

**WORTH CAPITAL 27 LLC**

Claimant

— v. —

**THE REPUBLIC OF PERU**

Respondent

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**CLAIMANT'S NOTICE OF INTENT TO COMMENCE ARBITRATION  
UNDER THE UNITED STATES-PERU TRADE PROMOTION AGREEMENT**

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**May 18, 2018**

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Pursuant to Article 10.16.2 of the United States–Peru Trade Promotion Agreement of 2006 (“TPA”), Claimant Worth Capital 27 LLC (“Worth Capital” or “Claimant”), on its own behalf and on behalf of Maple Gas Corporation del Perú S.R.L, a juridical person that the Claimant owns and controls (“Maple”), hereby serves notice (“Notice”) to the Republic of Peru (“Peru”) of its intention to submit to international arbitration claims arising out of its investments in the Aguaytía Integrated Project, including the Pucallpa Refinery and Sales Plant (“Refinery”).

## **I. PARTIES**

1. Claimant Worth Capital 27 LLC is an entity incorporated in the State of Delaware. Claimant’s address is:

Worth Capital 27 LLC  
c/o Mario Koehler  
16192 Coastal Highways,  
Lewes, Delaware 19958  
United States of America

2. Correspondence with Claimant relating to this matter should be sent to the undersigned counsel of record at the address below.

3. Worth Capital indirectly owns and controls Maple. Maple (now operating as “Petróleos de la Selva”) is a *sociedad comercial de responsabilidad limitada* incorporated in Peru, which conducts extraction and refining of hydrocarbons in the Amazonian jungle region of Peru and originally developed the Aguaytía Integrated Project in the 1990s. Today, Maple’s main business is the Pucallpa Refinery, a natural gasoline and crude oil processing facility that has been in operation since the 1960s. Since 1994, Maple has leased the Refinery from Petróleos del Perú S.A. (“Petroperú”), one of Peru’s two State-owned oil companies. Maple’s address is:

Maple Gas Corporation del Perú  
c/o Kurt Neumann Montalván  
Avenida La Paz N° 1049, oficina 501  
Miraflores  
Lima, Perú

4. Peru is a Party to the TPA. Pursuant to Annex 10-C of the TPA, Peru is to be notified of claims arising under the TPA at the following address:

Dirección General de Asuntos de Economía  
Internacional, Competencia e Inversión Privada  
Ministerio de Economía y Finanzas  
Jirón Lampa 277, piso 5  
Lima, Perú

## **II. PRELIMINARY STATEMENT**

5. This dispute arises out of Peru's efforts to drive Maple out of business and take back the Pucallpa Refinery.

6. Peru has placed a stranglehold on Claimant's investment in Pucallpa through a variety of measures. In recent years, these have included depressing Maple's ability to compete with Petroperú (including through discriminatory tax measures), depriving it of feedstock to operate the Refinery, withdrawing on spurious grounds its previous approval for Maple to acquire another lucrative oil project, publicly disparaging Maple, and, most recently, attempting to invoke the "sudden death" clause to terminate the lease over the Refinery, thus sounding the death knell on Claimant's investment.

7. This campaign has played out against the backdrop of an embarrassing, high-profile arbitration loss for a company on whose Board former Peruvian President Pedro Pablo Kuczynski ("PPK") served, at the hands of an entity that was part of a group of companies that became one of Maple's upstream investors—making Maple an easy target for Peru's escalating campaign of retaliation.

8. Peru has been explicit about its objective to reassert control of the Refinery, including in open threats from the President of Petroperú, recorded in writing.

9. Claimant deeply regrets the Government's actions that prompt it to send this Notice. Attempts to seek a resolution with the Government of the issues facing the Refinery over the recent years and months have had little success. Claimant continues to desire an amicable resolution of the Parties' dispute, and is hopeful that the recent change in Government since PPK's resignation may facilitate

constructive negotiations to this effect. In light of the immediate danger to its investment, however, and failing such resolution, Claimant reserves its rights to initiate an arbitration against Peru asserting breaches of, at the least, Articles 10.3 (national treatment), 10.5 (minimum standard of treatment), and 10.7 (expropriation) of the TPA.

