



**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
ARBITRATION RULES**

**ODEBRECHT LATINVEST S.À.R.L.**  
**(Grand Duchy of Luxembourg)**

**Claimant**

**-V-**

**THE REPUBLIC OF PERU**

**Respondent**

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**REQUEST FOR ARBITRATION**

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**21 January 2020**

**Clifford Chance LLP**



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## **REQUEST FOR ARBITRATION**

### **1. INTRODUCTION**

1. This Request for Arbitration is submitted pursuant to Article 11 of the Bilateral Investment Treaty between the Belgian-Luxembourg Economic Union (the "**BLEU**") and the Government of the Republic of Peru on the Reciprocal Promotion and Protection of Investments (the "**Treaty**" or "**BIT**").<sup>1</sup>
2. By this Request for Arbitration, Odebrecht Latinvest S.à.r.l. ("**OLI LUX**" or "**Claimant**") submits its dispute with the Republic of Peru ("**Peru**", the "**State**" or the "**Government**") to the International Centre for the Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") pursuant to Article 36 of the Convention on Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (the "**ICSID Convention**").
3. OLI LUX is a company organized and incorporated under the laws of the Grand Duchy of Luxembourg<sup>2</sup> that indirectly, through a Peruvian subsidiary, owns and controls 51.64% of Gasoducto Sur Peruano S.A ("**GSP**"); a Peruvian company.
4. On 23 July 2014, the Peruvian Government, via the Peruvian Ministry of Energy and Mines ("**MEM**"), entered into a concession contract (the "**Contract**") with GSP to build and operate a 1,000-kilometer pipeline for the transport of natural gas from Las Malvinas to the coast of Arequipa (the "**GSP Project**"); with a total anticipated cost of approximately USD 7 billion.<sup>3</sup>

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<sup>1</sup> **Exhibit CL-1:** Bilateral Investment Treaty between the Belgian-Luxembourg Economic Union and the Government of the Republic of Peru on the Reciprocal Promotion and Protection of Investments dated 12 October 2005 (in force since 12 September 2008). The Treaty is in three languages with the English version taking precedence.

<sup>2</sup> **Exhibit C-1:** Articles of Organization of Odebrecht Latinvest S.à.r.l. dated 31 May 2017.

<sup>3</sup> **Exhibit C-2:** Concession Contract for the Improvements to the Country's Energy Security and Development of the Gasoducto Sur Peruano ("*Mejoras a la Seguridad Energética del País y Desarrollo del Gasoducto Sur Peruano*") dated 23 July 2014.



5. OLI LUX invested hundreds of millions in the GSP Project. It was intended to become a critical component of Peru's energy infrastructure. However, following the election of President Pedro Pablo Kuczynski against the previous incumbent President Ollanta Humala in July 2016, and a significant decrease in the price of natural gas, a political decision was made to terminate the GSP Project. The newly-elected government was very clear in its intention not to pursue a project that relied on substantial government financial support (mainly through a take-or-pay regime guaranteed by a specific fiscal regime) and to favour instead a smaller project relying solely on private capital.
6. To that end, the Government withdrew its support to the GSP Project, which irremediably compromised the Project's ability to attract financing. The Government also undermined the Project by actively interfering in key negotiations with lenders, partners and potential buyers, aimed at securing financing and the continuity of the Project.
7. The Government also relied opportunistically on the then-ongoing, high profile international investigations involving unlawful conduct by some unrelated companies in the Odebrecht Group to further its objective to drive Odebrecht out of the country and to terminate the GSP Project without paying any compensation.
8. The measures taken by the Government in that context have led to the total loss of OLI LUX's investment and GSP is currently facing bankruptcy in Peru. For the reasons set out in this Request for Arbitration, these measures violated Peru's obligations under international law, and the Treaty in particular. The very same measures have also been the subject of arbitration proceedings against Peru commenced by Enagás,<sup>4</sup> another shareholder of GSP.
9. OLI LUX currently estimates its losses in relation to the GSP Project at between USD 1.2 and 1.5 billion.
10. Given the significant amounts owed by OLI LUX to creditors in relation to the GSP Project and the Government's refusal even to consider the payment of suitable

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<sup>4</sup> ICSID Case No. ARB/18/26.



compensation to OLI LUX in violation of the Contract and international law, OLI LUX has no choice but to commence these arbitration proceedings in order to recover appropriate compensation.

11. Pursuant to Article 36 of the ICSID Convention, Claimant sets forth below the contents of its Request for Arbitration.

## **2. THE PARTIES**

### **2.1 Claimant**

12. OLI LUX is a company constituted under the laws of the Grand Duchy of Luxembourg and with its registered office at 36-38, Grand Rue, L – 1660 Luxembourg.
13. OLI LUX indirectly owned and controlled at all relevant times 51.64% of GSP through Inversiones en Infraestructura de Transporte por Ductos S.A.C. ("IITD") and Odebrecht Latinvest Austria G.m.b.H. ("OLI Austria"). IITD was and remained a company incorporated and registered in Peru. OLI Austria was and remained a company incorporated and registered in Austria. OLI LUX owned and owns 100% of OLI Austria, which in turn owned and owns 100% of IITD, which in turn owned and owns 51.64% of GSP.<sup>5</sup> OLI LUX and its subsidiaries are part of the Odebrecht group of companies, which are ultimately owned by Odebrecht S.A ("ODB"), a Brazilian company.
14. GSP is a company incorporated under the laws of Peru and has three shareholders: IITD, which owns 51.64% of GSP; Enagás S.A. ("Enagás") from Spain, which owns 26.87%; and Graña y Montero ("GyM") from Peru, which owns 21.49%.<sup>6</sup>
15. The Claimant is represented in this arbitration by Clifford Chance LLP, more specifically:

Audley Sheppard QC  
Clifford Chance LLP

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<sup>5</sup> Exhibits C-18 to C-20.

<sup>6</sup> GyM joined the GSP Project in November 2015.



10 Upper Bank Street  
London E14 5JJ  
United Kingdom  
Phone: +44 (0) 207 006 1000  
[Audley.Sheppard@CliffordChance.com](mailto:Audley.Sheppard@CliffordChance.com)

and

Ignacio Suárez Anzorena  
José García Cueto  
**Clifford Chance US LLP**  
2001 K Street, N.W.  
Washington, D.C. 20006  
United States  
Phone: +1 (202) 912 5000  
[Ignacio.SuarezAnzorena@CliffordChance.com](mailto:Ignacio.SuarezAnzorena@CliffordChance.com)  
[Jose.GarciaCueto@CliffordChance.com](mailto:Jose.GarciaCueto@CliffordChance.com)

and

Louis-Alexis Bret  
Marie-Isabelle Delleur  
**Clifford Chance Europe LLP**  
1 rue d'Astorg  
CS 60058  
75377 Paris Cedex 08  
France  
Phone: +33 (0) 1 44 05 52 52  
[LouisAlexis.Bret@CliffordChance.com](mailto:LouisAlexis.Bret@CliffordChance.com)  
[Mi.Delleur@CliffordChance.com](mailto:Mi.Delleur@CliffordChance.com)



16. Clifford Chance has been duly authorized to represent the Claimant in this arbitration.<sup>2</sup> All correspondence in relation to this matter should be sent directly to the identified counsel, preferably by e-mail.

## **2.2 Respondent**

17. The Respondent is the Republic of Peru, this Request for Arbitration should be notified to:

**President of the Special Commission Law No. 28933**

Mr. Ricardo Ampuero Llerena

Ministry of Economy and Finance

Jr. Cusco No. 177, 5th floor

Lima, Peru

18. Claimant and Respondent are together referred to as the "**Parties**".

## **3. NATURE AND CIRCUMSTANCES OF THE DISPUTE**

19. By its actions and omissions, and by the acts and omissions of persons, entities and agencies for which it is responsible under international and Peruvian law, Peru has caused substantial and material damage to Claimant's investment in Peru, in breach of its obligations under the Treaty and applicable international law. It has deprived Claimant of the value of its shares and investments worth in excess of USD 1.2 billion in the GSP Project.
20. Claimant invested over a billion dollars to make, establish and advance the GSP Project. However, the Government adopted a series of arbitrary and discriminatory measures that destroyed the value of its investments and deprived Claimant of the specific benefits it reasonably expected to receive from the GSP Project.

