences in its subsequent submissions, in accordance with Article 9(6) of the IBA Rules and Section 5.2.7. of PO1.¹¹³

109. **The Tribunal's Analysis.** The Tribunal takes note of (i) the Claimant's explanation for his failure to produce any documents falling under the scope of the Respondent's RFP No. 1; and (ii) the Respondent's indication that it will invite the Tribunal to draw appropriate inferences in its subsequent submissions. The Tribunal will not issue further directions on this matter in this Procedural Order.

5. The Respondent's RFPs Nos. 5, 6, and 7

110. As set out in PO4, the Respondent's RFP No. 5 reads:

Baspetrol's financial documents or reports from 2014, including but not limited to:

- (i) Baspetrol's quarterly financial reports from 2014;
- (ii) Baspetrol's annual financial statements (including profit and losses statements, balance sheet recording revenues, turnover, and profits of the company) from 2014; and
- (iii) Baspetrol's audited annual financial statements (including profit and losses statements, balance sheet recording revenues, turnover, and profits of the company) from 2014.

111. In turn, the Respondent's RFP No. 6 concerns the following documents:

Baspetrol's financial documents or reports from 2015 to 2024, including but not limited to:

- (i) Baspetrol's quarterly financial reports from 2015 to 2024;
- (ii) Baspetrol's financial statements (including profit and losses statements, balance sheet recording revenues, turnover, and profits of the company) from 2015 to 2024; and
- (iii) Baspetrol's audited financial statements (including profit and losses statements, balance sheet recording revenues, turnover, and profits of the company) from 2015 to 2024.

112. Lastly, the Respondent's RFP No. 7 reads:

The following documents relating to Amorrortu and/or Baspetrol:

- (i) Loan or debt actually granted to Amorrortu and/or Baspetrol, from 2012 to 2014, with respect to Baspetrol's planned operation of the Blocks or otherwise;
- (ii) Loan or debt offers provided to Amorrortu and/or Baspetrol, from 2012 to 2014, with respect to Baspetrol's planned operation of the Blocks or otherwise; and/or
- (iii) Loan term sheets provided to Amorrortu and/or Baspetrol, from 2012 to 2014, with respect to Baspetrol's planned operation of the Blocks or otherwise.

¹¹² Respondent's First Submission, p. 2.

¹¹³ Respondent's First Submission, p. 2.

113. In its PO4, the Tribunal granted these requests to the following extent:

Respondent's [*RFPs Nos. 5, 6 and 7 are*] granted to the extent that any responsive documents are in the Claimant's possession, custody or control. The Tribunal recalls the Claimant's representation that he is the President of Baspetro (CWS-1, para. 1). In the circumstances, as more fully set out in Sections II and III of Procedural Order No. 4 (Document Production), the Claimant is required provide an explanation as to whether any responsive documents were ever in his possession, custody, or control; if not, why not; and if so, how the Claimant came to lose possession, custody or control of these documents.

114. **The Claimant's Position.** The Claimant submits that certain documents responsive to the Respondents RFPs Nos 5, 6, and 7 were in his possession "until or about March 2015".¹¹⁴ However, these documents were not preserved "or were otherwise lost after PeruPetro granted the contracts for Blocks III and IV to Graña y Montero".¹¹⁵ Consequently, the Claimant "recreated from memory certain documents" which he submits have been produced "in an abundance of caution".¹¹⁶
115. In respect of the explanations required by the Tribunal, the Claimant submits that "Baspetro never filed or prepared" any of the documents requested in connection with the Respondent's RFPs Nos. 5 and 6; nor did he receive any loan or debt, loan or debt offers, or loan term sheets as described in the Respondent's RFP No. 7.¹¹⁷
116. **The Respondent's Position.** Having taken note of the Claimant's explanations as to why the he is not in possession, custody, or control over the documents for which it requests production, the Respondent notes that it will request the Tribunal to draw the appropriate inferences in its subsequent submissions.¹¹⁸ Moreover, the Respondent submits that the Claimant's recreation of documents from memory is "an attempt to fabricate evidence where there is none".¹¹⁹ Such documents, the Respondent submits, are not responsive because they are not contemporaneous. In this connection, the Respondent reserves its right to request the Tribunal to draw all the appropriate inferences with respect to any evidence produced from memory by the Claimant.¹²⁰
117. **The Tribunal's Analysis.** The Tribunal takes note of (i) the Claimant's indication that he has recreated from memory and produced to the Respondent certain documents responsive to the Respondent's RFPs Nos. 5, 6, and 7; (ii) the Claimant's explanation for his failure to produce other documents falling under the scope of the Respondent's RFPs Nos. 5, 6, and 7; and (iii) the Respondent's indication that it will invite the Tribunal to draw appropriate inferences in its subsequent submissions. The Tribunal will not issue further directions on this matter in this Procedural Order.