### **III. FACTUAL BACKGROUND**

#### **A. Maple's Investment in the Aguaytía Integrated Project**

10. Maple's investment in Peru dates back to 1993, when US company Maple Resources Corporation ("Maple Resources") won the tender for the Aguaytía Integrated Project, an oil and gas project spanning exploration and development activities in Lots 31-B, C, D and E, thermoelectric power, and a refinery in Pucallpa. The Aguaytía Integrated Project sought to bring development and infrastructure—along with liquid fuel and electricity—to the remote Ucayali region in the Peruvian Amazonian jungle region.

11. To enable Maple Resources to develop the Aguaytía Integrated Project, in 1994, the state-owned oil company PERUPETRO S.A. ("PERUPETRO") concluded several license agreements with Maple that granted Maple the right to (i) develop the natural gas in the Aguaytía deposit and liquid hydrocarbons from the Maquía – Agua Caliente deposit, and (ii) lease the Refinery and Sales Plant at Pucallpa, which refines liquid hydrocarbons created by processing natural gas and crude oil from the Ucayali region ("1994 License Agreements").<sup>1</sup> PERUPETRO signed the 1994 License Agreements "in the name and in representation of the Peruvian State," and Maple Resources gave a parent company guarantee.<sup>2</sup> In the

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<sup>1</sup> See License Agreement between PERUPETRO S.A. and Maple Gas Corporation Del Peru for Lot 31-C, with the participation of Maple Resources and the Central Bank of Peru, March 30, 1994, **Ex. C-6**, Preliminary Clause, General Provisions (noting that the Aguaytía Integrated Project comprised three components: (i) "exploitation of Natural Gas in the Aguaytía Field," (ii) "exploitation of Liquid Hydrocarbons in the Maquía-Agua Caliente Fields," and (iii) "lease of the Pucallpa Refinery and Sales Plant."); License Agreement between PERUPETRO S.A. and Maple Gas Corporation Del Peru for Lots 31-B and D, with the participation of Maple Resources and the Central Bank of Peru, March 30, 1994, **Ex. C-7**, Preliminary Clause, General Provisions (same).

<sup>2</sup> See 1994 License Agreement for Lot 31-C, **Ex. C-6**, Preliminary Clause, Section (II), Annex D; and 1994 License Agreement for Lots 31-B and D, **Ex. C-7**, Preliminary Clause, Section (II), Annex D.

1994 License Agreements, Peru guaranteed that the Project would enjoy tax stability during the term of the License, which was meant to run for 30 years until 2024.<sup>3</sup> Specifically, Section 9.6 of the License Agreements provides that:

The State, through the Ministry of Economy and Finance, guarantees the Contractor [Maple] the benefit of tax stability during the Term of the Contract, as a result of which it will be subject, exclusively, to the tax regime in effect on the Signature Date.<sup>4</sup>

12. Peru’s assurance of tax stability was a cornerstone of the parties’ contractual bargain and key to Maple’s decision to invest in the Aguaytía Integrated Project.

13. In parallel, Maple and Petroperú also signed an accompanying lease agreement specifically for the Pucallpa Refinery (“1994 Lease Agreement”) that formed an integral part of the 1994 License Agreements.<sup>5</sup> The 1994 Lease Agreement was most recently updated through a March 2014 lease agreement with the same expiration date (March 28, 2024), with the possibility of an extension (the “2014 Lease Agreement”).<sup>6</sup>

14. After the original 1994 agreements, the Aguaytía Integrated Project was split into two separate operations. In exchange for investments in infrastructure and production facilities, Maple retained the lease for the Refinery and the mature oil fields in Lots 31-B, D and E. Its then-affiliate, Aguaytía Energy del Perú S.A. (“Aguaytía”), retained the exploration and production in Lot 31-C. Aguaytía was subsequently spun off outside the Maple Resources Group. Having originally been

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<sup>3</sup> See 1994 License Agreement for Lot 31-C, **Ex. C-6**, Sections 3.1 and 9.6; 1994 License Agreement for Lots 31-B and D, **Ex. C-7**, Sections 3.1 and 9.6.