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<sup>2</sup> **Exhibit C-3:** Minutes of Meeting of the Board of Managers of Odebrecht Latinvest S.à.r.l. dated 10 December 2019; **Exhibit C-4:** Power of Attorney of Odebrecht Latinvest S.à.r.l. to Clifford Chance dated 10 December 2019.



21. In mid-2014, the market for natural gas started showing signs of weakness and the price decreased significantly. This situation affected the prospects of the GSP Project, particularly from the point of view of the Government, which had made a commitment to provide GSP with a minimum guaranteed income in the initial stage of the Project (*Ingreso Garantizado Anual*). The continuation of the GSP Project as planned was no longer convenient to the Government and it withdrew the support needed to complete it as it was originally conceived and agreed.
22. The Government's measures affecting OLI LUX's investments in Peru include, without limitation:
  - (i) the arbitrary refusal to provide the amendments to the Projects documents required to finance the Project (called "bankability amendments"). This constitutes an unexplained departure from Peru's previously consistent practice regarding similar infrastructure projects and a stark reversal from the assurances given to OLI LUX and its partners in respect of similar projects;
  - (ii) the undermining of the concrete attempts of OLI LUX to dispose of its investment in GSP to allow for the continuation of the GSP Project, by suggesting to potential buyers that Peru was not interested in the Project moving forward in its then-existing configuration;
  - (iii) the improper and arbitrary failure to decide on and grant an extension of time requested by GSP to secure financing for the GSP Project beyond the 20 months after the Contract's Effective Date ("*Fecha de Cierre*") stipulated in the Contract;
  - (iv) the improper and arbitrary termination of the Contract on 24 January 2017;
  - (v) the improper execution of the performance bond (*garantía de fiel cumplimiento*) on the same date that the Contract was terminated;



- (vi) the enactment, on 1 February 2017, of Emergency Decree No. 001-2017 ("ED 001-2017"), which provided for the appointment of an administrator for the custody and maintenance of the assets of the GSP Project and established that the costs of hiring an administrator would be paid with the performance bond, contrary to the procedures established in the Contract and the applicable law;
- (vii) the enactment, on 15 February 2017, of Supreme Resolution No. 004-2017-EM, which established that the post-termination procedure provided by the Contract and the applicable law did not apply to the GSP Project, because the Contract was terminated before the operational phase;
- (viii) the enactment, on 13 February 2017, of Emergency Decree No. 003-2017 ("ED 003-2017"), replaced by Law No. 30737 on 12 March 2018, through which the Government froze the Claimant's investments and corresponding rights; and
- (ix) the enactment, on 3 March 2017, of Law No. 30543, which eliminated vital government subsidies granted to finance the GSP Project and made the Project financially unviable.

23. As explained below in Section 4, the foregoing measures constituted violations of international law, and, in particular, violated the Treaty, in addition to being in breach of Peruvian law.

### 3.1 Overview of the GSP Project

24. On 22 December 2012, the then Peruvian Government enacted Law No. 29970, with the purpose of strengthening the country's energy security and promoting the development of the petrochemical hub in the south of the country (*Ley que afianza la seguridad energética y promueve el desarrollo de polo petroquímico en el sur del país*). Articles 3.2 and 4.1, items (i) and (ii) of the Law describe certain projects for transporting natural gas and/or natural liquid gas through a pipeline network that would



have a guaranteed income mechanism and would be tendered by ProInversión, the Peruvian agency for the promotion of private investment.<sup>8</sup>

25. The Government officially announced its intention to develop the GSP Project, through Supreme Resolution No. 0015-2013-EF.<sup>9</sup>
  26. The GSP Project involved the construction of a 1,134 km pipeline from the Peruvian Amazonian jungle through the Andes to the coast, enabling the transportation of gas to the regions of Cusco, Apurímac, Puno, Arequipa, Moquegua and Tacna.
  27. On 22 February 2013, through Board Resolution No. 508-3-2013-CPS, ProInversión approved the GSP Project Bidding Terms (*Bases del Concurso de Proyectos Integrales para la Entrega en Concesión*) and announced the tender of the GSP Project.
  28. On 23 July 2014, after ODB's consortium won the bid, the Peruvian Government, via the MEM, entered into the Contract with GSP to build and operate the pipeline as well as a performance bond.
- 3.2 Peru undermined the financing of the GSP Project and OLI LUX's disposal of its investment by arbitrarily refusing to issue a bankability amendment**
29. Pursuant to Article 6.5 of the Contract, GSP had to secure financing for the Project within 20 months of the Contract's Effective Date. This deadline was twice extended to January 2017 (the "Closing Date").<sup>10</sup>
  30. Following a large scale investigation commenced in Brazil, allegations that ODB had paid bribes to public and private officials in other Latin American countries started to emerge and led to further investigations in Peru.

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<sup>8</sup> Exhibit CL-2; Law No. 29970 dated 22 December 2012.

<sup>9</sup> Exhibit CL-3; Supreme Resolution No. 0015-2013-EF dated 7 February 2013.

<sup>10</sup> The initial deadline based on Article 6.5 of the Contract was 23 March 2016. However, on 29 January 2016, the MEM extended this deadline by six months. The deadline was extended by another four months on 4 July 2017.



31. After the election in July 2016 of President Kuczynski, the new Government decided to distance itself from the Project. It became increasingly clear that the authorities were wanting to switch to a new type of project exclusively backed by the private sector.
32. In light of the increasing hostility of the Government against the Project, and given the additional difficulties for GSP to obtain financing due to ODB's involvement in GSP, OLI LUX decided to sell its stake in the Project. In order to find interested buyers and also to obtain financing for the Project, GSP needed to secure a bankability amendment to the Contract. The issuance of a bankability amendment by the Government is required for international lenders to finance this kind of project. While the Government had consistently granted a bankability amendment for similar infrastructure projects, both during the contractual timeframe, but also in situations in which the contractual timeframe had expired, it refused to do so in relation to GSP.
33. On 14 January<sup>11</sup> and 19 February 2016,<sup>12</sup> two bankability amendment proposals were presented to the Peruvian Government by GyM and Enagás. Following comments from the Government, a third proposal was sent by GSP on 6 April 2016.<sup>13</sup>
34. In the meantime, on 22 August 2016, IITD received a binding offer from a consortium composed of Sempra International, LLC ("**Sempra**"), Tecpetrol International S.A. ("**Tecpetrol**") and Techint S.A.C. ("**Techint**") (together the "**Sempra Consortium**"), with an all-cash price for its shares in the amount of USD 651,083,143.<sup>14</sup> One of the conditions for the conclusion of the deal was the signature of the bankability amendment before 1 November 2016.<sup>15</sup>

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<sup>11</sup> Exhibit C-5: Letter 001-2016-GSP-MEM-LEG from GSP to the MEM dated 14 January 2016.

<sup>12</sup> Exhibit C-6: Letter 0009-2016-GSP-MEM-LEG from GSP to the MEM dated 19 February 2016.

<sup>13</sup> Exhibit C-7: Letter 0014-2016-GSP-MEM-LEG from GSP to the MEM dated 6 April 2016.

<sup>14</sup> Exhibit C-8: Letter from the Sempra Consortium to IITD dated 22 August 2016.

<sup>15</sup> Exhibit C-9: Letter from IITD to the Sempra Consortium dated 7 October 2016, item 2.



### **3.3 The termination of the Contract did not comply with the applicable procedure**

35. On 16 January 2017, given the lack of response from the Government in respect of the last draft of the bankability amendment, GSP requested the MEM to grant a 120 days extension of the Closing Date of the GSP Project (i.e. until 23 May 2017). The MEM never replied to this request.<sup>16</sup>
36. On 24 January 2017, following GSP's failure to meet the Closing Date, the General Direction of Hydrocarbons ("**DGH**") terminated the Contract through Letter No. 145-2017-MEM-DGH. The termination was confirmed by Supreme Resolution No. 004-2017 issued on 15 February 2017 by the President and the MEM, declaring that the Contract was terminated on 24 January 2017 for breach of Article 6.7 of the Contract.
37. Peru's abrupt termination of the Contract did not follow any of the applicable procedures established in the Contract or in Supreme Decree No. 081-2007-EM.<sup>17</sup>

### **3.4 The Government abusively executed the performance bond for USD 262,500,000**

38. Also on 24 January 2017,<sup>18</sup> the Government improperly executed the performance bond of USD 262,500,000 regulated by Article 9.11.1 of the Contract.<sup>19</sup> This was first announced by a tweet from President Kuczynski at 12.00am on 24 January 2017.<sup>20</sup>

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<sup>16</sup> **Exhibit C-10:** Letter No. 0007 -2017-GSP-MEM-DT from GSP to the MEM dated 23 January 2017.