¹¹⁴ Claimant's First Submission, p. 9.

¹¹⁵ Claimant's First Submission, p. 9.

¹¹⁶ Claimant's First Submission, p. 9.

¹¹⁷ Claimant's First Submission, pp. 8-10.

¹¹⁸ Respondent's First Submission, p. 2.

¹¹⁹ Respondent's First Submission, p. 2.

¹²⁰ Respondent's First Submission, p. 2.

6. The Respondent's RFPs Nos. 11 and 12

118. As set out in PO4, the Respondent's RFP No. 11 reads as follows:

The following documents relating to Baspetrol's shares:

- (i) Baspetrol's shares registration book (libro de matricula de acciones) open at the Peruvian National Superintendency of Tax Administration (Superintendencia Nacional de Administración Tributaria, or "SUNAT"), updated to date;
- (ii) Baspetrol's shares certificates (certificados de acciones), issued from 2012 to date; and
- (iii) Any other document showing (i) the number of shares in Baspetrol; (ii) the ownership of Baspetrol's shares from 2012 (when Baspetrol was incorporated) to the present; (iii) any issuance and transfer of Baspetrol's shares from 2012 to the present; and (iv) any liens or encumbrances on Baspetrol's shares from 2012 to the present.

119. In turn, the Respondent's RFP No. 12 concerns the following documents:

The following documents relating to Baspetrol's shareholders:

- (i) Baspetrol's shareholders' agreement, and any modifications and/or amendments thereto, from 2012 to the present; and/or
- (ii) Any other arrangement, contractual or otherwise, among Baspetrol's shareholders, setting forth how Baspetrol was to be operated and/or describing Baspetrol's shareholders' rights and obligations (including voting rights and entitlement to dividends and profits).

120. As gleaned in PO4, the Tribunal granted both of these requests partially and required the Claimant to provide a privilege log to the Respondent:

The Tribunal takes note of the Claimant's agreement to produce certain documents in response to Respondent's [*RFPs Nos. 11 and 12*].

To the extent the Claimant has not agreed to production, as more fully set out in Sections II and III of Procedural Order No. 4 (Document Production), he is required to provide the Respondent with a privilege log for any responsive documents over which he claims privilege and/or confidentiality (Art. 9(2)(e) of the IBA Rules) identifying for each document (i) the author(s); (b) the recipient(s) (if any); (c) the subject matter of the document or portion thereof claimed to be privileged or confidential; (d) the date; (e) the basis for the claim of privilege, confidentiality or other grounds on which the responsive documents are withheld (whether under domestic or international law, or otherwise under an applicable legal or ethical standard and citations of the law or standard relied upon); and (f) an indication of which relevant interest(s), if any, might be prejudiced in the event the Tribunal were to order the production of the requested documents.

121. The Claimant asserts that he "previously produced documents regarding information for Baspetrol's shares", and directs the Tribunal to exhibit C-24, which was "produced with the Statement of Claim" and produced again on 16 July 2024.¹²¹

¹²¹ Claimant's First Submission, p. 7.