<sup>4</sup> See 1994 License Agreement for Lot 31-C, **Ex. C-6**, Section 9.6; 1994 License Agreement for Lots 31-B and D, **Ex. C-7**, Sections 9.6.

<sup>5</sup> See Lease Agreement between Maple Corporation del Perú S.R.L. and Petroperú S.A., March 29, 1994, **Ex. C-13**, Section 8.1(A) (stating that the Lease “forms part” of the “implementation of the ‘Aguaytía Integrated Project’”); see also Bidding Bases for the Aguaytía Integrated Project, November 1992, **Ex. C-2**, Section 1.4 C-D.

<sup>6</sup> See 2014 Lease Agreement, **Ex. C-13**, Sections 1 and 4.1; see also *id.*, Section 3 (noting that the “OBJECT OF THE CONTRACT” is to lease the Refinery and other associated assets, which “will be destined to undertake refining activities and commercialization of hydrocarbons”).

part of the same project, Aguaytía’s exploration and production facilities are physically connected to the Refinery.

15. Maple has invested approximately US\$60 million in the oil fields and US\$4.3 million in the Refinery and associated facilities, and it was entitled to operate the Refinery at least until the expiration of the Lease Agreement in 2024. By December 2017, however, as described below, Maple had no choice but to cease operations at the Refinery.

**B. Former President PPK’s High-Profile Dispute with Maple’s Investor**

16. Although Maple had previously had its difficulties with the Peruvian Government, it became a renewed target for the Government’s ire when the Blue Oil Group (“Blue Oil”), a group of companies with various interests in Peru, became one of Maple’s controlling investors.

17. One of the Blue Oil companies, Blue Oil Trading Ltd. (BVI), had been embroiled in a commercial dispute with Pure Biofuels del Perú S.A.C. (“Pure Biofuels”), a Peruvian company in the refined fuels wholesale and distribution sector. PPK was appointed to Pure Biofuels’ Board of Directors in June 2012,<sup>7</sup> when the two companies had just commenced competing arbitrations against each other in London and Lima. Having served as Minister of Energy and Mines, Minister of Economy and Finance, and Prime Minister of Peru, at that time PPK was one of the most powerful lobbyists and businessmen in Peru.

18. In an embarrassing defeat, in June 2014, the tribunal constituted under the rules of the Lima Chamber of Commerce dismissed Pure Biofuels’ claims of breach of contract, held that Pure Biofuels had acted in bad faith and was liable in tort, and ordered Pure Biofuels to pay Blue Oil Trading over US\$45 million in damages, plus costs and interest.<sup>8</sup> It was the largest award of its kind ever issued

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<sup>7</sup> See Businesswire, *Pure Biofuels del Perú, SAC appoints Pedro Pablo Kuczynski as Director*, June 24, 2012, **Ex. C-12**.

<sup>8</sup> See, e.g., Del País, *Fondo norteamericano asesorado por Kuczynski busca evadir pago por arbitraje de US\$45 millones*, March 18, 2015, **Ex. C-15**; Del País, *Último minuto: Embargo millonario a empresa de PPK en el callao*, April 27, 2015, **Ex. C-19**.

under the Lima Chamber of Commerce Rules, and it received significant public attention.

19. This embarrassment came at an inopportune time for PPK, who intended to run for President of Peru. PPK led Pure Biofuels' efforts to appeal, and then resist enforcement of, the multimillion dollar award, and he was held publicly accountable for the loss and the subsequent non-compliance.<sup>9</sup> Referring to PPK's unsuccessful efforts to annul the award in the Lima courts, the press reported that "PPK appears to be using influences to 'flip' [the] arbitral award."<sup>10</sup> After drawn-out appeals in Lima and litigation in the United States, the award was eventually settled in May 2015.<sup>11</sup>

20. By then, PPK was one of the frontrunners for the Presidential election; he ultimately formed an alliance with the standing President, Ollanta Humala. An opportunity to get even with Blue Oil came when, in 2015, Blue Oil joined an international consortium that later acquired control of Maple—making Maple a perfect target.<sup>12</sup> PPK was elected President of Peru the following Spring.