<sup>17</sup> **Exhibit C-2:** Concession Contract for the Improvements to the Country's Energy Security and Development of the Gasoducto Sur Peruano ("*Mejoras a la Seguridad Energética del País y Desarrollo del Gasoducto Sur Peruano*") dated 23 July 2014, Articles 20.1 and 20.2; **Exhibit CL-4:** Decreto Supremo No. 081-2007-EM *Reglamento de transporte de hidrocarburos por ductos* dated 22 November 2017, Articles 45, 46, 48 and 58.

<sup>18</sup> At exactly 12:00 AM on 24 January 2017, i.e. one minute exactly after the expiration of the Closing Date, Peru's President, Pedro Pablo Kuczynski ("**President Kuczynski**"), tweeted that he had ordered the execution of the performance bond against the consortium "*lead [sic] by Odebrecht*". See **Exhibit C-11:** Tweet from President Kuczynski dated 24 January 2017.

<sup>19</sup> The performance bond was reduced by USD 87,500,000 by the Government since GSP had already advanced more than 25% of works.

<sup>20</sup> **Exhibit C-11:** Tweet from President Kuczynski dated 24 January 2017.



39. By executing the performance bond on the same day that it announced the termination of the Contract, Peru once again violated the specific mechanisms and procedures provided by the Contract and the applicable law.<sup>21</sup>
40. The conduct of the Government was arbitrary and prejudicial to GSP and its investors. After refusing to issue a bankability amendment and adopting the view that the GSP Project was not economically convenient to its interests, the Government was collecting an extraordinary sum of money for a purported damage that either never occurred or to which Peru contributed with its own conduct. In other words, the Government abusively collected USD 262.5 million as compensation for not being exposed to the Contract that it was seeking to avoid.
41. In addition to executing the performance bond, four months after the termination of the Contract the Peruvian Government arbitrarily imposed a USD 92,000,000 fine based on GSP's alleged non-compliance with the critical path foreseen in Article 9.2 of the Contract.<sup>22</sup>
- 3.5 Peru failed to compensate GSP for the termination of the Contract and destroyed the value of its assets**
42. In the event of termination of the Contract, Article 20.4 provided for a precise procedure to be followed for the auction of the concession. Pursuant to this Article, the Government was required to: (i) appoint a person who would act as the auditor (*interventor*) to oversee the management of the concession until the transfer to a new concessionaire; and (ii) auction the concession within one year of the termination of the Contract (i.e. by 24 January 2018). Article 20.4.3 further provided that GSP was entitled to recover a portion of its investment from the auction proceeds by way of compensation amounting to at least 72.25% of the net book value of the concession

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<sup>21</sup> Exhibit C-2: Concession Contract for the Improvements to the Country's Energy Security and Development of the Gasoducto Sur Peruano ("*Mejoras a la Seguridad Energética del País y Desarrollo del Gasoducto Sur Peruano*") dated 23 July 2014, Article 6.7.

<sup>22</sup> Exhibit C-12: Letter No. 807-2017-MEM/DGH from the MEM to GSP dated 16 May 2017.



assets (less expenses incurred during the auction process). However, Peru did not follow any of these procedures in relation to GSP.

**3.5.1 Peru's unlawful manipulation of the process for the appointment of an auditor and failure to comply with the required process for the auction of the concession**

43. Instead of abiding by the procedure provided for by Article 20.4 of the Contract, the State changed the applicable procedure through the issuance of ED 001-2017 on 1 February 2017.<sup>23</sup>
44. While the applicable laws and regulations required the appointment of an auditor to carry out the auction of the concession assets, ED 001-2017 provided that an administrator appointed by the *Organismo Supervisor de la Inversión en Energía y Minería* ("OSINERGMIN") would be responsible for the custody and maintenance of the concession assets on behalf of the State, until their transfer to the private sector.<sup>24</sup> It also established that the costs of hiring the administrator would be paid with the funds from the execution of the performance bond.<sup>25</sup>
45. The State however unreasonably delayed the appointment of the administrator, and OLI LUX ended up bearing the costs of maintenance of the concession assets during the months following the termination of the Contract.<sup>26</sup> Strikingly, the MEM is still claiming S/ 370,829,162 (a little over USD 100 million) for the conservation,

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<sup>23</sup> It is important to note that the Contract, in case of early termination, provided for a regime for the protection of investments that was more favourable than the general regime provided for by Supreme Decree No. 081-2007-EM5, Exhibit CL-4.

<sup>24</sup> Exhibit CL-5: Emergency Decree No. 001-2017 dated 1 February 2017, Article 2.

<sup>25</sup> Exhibit CL-5: Emergency Decree No. 001-2017 dated 1 February 2017, Article 2.

<sup>26</sup> Exhibit C-2: Concession Contract for the Improvements to the Country's Energy Security and Development of the Gasoducto Sur Peruano ("*Mejoras a la Seguridad Energética del País y Desarrollo del Gasoducto Sur Peruano*") dated 23 July 2014, Article 20.4.2(xi), which states that "*in every case of Termination of the Concession, and to be consistent with Article 22 of the TUP, the assets of the concessions will be transferred to the State, which in turn, shall deliver them to the new concessionaire.*" (free translation of original: "*En todos los casos de Terminación de la Concesión, y para efectos de lo dispuesto en el Artículo 22 del TUP, se entenderá que los Bienes de la Concesión son transferidos al Estado el que, a su vez, los entregará en concesión al Nuevo Concesionario*").



maintenance and custody of the concession assets despite the execution of the performance bond, which was supposed to cover these transfer and maintenance costs.<sup>27</sup>

46. Pursuant to Article 20.4 of the Contract, Peru was also required to carry out a public auction after the termination of the Contract for the transfer and delivery of the concession.<sup>28</sup> The concessionaire is entitled to recover a portion of its investment through this auction pursuant to Article 20.4.3 of the Contract, which guarantees a recovery amounting to at least 72.25% of the net book value of the concession assets. Pursuant to the Contract and the applicable law, the auction was to occur within 12 months of the termination.<sup>29</sup>
47. Nonetheless, Peru has, to date, never carried out an auction, nor has it given a reasonable explanation for not doing so. OLI LUX was therefore denied the right to recover a portion of its investment in the GSP Project, despite GSP's numerous requests (and complaints) that the Government comply with such obligation.
48. Peru arbitrarily changed the procedures established in the Contract and applicable law for the appointment of an auditor and for the auction of the concession assets, to the substantial financial detriment of GSP and without its consent.

3.5.2 Peru's enactment of Law No. 30543, which materially altered the nature and viability of the GSP Project, thereby substantially diminishing its value

49. On 3 March 2017, as part of the sudden and drastic series of measures adopted by the State against OLI LUX's investments, Peru enacted Law No. 30543,<sup>30</sup> which abrogated

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<sup>27</sup> **Exhibit C-13:** Letter No. 1008-2019-MINEM/DGH from the MEM to GSP dated 24 September 2019.

<sup>28</sup> **Exhibit C-2:** Concession Contract for the Improvements to the Country's Energy Security and Development of the Gasoducto Sur Peruano ("*Mejoras a la Seguridad Energética del País y Desarrollo del Gasoducto Sur Peruano*") dated 23 July 2014, Article 20.4.2; **Exhibit CL-4:** Decreto Supremo No. 081-2007-EM *Reglamento de transporte de hidrocarburos por ductos* dated 22 November 2017, Articles 45 and 54.

<sup>29</sup> **Exhibit C-2:** Concession Contract for the Improvements to the Country's Energy Security and Development of the Gasoducto Sur Peruano ("*Mejoras a la Seguridad Energética del País y Desarrollo del Gasoducto Sur Peruano*") dated 23 July 2014, Article 20.4.3.