122. The Respondent, for its part, reserves its right to contest the Claimant's allegation that he has produced documents containing information on Baspetrol's shares in response to Respondent's Requests Nos. 11 and 12.¹²²
123. **The Tribunal's Analysis.** The Tribunal takes note of (i) the Claimant's indication that he has already produced documents regarding Baspetrol's shares; and (ii) the Respondent's indication that it reserves its right to contest the Claimant's allegation that he has produced documents containing information on Baspetrol's shares in response to Respondent's RFPs Nos. 11 and 12. The Tribunal will not issue further directions on this matter in this Procedural Order.

III. THE TRIBUNAL'S ORDER

124. For the above, reasons, the Tribunal decides as follows:
- a. The Respondent shall produce the documents responsive to the Claimant's reformulated request in RFPs Nos. 1, 2, 3 and 4, upon a confidentiality regime being agreed by the Parties, or failing such agreement, within 7 days of a confidentiality regime being ordered by the Tribunal.
 - b. The Tribunal directs the Parties to confer to seek agreement on the terms of an appropriate confidentiality regime, and revert to the Tribunal by no later than **Monday, 17 February 2025** to report the extent of their agreement, and their reasons for any remaining disagreement.
 - c. The Claimant's request in RFP No. 6 is declined.
 - d. The Claimant's request in RFPs Nos. 8 and 9 is declined in respect of Items 1 and 5-14 of the Respondent's Second Privilege Log. In respect of Items 2-4 of the Second Privilege Log, the Tribunal invites the Parties to confer and attempt to seek agreement on the terms of an appropriate confidentiality order and revert to the Tribunal by no later than **Monday, 17 February 2025** to report the extent of their agreement, and their reasons for any remaining disagreement.
 - e. In respect of the Respondent's RFPs Nos. 1, 5, 6, 7, 11, and 12, the Tribunal declines to make any further orders to produce documents responsive to these requests at this stage of the proceedings.

¹²² Respondent's First Submission, p. 2.

Place of Arbitration: New York, United States of America

A handwritten signature in dark ink, appearing to read "J. Unterhalter", is positioned above a horizontal line.

Justice David Unterhalter
(Presiding Arbitrator)

On behalf of the Tribunal

DISSENTING OPINION OF PROFESSOR BRYAN SCHWARTZ

1. I agree with the Tribunal that the documents in RFPs Nos. 2, 3 and 4 be produced, but the Tribunal's "for counsel's eyes only" restriction is excessive. I also disagree with the narrowness of the Tribunal's supporting reasoning for the latest requests that it has granted.
2. I dissent from the Tribunal's outright refusal to issue production on RFP No. 6.
3. This Tribunal derives its authority from Chapter 10 of the USPTPA, the Investment Chapter which aims to provide certain assurances. The Preamble of the Treaty specifically refers to the object of the Treaty as including promoting "transparency and prevent and combat corruption, including bribery, in international trade and investment."
4. The substantive assurances of the Treaty to investors include norms such as the minimum standard of treatment under customary international law.
5. The procedural assurances include access to international arbitration so that an independent and impartial body can consider disputes in light of the substantive norms. Investors can bring complaints under the Investment Chapter, invoking international substantive norms and processes. The one-way mechanism – investors can make claims against states – is based on the reality that home states can extensively protect and promote their interests using their own substantive laws and procedures. Access to international norms and procedures provides a counterbalance to the exercise of the generally extensive authority that they are recognized as having under international law.
6. The letter, object, and purpose of investment provisions like those in Chapter 10 would be frustrated if a state could simply invoke its domestic or procedural law to defeat complaints. In applying overriding international norms, domestic law can be important in many ways. The rationale for a domestic norm, how domestic authorities have applied it, and the reasonable expectations it creates can determine how to apply binding international law, including the law of a treaty. But domestic law ordinarily cannot trump international obligations. As the tribunal in *Biwater Gauff v. Tanzania* encapsulates, a foundational concept in the context of investment treaties and in the broader context of the law of treaties and of international law generally is simply this: "[n]o state may have recourse to its internal law as a means of avoiding its international responsibilities."¹²³
7. The Treaty applicable here contemplates that an international arbitration panel will conduct its proceedings in accordance with the Treaty and with international law generally. A tribunal must exercise discretion on how to conduct its proceedings in a manner that is faithful to the letter, object, and purpose of the applicable treaty, and consistent with international law generally.
8. One of the advantages of international arbitration is that the tribunal has considerable flexibility in its procedures and may be able to dispose of a case more expeditiously and efficiently in light of the nature of the dispute than if it were bound by a highly detailed set of process requirements. Any discretion left to a tribunal must be exercised reasonably, fairly, and in good faith. To do so,