21. As described below, beginning in late 2015 and escalating during PPK's Presidency, Peru undertook a series of coordinated measures through the executive branch and its State-owned oil companies, as well as through other actors, to stifle Maple's operations and eventually drive it out of business.

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<sup>9</sup> See, e.g., Del País, *Emiten laudo millonario*, March 18, 2015, **Ex. C-14**; Del País, *Fondo norteamericano asesorado por Kuczynski busca evadir pago por arbitraje de US\$45 millones*, March 18, 2015, **Ex. C-15**.

<sup>10</sup> See Gato Encerrado, *PPK Estaría Usando Influencias Para "Voltear Decisión Arbitral*, March 20, 2015, **Ex. C-16** (reposting an article from Del País).

<sup>11</sup> See Superior Court of Lima, *Pure Biofuels del Peru v. Blue Oil Trading*, April 17, 2015, **Ex. C-18**; *Blue Oil Trading Limited v. Pegasus Capital Advisors, L.P.*, Stipulation of Discontinuance, March 28, 2015, Index No. 651004/2015, **Ex. C-17**; Del País, *Último minuto: Embargo millonario a empresa de PPK en el callao*, April 27, 2015, **Ex. C-19**.

<sup>12</sup> See El Comercio, *Maple Resources retoma el control de refinería de Pucallpa*, October 21, 2015, **Ex. C-22**; El Comercio, *Maple Energy: Convocaremos a licitación para adquirir petróleo*, February 29, 2016, **Ex. C-23**.

## **C. The Government’s Retaliation Against Maple**

### **1. Amendment of Tax Regime to Deny Relief to Maple Alone**

22. Loyal to his alliance with PPK, in September 2015, the Government of Ollanta Humala passed an executive decree whose effect was to make Maple the *only* oil company in the Amazonian jungle region that could not recoup its sales tax.

23. One of the taxes that Maple pays to the Peruvian Government is the *Impuesto General a las Ventas* (“IGV”), a general end-user sales tax. Like any value-added tax, IGV is meant to be a transferable tax: companies pay a percentage tax to their suppliers on all goods they purchase, and then charge the same percentage tax to their customers when they sell the goods they produce. In that way, companies are meant to be able to pass their own IGV payments to the end customer.

24. Since January 1999, however, oil companies operating in the jungle region (such as Maple and, until 2015, Petroperú) have been unable to pass on their IGV liability to their customers by raising prices. As of January 1, 1999, Law No. 27037, the “Law to Promote Investments in the Amazon,” created a new, selective form of sales tax exemption applicable to certain counties and regions in the Amazon, including regions where Maple’s customers were located.<sup>13</sup> The day after Law No. 27037 was issued, the Government passed Supreme Decree No. 005-99 (“Supreme Decree 005”), which among other things excluded operations exclusively amongst “Oil Companies” (“*Empresas Petroleras*”) from the scope of Law No. 27037, forcing them to pay IGV charges to the Government regardless of their geographic position or economic activity in the Amazon.<sup>14</sup> Under this change in the IGV regime, Maple’s customers in the Amazon became exempt from paying IGV, making it impossible for Maple to recoup IGV by charging it to its customers. Maple therefore could no longer transfer millions of dollars of IGV charges. At the time, this change in regime theoretically affected Petroperú as well as Maple.

25. In late 2015, Peru effectively lifted the IGV burden on Petroperú altogether, while leaving Maple as the only company that could not recoup IGV. In

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<sup>13</sup> See Law No. 27037, **Ex. C-8**, Art. 14.1.

<sup>14</sup> See Supreme Decree No. 005-99-EF, **Ex. C-9**, Article 2.