<sup>30</sup> **Exhibit CL-6:** Law No. 30543 – Law that Eliminates the Energy Security Asset Collection That Has Been Affecting the Cost of the Electricity Service and Orders the Restitution of Such Amount to the Energy Service Users dated 3 March 2017.



the Energy Security Consolidation Charges ("ESCC").<sup>51</sup> The ESCC were charges collected from the energy industry that the State provided as subsidies to GSP to ensure the financial viability of the Project through a guaranteed annual income (*Ingreso Garantizado Anual*). Law No. 30543 not only eliminated the ESCC, but also ordered the reimbursement of the amounts already collected.<sup>52</sup>

50. The ESCC was for the means by which the Government upheld its ship-or-pay obligation and guaranteed that even if no gas was running through the Project's pipes, the owners would still have a minimum income to cover the costs of the Project.
51. The ESCC was a critical subsidy for the GSP Project that made it financially viable and created the necessary conditions to obtain financing.
52. This Law consequently significantly altered the nature and viability of the GSP Project and substantially diminished its value, thereby hindering OLI LUX's ability to recover its investment as a result of the auction process contemplated in the Contract.
53. This measure, along with all others, has led to GSP's insolvency. The Government has also diverted improperly the insolvency process conducted by INDECOPi to deprive GSP/ITD of an adequate opportunity to be properly represented in this process and receive the compensation they are entitled to. INDECOPi is a public authority operating under the control of the Ministry of Finances and its actions are directly attributable to the Government.

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<sup>51</sup> This included the *Cargo por Afianzamiento de la Seguridad Energética (CASE)*, *Cargo por Sistema de Seguridad Energética en Hidrocarburos (SISE)* and *Tarifa Regulada de Seguridad (TRS)*.

<sup>52</sup> These collections were the State's contribution to the financing of the GSP Project and guaranteed the Project's viability.



### **3.6 Peru adopted draconian measures that affected GSP for corruption allegations unrelated to the GSP Project**

54. On 13 February 2017, Peru enacted ED 003-2014,<sup>33</sup> which was replaced on 9 March 2018 by Law No. 30737 and its corresponding Regulation.<sup>34</sup> These enactments provide for the retention and restriction of funds belonging to companies convicted of corruption or having admitted to corrupt practices and for the payment of civil reparation to the State.
55. The Ministry of Justice and Human Rights ("MINJUS") explained on its website that the purpose of ED 003-2017 was to prevent the transfer abroad of money obtained due to corrupt activities.<sup>35</sup>
56. ED 003-2017 restricted the rights of Odebrecht entities (by virtue of Odebrecht having admitted to corrupt activity in the context of foreign investigations in the US and Brazil) to repatriate capital and transfer money abroad or to sell their assets without prior authorization from the MINJUS.<sup>36</sup> This restriction applies to: the sale of assets, shares or rights; the reduction or increase of capital; the partial or total liquidation of the companies; and any income from the use and enjoyment of OLI LUX's assets and rights in Peru.<sup>37</sup>
57. While ED 003-2017 was drafted in general terms, it targeted specifically Odebrecht entities by including only Odebrecht-related entities in its annex listing companies to

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<sup>33</sup> **Exhibit CL-7:** Emergency Decree No. 003-2017 dated 13 February 2017; **Exhibit CL-8:** Ministerial Resolución No. 0061-2017-JUS dated 7 March 2017 with the list of Legal Entities Included in the Emergency Decree No. 003-2017.

<sup>34</sup> **Exhibit CL-9:** Law No. 30737 dated 9 May 2018; **Exhibit CL-10:** Supreme Decree No. 096-2018-EF dated 9 May 2018.

<sup>35</sup> **Exhibit C-14:** Article "Decreto de Urgencia N° 003-2017 impedirá que la corrupción se lleve dinero del país" dated 15 February 2017.

<sup>36</sup> **Exhibit CL-7:** Emergency Decree No. 003-2017 dated 13 February 2017, Articles 3 and 4; **Exhibit CL-9:** Law No. 30737 dated 9 May 2018, Articles 3 and 4; and **Exhibit CL-10:** Supreme Decree No. 096-2018-EF dated 9 May 2018, Articles 4-9.

<sup>37</sup> **Exhibit CL-7:** Emergency Decree No. 003-2017 dated 13 February 2017, Article 3; **Exhibit CL-9:** Law No. 30737 dated 9 May 2018, Article 3.



which the Decree applies.<sup>38</sup> ED 003-2017 also targeted companies involved in concessions with Odebrecht, if they had a participation larger than 5% in the contracts with Peru.<sup>39</sup>

58. This Decree destroyed the viability of several of Odebrecht's projects in the country, created legal uncertainty and instability that negatively affected the GSP Project, and imposed severe economic restrictions on OLI LUX. It also irreparably impaired the chain of payments to suppliers and providers that were involved in Odebrecht projects; including the GSP Project, and caused substantial harm to the Peruvian economy.
59. These measures have hindered OLI LUX's ability to receive payments and any type of income related to its investments in the GSP Project. This has deprived OLI LUX of the enjoyment and proceeds of its investments and has prevented it from fulfilling its obligations with its lenders and employees.
60. The enactment of the 2017-2018 Regulations created more uncertainty regarding the auction and transfer of the GSP Project, which Peru has still not carried out to date. This uncertainty stems from: (i) the imposition of the MINJUS' approval as a requirement for the sale of any asset of OLI LUX and the lack of specificity and transparency in the process for approval; (ii) the lack of specificity regarding the procedures to be followed by the Attorney General to determine the amount of the civil reparation; and (iii) the Government's discretion in the determination of the sale price of any of OLI LUX's assets.
61. On 10 December 2018, Construtora Norberto Odebrecht SA ("CNO") and the Peruvian Attorney General's Office entered into a Cooperation Agreement ("**Cooperation Agreement**") by virtue of which CNO agreed to pay a USD 180 million fine, and agreed to provide information and evidence regarding the investigations of corruption cases in Peru. The Cooperation Agreement was approved by a Peruvian judge on 17 June 2019. By means of the Cooperation Agreement, CNO recognized that unlawful

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<sup>38</sup> Exhibit CL-8: Ministerial Resolution No. 0061-2017-JUS dated 7 March 2017 with the list of Legal Entities Included in the Emergency Decree No. 003-2017.

<sup>39</sup> Exhibit C-15: Article "*Congreso endureció el DL 003 y lo extendió a socios de Odebrecht*" dated 10 November 2017.



activity took place in relation to four projects only, operated or built by Odebrecht companies in Peru. The GSP Project is not one of them and OLI LUX, GSP and ITD are not amongst the companies identified in the Cooperation Agreement. Yet, Peru has treated OLI LUX, ITD and GSP as if they were guilty of unlawful conduct, and has imposed – and continues to impose – arbitrary and discriminatory measures on these entities.

#### **4. BREACHES OF THE TREATY**

##### **4.1 Fair and equitable treatment**

62. Article 3.1 of the BIT contains the fair and equitable standard ("FET"), providing that *"All investments made by investors of one Contracting Party shall enjoy a [sic] fair and equitable treatment in the territory of the other Contracting Party, in accordance with customary international law,"*<sup>40</sup>
63. Through its organs, agencies and representatives, Peru has not afforded FET to the Claimant's investments, including the shares indirectly owned by OLI LUX in GSP and GSP's concession rights. The facts set out above, which Claimant will further detail in subsequent submissions, demonstrate that the State did not fulfil Claimant's legitimate expectations regarding its investments.
64. To the contrary, the State acted in bad faith towards Claimant's investments and took measures that were arbitrary, grossly unfair, discriminatory, disproportionate to the objective sought and violated basic principles of due process, depriving Claimant of the value of its investments.
65. The actions taken by the Peruvian State against Claimant's investments in violation of the FET standard include:

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<sup>40</sup> Claimant also reserves the right to invoke the benefit of Article 4.1 of the BIT in relation to its claim for breach of the FET standard.



- (a) The failure to approve the bankability amendment proposal presented by GSP, which frustrated ODB's efforts to sell its shares in the GSP Project;<sup>41</sup>
- (b) The improper and illegal termination of the Contract, in violation of the contractual provisions and applicable law;<sup>42</sup>
- (c) The improper and illegal execution of the performance bond immediately following the wrongful termination of the Contract;<sup>43</sup>
- (d) The enactment of ED 003-2017 and Law No. 30737 and its implementing Regulations, which arbitrarily and illegally established onerous financial restrictions and the freezing of OLI LUX's assets and rights with respect to its investments;<sup>44</sup>
- (e) The refusal to conduct an auction of the concession assets and the manipulation of the termination process for the GSP Project, including through the enactment of ED 001-2017 and the enactment of Supreme Resolution No. 004-2017-EM;<sup>45</sup>
- (f) The enactment of Law No. 30543, which eliminated the subsidies for the GSP Project and destroyed its viability, significantly reducing its value and potential sale price;<sup>46</sup>
- (g) The arbitrary and unreasonable application of a fine of USD 92,000,000; and

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<sup>41</sup> See Section 3.2 above.