¹²³ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, 24 May 2006, p. 8.

a tribunal must fully consider the point of authorizing international arbitration, including permitting a claimant to have a reasonable opportunity to establish that a treaty-actionable injustice has occurred, and the home state to have a reasonable opportunity to defend itself.

9. Article 27(3) of the UNCITRAL Rules provides that:

At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

10. The IBA Rules require a party requesting production to specify how the document requested is relevant to the case and material to the outcomes. Article 9(2) identifies grounds for refusing the production of evidence, which may include.

- (a) lack of sufficient relevance to the case or materiality to its outcome;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable
- ...
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling;

11. The grounds mentioned in (a), (e), and (f) clearly leave matters to the discretion of the tribunal rather than making a home state's domestic law dispositive. Under Article 9(2)(b), a tribunal must ultimately be governed by the international law applicable to its proceedings; it may not simply defer to domestic rules in the face of overriding international law. The applicable international law concerning the mandate and duties of this Tribunal overrides any conflicting rules of Peruvian law.

12. The mere fact that an allegation is made might not be sufficient to require a tribunal to issue a production order. But the Claimant in this case is not merely making allegations in relation to its production requests. I do not prejudge the ultimate outcome of this case, including accepting or rejecting the evidence put forward in the witness statements already submitted by the Claimant. They have not been subjected yet to cross-examination or other forms of impeachment by Peru.

13. However, the witness statements are detailed and submitted by persons who have identified their claims to expertise and the basis on which they state their observations and opinions. The witness statements variously contend that:

- a. some Peruvian officials engaged in a series of corrupt transactions involving government choices to provide opportunities to private sector businesses. Peru does not appear to contest that serious corruption occurred but disputes the scope of it. It denies that the corruption scheme that has been established extended to the Claimant's business;
- b. that the Claimant was not treated lawfully and fairly under Peruvian domestic law in respect of its efforts to proceed with its contemplated business in Peru;

- c. that some key actors, in government and in the private sector, which were involved in the established corruption scheme were the same as those who were involved in the alleged scheme concerning the Claimant's business;
 - d. that there is overlap in the methodologies used in the established scheme and the alleged scheme;
 - e. that the alleged scheme occurred proximately in time to the established scheme; and
 - f. that there was at least one clandestine meeting between some of the key players during the time when important decisions were made involving the Claimant's attempts to proceed with its business.
14. Peru has submitted evidence that the clandestine meetings or meetings did not involve the Claimant's case. According to one of Peru's own witness statements, however, after one such meeting, a major private sector actor engaged in a series of manoeuvres to occlude its participation in further contracting with Peru.
15. These witness statements included hundreds of pages of detailed contentions of fact and analysis and were replete with references to documents and legal instruments. I have reviewed all of the material submitted as part of deliberating on the production requests.
16. It can be unreasonable to expect that a claimant will, out of the resources available to it on its own, be able to fully develop a case of unfair or corrupt treatment by a government. The state is likely to have important information that is not available, as a practical matter or under domestic law, to the claimant. If wrongdoing occurs, various officials may make a special effort to avoid public disclosures. To develop its case, a claimant may require the production of documents by the state.
17. When a discretionary power exists, it can be a legal wrong to fail to exercise it. It would be a misuse of the discretion of a tribunal to effectively insist that a claimant must first prove its case to obtain the production orders required to prove its case. A claimant must have a fair opportunity to develop its case through means that include production orders.
18. A tribunal is not necessarily required to adopt the comprehensive production directions that might automatically apply in major civil litigation cases in some systems. A tribunal might indeed require a reasonable foundation before adopting a particular production request. A reasonable prospect that documents will ultimately have probative value can be a sufficient foundation for making a production order.
19. In this case, the Claimant has, in fact, provided a reasonable foundation for the requests at issue through multiple and extensive witness statements. This foundation has been established quite apart from Peru's conduct in "opening the door" to such production through the witness statement of Dr. Vela, to which I will now turn.
20. [REDACTED]. The statement does not merely argue that the investigations did not show any corruption with respect to the Claimant's situation. The witness statement proposes that the record's silence on the Claimants matters affirmatively shows that there was no corruption in