September 2015, then-President Humala issued Supreme Decree No. 266-2015 (“Supreme Decree 266”), which amended Supreme Decree 005 in such a way as to allow Petroperú to offset its IGV payments from operations in the IGV-exempt Amazonian regions against its sales anywhere else in Peru.<sup>15</sup> This amendment, of course, did not provide any degree of relief to a regional oil company like Maple, which makes the vast majority of its sales in the IGV-exempt Amazon region and does not have significant sales elsewhere in Peru to use as an offset against its IGV payments. To the contrary, Maple was left as the only oil refiner operating in the Amazonian jungle region that could not take advantage of this amendment.

26. Given that Maple could not offset its IGV payments against sales outside of the IGV-exempt Amazon region, its only possible alternative to alleviate the financial burden would have been to increase sales prices to its customers in the Amazon. That would have been fatal to Maple’s ability to compete, because the combination of Peru’s price policy and Petroperú’s public guarantee of acting as the supplier of last resort effectively created a price cap on the market.

27. As a result, since late 2015, Maple has been and still is the *only* “oil company” (“*empresa petrolera*”) within the meaning of Supreme Decree 005 in the Amazon jungle region that cannot recoup its IGV credit. Petroperú, on the other hand, has been able to take advantage of the significant economic benefit of the IGV credit.<sup>16</sup> This has further depressed Maple’s ability successfully to compete with Petroperú.

## **2. Petroperú Cuts Off Feedstock for the Refinery**

28. A few months later, the State-owned oil company Petroperú openly declared its intention to oust Maple from the Refinery. Petroperú is controlled by the Peruvian Government: the Minister of Energy and Mines (a role formerly held by

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<sup>15</sup> See Supreme Decree No. 266-2015-EF, **Ex. C-20**.

<sup>16</sup> See, e.g., Petroperú, Q4 2015 Management Report, **Ex. C-21**, p. 2 (announcing that “starting October [2015], by virtue of Decree No. 266-2015-EF, it would be able to use all of the [IGV] credit” and that this had a positive impact of \$106 million soles, which at the time amounted to around US\$32 million).

PPK himself) is one of the five members of Petroperú’s “supreme organ,” and the other four are appointed directly by the President through a Supreme Decree.<sup>17</sup>

29. Petroperú demanded that Maple allow Petroperú to use the Refinery to sell Petroperú’s own production into the Pucallpa market, which would have allowed Petroperú to compete even more aggressively with Maple on Maple’s home turf. Petroperú claimed that Maple was contractually obliged to grant this, whereas Maple maintained that the contract only required the parties to negotiate in good faith.

30. At a February 2, 2016 meeting to discuss this and other issues, the then-President of the Board of Petroperú, Germán Velásquez Salazar, said that if Maple did not accede to Petroperú’s demands, Petroperú would simply take back the Refinery.<sup>18</sup>

31. Petroperú has steadily been making good on its threat by preventing the Refinery from accessing the crude oil and gas that it needs to operate. Only two companies currently produce feedstock that is of the right quality to be processed in Maple’s Refinery: Aguaytía (which produces natural gas condensate, referred to as natural gasoline) and the Spanish company Compañía Española de Petróleos (“CEPSA”) (which extracts a sweet crude oil named Los Angeles crude). In 2016 and 2017, Petroperú took steps to lock up virtually all of Aguaytía’s and CEPSA’s production.<sup>19</sup> Maple warned Petroperú that its behavior violated its obligation of good faith and might constitute tortious interference, but Petroperú did not respond.<sup>20</sup>

32. Buoyed by its status as the State-owned oil major, Petroperú has gone to commercially irrational lengths to achieve its political ends. For instance, instead of selling the feedstock to Maple to be processed in the Refinery, Petroperú ships CEPSA’s crude hundreds of miles away to Petroperú’s refinery in the port city of Iquitos, which is accessible by river only, using a makeshift terminal at great

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<sup>17</sup> See Law No. 28840, **Ex. C-11**, Article 2; Petroperú Bylaws, **Ex. C-1**, Articles 22-23, 47 (stating that five of the six members of Petroperú’s Board are appointed, in turn, by the General Shareholders Committee, i.e., Petroperú’s supreme organ).

<sup>18</sup> See Letter from Maple to Petroperú, May 30, 2016, **Ex. C-25**.