<sup>42</sup> **Exhibit C-2:** Concession Contract for the Improvements to the Country's Energy Security and Development of the Gasoducto Sur Peruano ("*Mejoras a la Seguridad Energética del País y Desarrollo del Gasoducto Sur Peruano*") dated 23 July 2014, Articles 20.1 and 20.2; **Exhibit CL-4:** Decreto Supremo No. 081-2007-EM *Reglamento de transporte de hidrocarburos por ductos* dated 22 November 2017, Articles 45, 46, 48 and 58. See also Section 3.3 above.

<sup>43</sup> See Section 3.4 above.

<sup>44</sup> See Section 3.6 above.

<sup>45</sup> See Section 3.5.1 above.

<sup>46</sup> See Section 3.5.2 above. This includes communications, public and private statements by officers of Peru that undermined the financial viability of the GSP Project.



- (h) The failure to take prompt and adequate action to receive, safeguard, and maintain the concession assets as required under the Contract.<sup>47</sup>
66. All the above measures formed a pattern of persecution and financial strangulation adopted by the State against the Claimant to financially suffocate it, expropriate its assets and force it to abandon the country.
67. The Government arbitrarily and unreasonably terminated one of the most important projects in Peru, which was under OLI LUX's control. This, coupled with former President Kuczynski's personal involvement in the termination of the Contract; in the illegal execution of the performance bond;<sup>48</sup> in the enactment of ED 003-2017 due to his desire to distance himself from Odebrecht in light of accusations of corruption; and the State's illegal elimination of the key subsidy for the GSP Project makes evident that the Peruvian Government's measures affecting OLI LUX's investments were politically motivated and in violation of its FET obligations under the Treaty.
- 4.2 Wrongful expropriation**
68. Peru expropriated OLI LUX's investments in violation of Article 7 of the Treaty and customary international law.
69. Article 7 of the Treaty, titled "Deprivation and limitation of ownership," provides in relevant part:

*1. Each Contracting Party undertakes not to adopt any measure of expropriation or nationalisation or any other measure having the effect of directly or indirectly dispossessing the investors of the other Contracting Party of their investments in its territory.*

*2. If reasons of public purpose or necessity, security or national interest require a derogation from the provisions of paragraph 1, the following conditions shall be complied with:*

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<sup>47</sup> See Section 3.5.1 above.

<sup>48</sup> Exhibit C-11: Tweet from President Kuczynski dated 24 January 2017.



*a) the measure shall be taken under due process of law;*

*b) the measure shall be neither discriminatory, nor contrary to any specific commitments;*

*c) the measure shall be accompanied by provisions for the payment of an adequate, effective and prompt compensation.*

*3. Such compensation shall amount to the actual value of the investments on the day before the measures were taken.*

*Such compensation shall be paid in any convertible currency. It shall be paid without undue delay and shall be freely transferable.*

*It shall bear interest at the normal commercial rate from the date of expropriation until the date of its payment.*

70. This provision protects investors against direct and indirect expropriation, whereby the State, through regulations or other measures, substantially deprives the investor of its investment or deprives such investment of its value.

71. Through its organs, agencies and representatives, Peru adopted harmful measures against OLI LUX's investments that amount to an illegal, indirect and creeping expropriation under the Treaty and customary international law. These measures include:

(a) Terminating the Contract despite the pending negotiation of a bankability amendment and regardless of GSP's request to suspend the Contract's deadlines;<sup>49</sup>

(b) Improper execution of the performance bond in violation of the Contract's provisions;<sup>50</sup>

(c) Freezing of OLI LUX's assets and rights with respect to its investments and the establishment of the various onerous financial constraints set out in ED 003-

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<sup>49</sup> See Section 3.2 above.

<sup>50</sup> See Section 3.4 above.



2017 and in Law No. 30737 and its Regulation, which restricted OLI LUX's ability to recover any value from its investment;<sup>51</sup>

- (d) Failure to carry out the auction of the concession assets and manipulation of the termination process for the GSP Project, through the enactment of ED 001-2017 and Supreme Resolution No. 004-2017-EM, which have, to date, prevented OLI LUX from recovering its investment in the GSP Project;<sup>52</sup> and
- (e) Enactment of Law No. 30543, which eliminated the subsidies for the GSP Project destroying its viability and resulting in GSP's insolvency.<sup>53</sup>

72. None of the measures described above complied with Article 7 of the Treaty, as they: (i) did not involve reasons of public purpose or necessity, security or national interest, (ii) were not taken under due process of law, (iii) were discriminatory against OLI LUX; (iv) were contrary to the specific commitments Peru had made with respect to the Contract; and (v) were not accompanied by provisions for the payment of adequate, effective, or prompt compensation. These measures therefore violated Peru's obligations under the Treaty and customary international law.

#### **4.3 Continuous protection and security from unjustified and discriminatory measures by Peru**

73. Peru has failed to afford OLI LUX's investments continuous protection and security from unjustified and discriminatory measures, in violation of Article 3 of the Treaty and customary international law.

74. Article 3 of the Treaty, titled "Protection of investments," provides in relevant part:

*2. Except for measures required to maintain public order, such investments shall enjoy continuous protection and security, i.e. excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management,*

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<sup>51</sup> See Section 3.6 above.

<sup>52</sup> See Section 3.5.1 above.

<sup>53</sup> See Section 3.5.2 above.



*maintenance, use, possession or liquidation thereof. The concept of « continuous protection and security » does not create additional substantive rights to those recognized by the customary international law.*

75. Pursuant to Article 3.2 of the Treaty, "continuous protection and security" proscribes *"any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof."*<sup>54</sup> Peru therefore undertook to ensure legal protection and security to Claimant's investments and that it would not implement any "unjustified or discriminatory measure" that would adversely affect those investments in Peru.
76. The standard of continuous protection and security requires Peru to afford both legal protection and security to investments of BLEU investors, which includes maintaining a stable and secure investment environment, via stable, non-discriminatory and transparent laws, free from improper interference by State authorities and other actors.
77. Peru breached this obligation with respect to OLI LUX's investments through the multiple measures adopted, including:
- (a) Termination of the Contract;
  - (b) Execution of the performance bond;
  - (c) Establishment of onerous financial restrictions and freezing of OLI LUX's assets and rights with respect to its investments through the enactment of ED 003-2017 and Law No. 30737 and its Regulations;
  - (d) Failure to carry out the auction of GSP's assets and manipulation of the termination process for the GSP Project; and
  - (e) Elimination of the promised subsidies for the GSP Project.

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<sup>54</sup> Claimant also reserves the right to invoke the benefit of Article 4.1 of the BIT in relation to its claim for breach of Peru's obligation not to impose unjustified or discriminatory measures and to afford continuous protection and security to its investment.



78. None of these measures were required to maintain public order. They were unjustified and discriminatory against OLI LUX and they hindered the management, maintenance, use, possession and liquidation of OLI LUX's investments. These measures thus constituted a failure by Peru to afford protection and security to Claimant's investments, in violation of Article 3 of the Treaty and customary international law.
- 4.4 By application of the Most Favored Nation Protection, Peru violated its obligation to comply with all other obligations it entered into in relation to OLI LUX's investments**
79. By application of the Most Favoured Nation ("MFN") protection afforded by the Treaty, the Claimant is entitled to rely on the investment protections contained in other Treaties entered into by Peru with third countries.
80. Article 4 of the Treaty provides:
- 1. In all matters relating to the treatment of the investments, the investors of each Contracting Party shall enjoy national treatment and most-favoured-nation treatment in the territory of the other Contracting Party.*
- 2. With respect to the operation, management, maintenance, use, enjoyment and sale or other disposal of investments, each Contracting Party shall accord, on its territory, to investors of the other Contracting Party, treatment no less favorable than that granted to its own investors or to investors of any other State if the latter is more favorable.*
81. Accordingly, by operation of the MFN clause, the Claimant's investments are protected by the 'umbrella clause' contained in – amongst other relevant treaties – the Agreement between the Government of the United Kingdom of Great Britain and the Government of the Republic of Peru for the Promotion and Protection of Investments, in force since 21 April 1994 ("**Peru-UK BIT**"), under which Peru undertakes to "observe any



*obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.”<sup>55</sup>*

82. Peru’s failure to comply with any obligation entered into in relation to the Claimant’s investments therefore amounts to a breach of the Treaty. Accordingly, through the enactment of ED 003-2017 and Law No. 30737, Peru violated the commitments and obligations it entered into with the Claimant’s subsidiaries GSP and/or IITD under the Contract and Peruvian law, among others:

- (a) Contractual provisions promising (i) legal stability in relation to the concessionaire’s right to develop, exploit and freely manage the assets of the concessions;<sup>56</sup> and (ii) guaranteed payments and revenues to the operators;<sup>57</sup>
- (b) Contractual provisions concerning suspension and termination of the Contract and auction of the Concession assets of the Project after termination (Articles 19 and 20 of the Contract);<sup>58</sup>
- (c) Article 70 of the Peruvian Constitution, under which the State is obliged to protect and not interfere with private property unless for public necessity proclaimed by law and upon payment of compensation for the damages incurred by the affected party;<sup>59</sup>

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<sup>55</sup> **Exhibit CL-11:** Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Peru for the Promotion and Protection of Investments dated 4 October 1993, Article 2(2): “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of national or companies of the other Contracting Party”. Claimant reserves the right to rely on other treaties to which Peru is a party in its main submissions.

<sup>56</sup> **Exhibit CL-12:** Legal stability agreement concluded between the State of Peru and Inversiones en Infraestructura de Transporte por Ductos S.A.C., de Perú dated 28 November 2014

<sup>57</sup> **Exhibit C-2:** Concession Contract for the Improvements to the Country’s Energy Security and Development of the Gasoducto Sur Peruano (“Mejoras a la Seguridad Energética del País y Desarrollo del Gasoducto Sur Peruano”) dated 23 July 2014, Article 14.6.

<sup>58</sup> See Sections 3.3 and 3.5.1 above.

<sup>59</sup> **Exhibit CL-13:** Political Constitution of Peru dated 29 December 1993, Article 70.



- (d) Article 62 of the Peruvian Constitution, which guarantees freedom of contract and the stability of concession contracts. The commitments the State undertakes in concession contracts cannot be modified by law;<sup>60</sup>
- (e) Article 63 of the Peruvian Constitution, which establishes the same guarantee of freedom of contract and stability for foreign investments;<sup>61</sup> and
- (f) Other Peruvian legislation providing for stability of the legal framework and guarantees to foreign investments, including (i) freedom of commerce and industry, (ii) free transfer of payments abroad including profits, dividend and capital invested, and (iii) non-discriminatory treatment. These laws include Legislative Decree No. 662, which approves the Legal Stability Regime for Foreign Investment (*Régimen de Estabilidad Jurídica a la Inversión Extranjera*); Legislative Decree No. 757, which approves the Legal Framework for the Development of Private Investment; Supreme Decree 162-92-EF, which approves the regulation of guarantees to private investment; and the agreements of legal stability executed by the State and the Claimant's subsidiaries in accordance with this legislation.

- 83. In violation of the above commitments and obligations, the Peruvian Government has prevented the Claimant from: (i) transferring profits and proceeds from its investments; and (ii) disposing of and transferring their rights and interests in the GSP Project, thus damaging the Claimant's investments.
- 84. The enactment of ED 003-2017 and Law No. 30737 therefore violated Peru's obligations towards the Claimant and its subsidiaries in relation to the GSP Project under the Contract and Peruvian law, thereby constituting a violation of the Treaty.
- 85. Furthermore, as previously mentioned, Peru breached the Contract and violated the applicable law when it illegally terminated the Contract, improperly executed the performance bond, arbitrarily changed the termination process, refused to carry out the auction of the concession assets or to compensate OLI LUX, and abrogated the financial

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<sup>60</sup> Exhibit CL-13: Political Constitution of Peru dated 29 December 1993, Article 62.

<sup>61</sup> Exhibit CL-13: Political Constitution of Peru dated 29 December 1993, Article 63.



incentives it had promised for the development of the GSP Project, depriving it of its value.

86. These measures violated Peru's undertaking to comply with all its obligations in connection with Claimant's investments, which is provided in the Peru-UK BIT and imported by operation of the MFN protection contained in the Treaty's.

#### **4.5 National Treatment and Most-Favored-Nation Treatment**

87. Peru breached its obligation to treat OLI LUX's investments no less favourably than Peru treats investments of its own nationals or of investors of other states, in violation of Article 4 of the Treaty.

88. Article 4 of the Treaty, titled "National treatment and most favoured nation," provides in relevant part:

*1. In all matters relating to the treatment of investments, the investors of each Contracting Party shall enjoy national treatment and most-favoured-nation treatment in the territory of the other Contracting Party.*

*2. With respect to the operation, management, maintenance, use, enjoyment and sale or other disposal of investments, each Contracting Party shall accord, on its territory, to investors of the other Contracting Party, treatment no less favourable than that granted to its own investors or to investors of any other State if the latter is more favourable.*

89. This provision affords OLI LUX's investments protection commensurate with the maximum protections available to investments of Peruvians and of all nationals from other states with which Peru has concluded bilateral investment treaties. Peru's fulfilment of its substantive obligations owed to OLI LUX's investments under the Treaty must be assessed in accordance with Article 4.

90. Peru may also have violated its obligations of national treatment ("NT") and MFN under this clause by affording more favourable treatment to the investments of investors



who were in the same or in a similar situation as ODB but did not have their rights restricted.

91. Peru's refusal to suspend or extend the Closing Date for the GSP Project and to enter into a bankability amendment also manifests less favourable treatment than that afforded to investors in like circumstances.<sup>62</sup>
92. These differences in treatment constitute a violation of Peru's NT and MFN obligations under the Treaty.

#### **4.6 Free transfer of assets and returns**

93. Peru breached its obligation to allow the Claimant to freely transfer payments relating to its investments, in violation of Article 8 of the Treaty.
94. Article 8 of the Treaty, titled "Transfers," provides in part:

*1. Each Contracting Party shall grant to investors of the other Contracting Party the free transfer of all payments relating to an inves[t]ment, including more particular[ly]:*

*a) amounts necessary for establishing, maintaining or expanding the investment;*

*b) amounts necessary for payments under a contract, including amounts necessary for repayment of loans, royalties and other payments resulting from licenses, franchises, concessions and other similar rights, as well as salaries of expatriate personnel;*

*c) proceeds from investments;*

*d) proceeds from the total or partial liquidation of investments, including capital gains or increases in the invested capital;*

*e) compensation paid pursuant to Article 7.*

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<sup>62</sup> See para. 29 above.



[...]

*4. Each Contracting Party shall issue the authorisations required to ensure that the transfers can be made without undue delay, with no other expenses than the usual banking costs.*

*5. Notwithstanding the agreed in previous paragraphs, the Contracting Parties may hinder, under due process of law, the transfer by the equitable and non-discriminatory application of their legislation in the following cases:*

*a) Bankruptcy, insolvency or protection of creditor's rights;*

*b) Issuance, trade and transactions of securities;*

*c) Criminal or administrative infringements;*

*d) Guarantee of enforcement of decisions in administrative proceedings;*

*e) Non-compliance of obligations under prevailing tax laws;*

*f) Non-compliance of obligations under prevailing labour laws.*

95. Under this provision, Peru is obligated to allow OLI LUX to freely transfer payments related to its investments in the country.
96. Peru breached this obligation by preventing the Claimant from transferring funds related to its investments. The State, through the Regulations, restricted OLI LUX's right to transfer the full amount of its capital, dividends and profits from its investments in Peru, notably by (i) not holding an auction and (ii) freezing OLI LUX's assets. These measures by the State have blocked OLI LUX's ability to transfer abroad and to receive payments and any type of income related to its investments, preventing it from fulfilling its obligations with its lenders and employees, in violation of OLI LUX's right of free transfers under the Treaty.
97. According to Law 30737 and its Regulation, the restriction against repatriating capital and transferring money abroad will be in force until (i) the company pays all its debts



with workers, vendors and other third parties (excluding other Odebrecht entities) related to the Project, along with the civil reparation and taxes, (ii) the implicated persons are acquitted from charges, or (iii) the proceedings against the implicated persons are dismissed. If transfers must be made for the payment of debts abroad that may affect the value of the Project, these are subject to the MINJUS's approval. Therefore, the application of Law No. 30737 violates the free transfer protection under the Treaty.