respect of the Claimant's and other cases. The reasoning put forward is this: that wrongdoing parties involved in the main investigation had incentives, in the context of cooperation agreements, to confess to any other corruption schemes. If they did not own up to a particular corruption scheme, that is evidence that that particular scheme did not, in fact, take place.

21. It would not be fair for the Tribunal to consider such a witness statement without providing the Claimant the opportunity to review the documents on which it is based.
22. Dr. Vela's witness statement, however, is by no means the sole basis on which the production orders at issue should be granted. Rather, on all of the RFP Nos. 2, 3, and 6, the Claimant has, through its tender of evidence and argument to date, established a reasonable ground for production orders. Therefore, they should be issued.
23. Instead, RFP No. 6 has been outright rejected. I dissent in this respect, as I did on the outright rejection of Claimant's RFP No. 7 in the context of PO4.
24. With respect to RFP Nos. 2, 3, and 4, the Tribunal's restriction to "for counsel's eyes only" is excessive. It prevents the Claimant's lawyers from being adequately informed and instructed by the Claimant. Peru has not even established that any harm would result from disclosing the specific information here. On any reasonable view of the evidence concerning risks that Peru has actually submitted, a sufficiently cautious approach would involve a standard protection order at this stage, not the extreme form directed here. A protection order could also be accompanied by a recognition that after the Claimant has actually seen the documents, it might have grounds to request that the Tribunal modify or remove the initial restrictions.
25. With respect to third-party proprietary information, the Claimant should not be denied access to probative information. Many investor-state cases involve contests to procurements, including complaints of unfair treatment, discrimination in favor of local applications, political favoritism, and outright corruption. Information about how other private investors were treated may be crucial to adjudicating the issues before the Tribunal. There may indeed be a legitimate need in some cases to protect third-party proprietary information. But the means of protection should not be excessive; they should not deny the Claimant access to information that it reasonably needs to develop its case or that the Tribunal needs to adjudicate it fairly.
26. I would add that to the extent that it is not limited by countervailing legal provisions, a tribunal must also respect the transparency provisions in investment treaties that promote public access to information. Concerns have been expressed over the years about the potential secrecy of international arbitral proceedings in the context of arbitrations that may cost public money and inhibit a government from pursuing specific policies. Transparency promotes public confidence in the arbitration process. It permits experts and ordinary citizens to identify errors or biases in arbitral processes. Transparency is not an overriding value in any and all circumstances, but it is essential under the Treaty. Additionally, we are informed by expert evidence that transparency is an important norm under Peruvian public law itself.

27. The observations and conclusions I have presented not only follow from a fair reading of the letter, purpose, and object of the Treaty, but are also supported by the preponderance of relevant arbitral case law and specifically with the well-reasoned majority opinion in a closely analogous case, *Seda v. Colombia*.¹²⁴

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¹²⁴ *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Procedural Order No. 4, 13 August 2021.