<sup>19</sup> *Id.*; see also El Comercio, *Refinería de Pucallpa cierra operaciones*, January 22, 2018, **Ex. C-33**.

<sup>20</sup> See Letter from Maple to Petroperú, May 22, 2016, **Ex. C-24**; Letter from Dewey, Pegno & Kramarsky LLP to Petroperú, January 17, 2018, **Ex. C-32**.

environmental risk.<sup>21</sup> Maple understands that CEPSA is selling to Petroperú for less, by a wide margin, than what Maple would have been willing to offer, and that its contract with Petroperú is effectively exclusive because it requires CEPSA to refine its production at Petroperú's refinery in Iquitos, which would prevent any onward sales to Maple.

33. Furthermore, since it began its practice of acquiring 100% of CEPSA's crude in 2016, Petroperú has exported several hundred thousand barrels of residual fuel oil from its Iquitos refinery by river barge, a journey of almost two thousand nautical miles along the Amazon river just to get to the Atlantic ocean, at great loss.

34. Aguaytía, in turn, has production facilities that are physically connected to Maple's Refinery and had been processing its gas there for almost 20 years. Indeed, until it built its own facilities in July 2017 (with backing from Petroperú in the form of an offtake promise), Aguaytía could not evacuate its production without using Maple's pipeline and storage facilities. Maple is aware that, since July 2017, Petroperú has been paying Aguaytía a price that was *almost 50% higher* per barrel (after freight) than Aguaytía's long-term agreement with Maple—an extremely surprising price difference in a low margin industry. In addition to this extraordinarily high price, in order to deny Maple's Refinery access to this feedstock, Petroperú sends Aguaytía's natural gasoline condensate to its refinery in Lima, which involves loading barrels of natural gasoline onto tanker trucks and crossing the Andes at high risk and on a days-long trip.<sup>22</sup>

35. Unable to compete with either Petroperú's economically irrational conditions or its considerable political clout, Maple was left with no supply to keep the Refinery running. Maple's end-of-life oil fields in Lots 31-B, D and E have a combined production of approximately 100 barrels per day and could not sustain the approximately 3,500-4,000 bpd capacity of the Refinery. As Petroperú well knew, cutting off supply from the only three possible suppliers in the region—Petroperú (by way of resale), CEPSA and Aguaytía—doomed Maple's Refinery. By December

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<sup>21</sup> See Letter from Maple to Petroperú, August 31, 2016, **Ex. C-26**.

<sup>22</sup> See e.g. El Comercio, *Refinería de Pucallpa cierra operaciones*, January 22, 2018, **Ex. C-33**.

2017, the Refinery had exhausted its crude inventories and had no choice but to cease operations.<sup>23</sup>

### 3. Frustration of Maple's Efforts to Find New Supply Sources

36. Although Maple sought out alternative avenues to salvage the Refinery, Peru thwarted those as well.

37. Since late 2016, Maple had been in discussions with Frontera Energy Corporation ("Frontera," previously known as Pacific Stratus Energy), to assign to Maple the Exploration and Exploitation Contract for Lot 126 that had been awarded to Frontera by PERUPETRO on behalf of the State.<sup>24</sup> In deciding whether or not to approve the license transfer, PERUPETRO was acting on behalf of the Peruvian State.<sup>25</sup> In addition, like for Petroperú, the Peruvian Government also appoints PERUPETRO's senior organs: all five members of the PERUPETRO Board represent either the Ministry of Energy and Mines or the Ministry of Economy and Finance, and all three members of its General Shareholders' Committee are appointed by the Ministry of Energy and Mines.<sup>26</sup>

38. The Frontera transaction represented a critical opportunity for Maple. Lot 126 was located only 100 miles from the Refinery, and had estimated proven and easy-to-lift reserves of up to 6 million barrels of light, sweet crude (52 EPA). It would have supplied the Refinery with a steady stream of crude oil at favorable economic conditions. Maple's proposal was also attractive for the State: it would have accelerated production from the field, and therefore payment of royalties for the State, from several years to a matter of months. Accordingly, Maple, Frontera, and

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<sup>23</sup> *Id.*

<sup>24</sup> See Letter from Frontera and Maple to PERUPETRO, June 7, 2017, **Ex. C-27**.