98. The same violations of the Treaty will apply to any revenues received by OLI LUX from the sale of the GSP Project if the Peruvian State allows that project to be auctioned or sold as required under the Contract and applicable law.

## **5. HARM CAUSED TO OLI LUX**

99. The measures referred to above have already caused and will continue to cause substantial financial harm to OLI LUX.
100. The full extent of that financial harm will be explained in Claimant's later submissions and factual and expert evidence to be provided.

## **6. JURISDICTION**

101. Jurisdiction is established pursuant to Peru's offer to arbitrate disputes such as the present one in Article 11 of the Treaty.
102. Moreover, the conditions of Article 25 of the ICSID Convention are satisfied.

### **6.1 Claimant is entitled to the protections of the Treaty**

103. Peru and the BLEU signed the Treaty on 12 October 2005. The Treaty entered into force on 12 September 2008 and remains in force today. The Treaty protects



investments made by an investor of a Party in the territory of another Party. Claimant and its investments in Peru are entitled to protection under the Treaty.<sup>63</sup>

6.1.1 Claimant is a protected investor

104. Under Article 1.1.b of the Treaty, an "investor" includes companies "*constituted in accordance with the legislation of [...] the Grand Duchy of Luxembourg [...] and having its registered office in the territory of [...] the Grand Duchy of Luxembourg [...].*"
105. Claimant is duly incorporated and has its registered office in the Grand Duchy of Luxembourg.<sup>64</sup> Claimant thus qualifies as an investor under the Treaty.

6.1.2 Claimant has a protected investment

106. Article 1.2 of the Treaty defines an "investment" as "*every kind of asset and any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity.*"
107. Importantly, the definition of "investment" expressly includes (i) "*shares, corporate rights and any other kind of shareholdings, including minority or indirect ones, in companies constituted in the territory of one Contracting Party*"<sup>65</sup>; (ii) "*concessions granted under public law or under contract, including concessions to explore, develop, extract or exploit natural resources.*"<sup>66</sup>

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<sup>63</sup> Exhibit CL-1: Bilateral Investment Treaty between the Belgian-Luxembourg Economic Union and the Government of the Republic of Peru on the Reciprocal Promotion and Protection of Investments dated 12 October 2005 (in force since 12 September 2008).

<sup>64</sup> Exhibit C-1: Articles of Organization of Odebrecht Latinvest S.A.R.L. dated 31 May 2017.

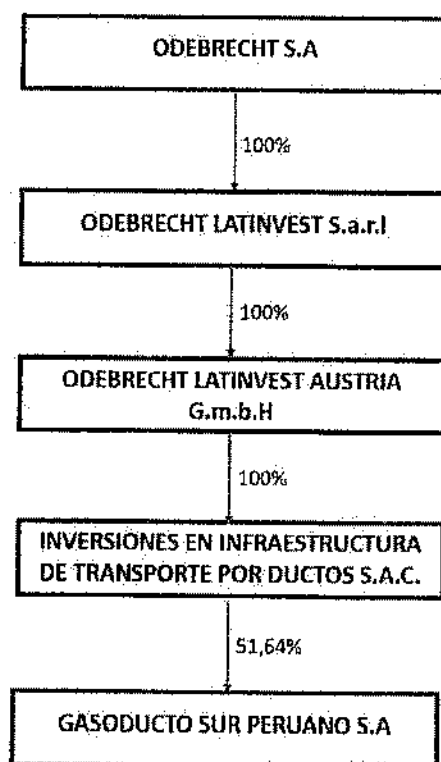
<sup>65</sup> Exhibit CL-1: Bilateral Investment Treaty between the Belgian-Luxembourg Economic Union and the Government of the Republic of Peru on the Reciprocal Promotion and Protection of Investments dated 12 October 2005 (in force since 12 September 2008), Article 1.2.b.

<sup>66</sup> Exhibit CL-1: Bilateral Investment Treaty between the Belgian-Luxembourg Economic Union and the Government of the Republic of Peru on the Reciprocal Promotion and Protection of Investments dated 12 October 2005 (in force since 12 September 2008), Article 1.2.e. This same provision refers to "*claims to money and to any performance having economic value*" and (iv) "*pledges and similar rights*".



108. The present dispute arises out of OLI LUX's investment in Peru, including but not limited to: (i) 51.64% of the shares in GSP, which are indirectly owned by OLI LUX through OLI Austria and IITD; (ii) 100% of the shares of IITD which are indirectly owned by OLI LUX through OLI Austria; (iii) the Contract relating to the construction, operation and exploitation of the GSP Project;<sup>67</sup> and (iv) any other affected Peruvian assets of GSP or IITD.

109. The chart below illustrates the chain of ownership of OLI LUX's investments in Peru.<sup>68</sup>



110. Therefore, OLI LUX meets the definition of a protected investment under Article 1.2 of the Treaty.

<sup>67</sup> This includes the guarantees and the right to compensation provided in the Contract and in Peruvian law. It is noted that Article 1.2.c of the BIT refers also to "*claims to money and to any performance having economic value*" and (iv) "*pledges and similar rights*".

<sup>68</sup> Exhibits C-18 to C-20.



**6.2 Claimant has complied with the requirements to submit the dispute to international arbitration**

111. Article 11 of the Treaty on "Settlement of investment disputes" provides in relevant parts:

*1. Any investment dispute between an investor of one Contracting Party and the other Contracting Party shall be notified in writing by the first party to take action. The notification shall be accompanied by a sufficiently detailed memorandum, including: [...]*

*As far as possible, the Parties shall endeavour to settle the dispute through negotiations, if necessary by seeking expert advice from a third party, or by conciliation between the Contracting Parties through diplomatic channels.*

*2. In the absence of an amicable settlement by means of a direct agreement between the Parties in dispute or by means of conciliation through diplomatic channels within six months after the notice, the dispute shall be submitted, at the choice of the investor [...], to international arbitration. [...]*

*To this end, each Contracting Party agrees in advance and irrevocably to the settlement of any dispute by this type of arbitration. [...]*

*3. In case of international arbitration, the dispute shall be submitted for settlement by arbitration to one of the hereinafter methods, at the option of the investor: [...]*

*- the International Centre for the Settlement of Investment Disputes (I.C.S.I.D), set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965, when each State party to this Agreement has become a party to*



*the said Convention. As long as this requirement is not met, each Contracting Party agrees that the dispute shall be submitted to arbitration pursuant to the Rules of the Additional Facility of the I.C.S.I.D. [...]*

*4. No claim may be submitted to arbitration under this Article if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged and knowledge that the claimant has incurred loss or damage.*

*5. No claim may be submitted to international arbitration under this Section unless the claimant consents in writing to international arbitration in accordance with the procedures set out in this Agreement; and the notice of international arbitration is accompanied, by the claimant's written waiver of any right to initiate before any administrative tribunal or court under the law of either Party; or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.1. [...]*

112. Peru made a unilateral offer to submit to arbitration claims for breaches of its obligations under the Treaty. By means of the Notice of Dispute dated 24 May 2017,<sup>69</sup> Claimant accepted Peru's offer, and in any event reiterates its consent in the present Request for Arbitration.
113. Claimant has consented to arbitration and hereby submits the present dispute to arbitration under the ICSID Convention pursuant to Article 11.3 of the Treaty.<sup>70</sup> The Tribunal shall therefore decide the issues in dispute in accordance with the ICSID Convention. Claimant has complied with all the requirements set forth in Article 11 of the Treaty.

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<sup>69</sup> Exhibit C-16: Notice of Dispute dated 24 May 2017.

<sup>70</sup> Exhibit C-16: Notice of Dispute dated 24 May 2017.



114. **First**, Claimant has notified in writing the existence of an investment dispute by virtue of the submission of the Notice of Dispute dated 24 May 2017 pursuant to Article 11.1 of the Treaty.<sup>71</sup>
115. **Second**, in accordance with Article 11.2 of the BIT, more than six months have elapsed since the Notice of Dispute without the Parties reaching an amicable settlement.
116. **Third**, Claimant is exercising the option to submit the dispute to ICSID arbitration as provided in Article 11.3 of the Treaty.
117. **Fourth**, all of the breaches and/or knowledge of the loss or damage incurred took place less than 3 years from the date of the submission of this Request for Arbitration.
118. **Fifth**, pursuant to Article 11.5 of the Treaty, Claimant hereby waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measures of Peru that are alleged to be a breach referred to in Article 11.1 of the Treaty.

### 6.3 ICSID Jurisdiction

119. Article 25 of the ICSID Convention ("**Jurisdiction of the Centre**") provides, in relevant part:

*(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

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<sup>71</sup> Exhibit CL-1: Bilateral Investment Treaty between the Belgian-Luxembourg Economic Union and the Government of the Republic of Peru on the Reciprocal Promotion and Protection of Investments dated 12 October 2005 (in force since 12 September 2008).



(2) *"National of another Contracting State" means:*

*(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute [...]*

120. Each of the jurisdictional requirements prescribed in Article 25 of the ICSID Convention is satisfied in this case, as briefly described below.

6.3.1 Peru is a Contracting State

121. Peru signed the ICSID Convention on 4 September 1991.<sup>72</sup> The State's instrument of ratification was deposited on 9 August 1993.<sup>73</sup> The ICSID Convention entered into force in Peru on 8 September 1993.<sup>74</sup>

122. The *rationae personae* jurisdiction requirement of the ICSID Convention is therefore satisfied in respect of the State.

6.3.2 Claimant is a National of another Contracting State

123. Under Article 25.2(b) of the ICSID Convention, a *"national of another Contracting State"* includes companies which have *"[t]he nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to arbitration"*.

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<sup>72</sup> ICSID, Search ICSID Membership, Peru. Available at: <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*



124. OLI LUX is a company established and duly registered under the laws of Luxembourg. Luxembourg signed the ICSID Convention on 28 September 1965.<sup>75</sup> Luxembourg's instrument of ratification was deposited on 30 July 1970.<sup>76</sup> The ICSID Convention entered into force in Luxembourg on 29 August 1970.<sup>77</sup>
125. The *ratione personae* jurisdiction requirement of the ICSID Convention is therefore satisfied in respect of OLI LUX.

6.3.3 Claimant has qualifying investments under the Convention

126. The Claimant's assets and interests in Peru are unquestionably "investments" for the purposes of Article 25 of the ICSID Convention since they consist of shares and contractual and other related rights related to the GSP Project.
127. The GSP Project is the quintessential type of investment that the ICSID Convention aims at promoting and protecting:
- (a) GSP entered into a 34-year concession contract with the MEM for the construction and operation of a major infrastructure project;
  - (b) To establish and advance the GSP Project, OLI LUX invested over USD 1 billion in Peru;
  - (c) OLI LUX's investments in the GSP Project involved the assumption of commercial risks that are germane to the construction and operation of any long-term infrastructure projects, especially in remote locations;
  - (d) To date, the GSP Project has generated substantial economic activity in the country, especially employment. Moreover, the GSP Project (had it gone forward) was intended to contribute directly to the social and economic

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<sup>75</sup> ICSID. Search ICSID Membership. Luxembourg. Available at: <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*



development of Peru through the transportation of natural gas to the south of the country (from Las Malvinas to the coast of Arequipa).

128. Claimant's investments therefore satisfy the *ratione materiae* jurisdiction requirement under the ICSID Convention.

6.3.4 There is a legal dispute between OLI LUX and Peru

129. OLI LUX's claims concern Government measures which are in breach of various provisions of the Treaty, causing severe economic restrictions on OLI LUX and substantially destroying the economic value of its investment in the GSP Project (as explained above). Peru has failed to address and remedy OLI LUX's claims under the Treaty.

130. There is therefore a legal dispute between OLI LUX and Peru within the meaning of Article 25 of the ICSID Convention.

6.3.5 The Parties have consented in writing to ICSID arbitration

131. Through Article 11 of the Treaty, Peru has made a unilateral offer for BLEU investors to submit claims for breaches of its obligations under the Treaty to the jurisdiction of the Centre.

132. As described at paragraph 112 above, OLI LUX confirmed its acceptance of the ICSID jurisdiction in its Notice of Dispute, and reiterates its consent in the present Request for Arbitration.

133. The requirement for written consent under Article 25 of the ICSID Convention is therefore satisfied.

## 7. PROCEDURAL MATTERS

### 7.1 Constitution of the Arbitral Tribunal

134. Having regard to the nature and significance of the dispute and Article 37.2 of the ICSID Convention, Claimant proposes that the Arbitral Tribunal comprises three arbitrators: one arbitrator nominated by Claimant at the time of (or very soon after) the



registration of this Request for Arbitration; another arbitrator nominated by Respondent within 30 days of the appointment of arbitrator appointed by Claimant, and the President of the Arbitral Tribunal to be nominated by agreement of the Parties (in consultation with the two party-appointed arbitrators) within 30 days of the nomination of the arbitrator appointed by Respondent (or such later time as may be agreed), failing which the President shall be selected by the two party-appointed arbitrators.

135. Claimant invites Respondent to agree with this proposal within 20 days of the date of this Request in accordance with Rule 2.1(b) of the ICSID Rules of Procedure for Arbitration Proceedings.

## **7.2 Language of the arbitration**

136. Claimant proposes that the arbitration be conducted in English, given that it is the default language of the Treaty, and that each Party be allowed to submit documents drawn up either in English or in Spanish without the need to provide translations.

## **7.3 Place of arbitration**

137. Pursuant to Article 62 of the ICSID Convention, arbitration proceedings shall be held at the seat of the Centre, or at another location to be agreed upon by the Parties.

## **7.4 Compliance with Institution Rule 2 and other procedural rules**

138. This Request for Arbitration is fully compliant with all the requirements of Institution Rule 2(F).
139. As regards more particularly the requirements set forth in Institution Rule 2(1)(f), the Board of Managers of OLI LUX held a meeting on 10 December 2019 at which it decided (i) to file the present proceedings<sup>78</sup> and (ii) to appoint Clifford Chance to represent OLI LUX in this Arbitration.<sup>79</sup>

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<sup>78</sup> Exhibit C-3: Minutes of Meeting of the Board of Managers of Odebrecht Latinvest S.à.r.l. dated 10 December 2019.

<sup>79</sup> Exhibit C-4: Power of Attorney of Odebrecht Latinvest S.à.r.l. to Clifford Chance dated 10 December 2019.



140. All the documents produced are certified as compliant.<sup>80</sup>
141. A wire transfer for an amount of USD 25,000 has been made in compliance with Regulation 16 of the Administrative and Financial Regulations.<sup>81</sup>

#### **7.5 Reservation of rights**

142. Claimant reserves its right to modify or supplement the claims and prayer for relief in this Request for Arbitration, to advance further claims, arguments, and prayers for relief, and to produce further evidence (whether factual or legal) as may be necessary to complete or supplement the presentation of those claims, or to respond to any arguments or allegations raised by Respondent.

### **8. RELIEF SOUGHT**

143. For the foregoing reasons, Claimant seeks the following relief from the Arbitral Tribunal:
- (a) an order declaring that Peru has violated Articles 3, 4, 7 and 8 of the Treaty as well as its obligations under international law;
  - (b) an order for specific performance directing Peru to reinstate Claimant to the status quo and grant it the management and execution of the GSP Project in the same terms and conditions as before any violations of its obligations had occurred;
  - (c) in the alternative, an order directing Peru to pay damages sufficient to wipe out the consequences of its wrongful actions and omissions in a sum to be determined in the course of these proceedings, but which the Claimant presently estimates to be in excess of USD 1.2 billion, plus pre- and post-award interest

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<sup>80</sup> The only document that is not in an official language of the ICSID Convention is Exhibit C-18, for which a free translation of the relevant part is provided.

<sup>81</sup> Exhibit C-17; Wire transfer from Odebrecht Latinvest S.A.r.l. dated 18 December 2019.



thereon at a rate to be determined in the course of these proceedings, compounded monthly;

- (d) an order directing Peru to pay all costs incurred in connection with these arbitration proceedings, including but not limited to the costs and fees of the arbitrators and of the Centre, as well as legal and other expenses incurred by Claimant including the fees of its legal counsel, experts and consultants, and those of Claimant's own employees, plus interest thereon at a reasonable rate from the date on which such costs were/are incurred to the date of payment; and
- (e) such other relief as the Arbitral Tribunal may deem just and appropriate.

**Respectfully submitted on behalf of Claimant on 21 January 2020.**

**CLIFFORD CHANCE LLP**