<sup>25</sup> See Law No. 26221, Organic Hydrocarbons Law, **Ex. C-3**, Article 6 (stating that PERUPETRO's functions include e.g. "to negotiate and enter into contracts with private persons through the power conferred by the State under this law") and Article 8 (stating that "the State grants PERUPETRO S.A. the right of ownership over the extracted Hydrocarbons for the purpose that it may enter into Contracts for exploration and exploitation or exploitation of these materials") (emphasis added); see also Law No. 26225, the "Organization and Functions Law" for PERUPETRO, **Ex. C-4**, Art. 3(b) (PERUPETRO's corporate purpose includes negotiating and signing hydrocarbons contracts pursuant to the Law).

<sup>26</sup> Law No. 26225, **Ex. C-4**, Articles 10-12.

PERUPETRO had spent months negotiating the terms of the assignment and exchanging detailed technical and legal information; by June 2017, Maple and Frontera—with PERUPETRO’s support—had reached an agreement for Frontera to assign the Lot 126 contract to Maple.<sup>27</sup> In August 2017, PERUPETRO informed Maple that, after conducting “an evaluation of [Maple’s] legal, technical, economical, and financial capacity,” Maple “had been favorably approved as an *Empresa Petrolera* to assume 100% of Lot 126.”<sup>28</sup> Maple and Frontera were thus ready to finalize their deal, with minor details remaining to be settled regarding the change in contracting parties.

39. Some months later, however, PERUPETRO reversed its position. In November 2017, while the parties were ironing out the remaining details, PERUPETRO wrote that, through no fault of Maple, it had allegedly considered the wrong financial statements when issuing the earlier approval.<sup>29</sup> It then revoked Maple’s certification to assume operation of Lot 126.<sup>30</sup> Maple challenged this decision, but to no avail.<sup>31</sup> In the meantime, the deal fell through. PERUPETRO insisted on calling on Frontera’s US\$2.8 million bank guarantee for alleged failure to comply with its commitments under the license, explaining that this was a political decision; Frontera ended up terminating the license and paying PERUPETRO significant abandonment costs.

40. As a result of the actions set forth above, by December 2017, Maple was forced to shut down the Refinery.<sup>32</sup> Maple explained that the closure was a result of Petroperú’s capture of all of the potential feedstock for the Refinery, which Petroperú abruptly denied.<sup>33</sup>

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<sup>27</sup> See Letter from Frontera to PERUPETRO, June 7, 2017, **Ex. C-27**.

<sup>28</sup> See Letter from PERUPETRO to Maple, August 11, 2017, **Ex. C-29**.

<sup>29</sup> See Letter from PERUPETRO to Maple, November 27, 2017, **Ex. C-30**.

<sup>30</sup> *Id.*

<sup>31</sup> See PERUPETRO Appeal Decision, January 4, 2018, **Ex. C-31**.

<sup>32</sup> See e.g., El Comercio, *Refinería de Pucallpa cierra operaciones*, January 22, 2018, **Ex. C-33**.

<sup>33</sup> See e.g., Petroperú Website, *Petroperú Contribuye Con El Desarrollo De Pucallpa*, January 23, 2018, **Ex. C-34** (claiming that “Petroperú does not have any responsibility for the alleged lack of

41. At that time, in an effort to find an alternative use for the Refinery, Maple was also pursuing potential deals with other wholesalers in Lima, which is well-served by two refineries and several ocean terminals. Maple was in advanced discussions with Repsol, which owns the La Pampilla refinery in Callao, to set up a wholesaler in the jungle region to sell the Repsol refinery's production. This would have allowed Maple to use the Refinery's installed physical and salesforce capacity to store and sell gasoline and diesel, in order to maintain a presence in the oil distribution sector while paying the bills.<sup>34</sup>

42. This deal, too, was scuppered by Petroperú. Having heard that Maple was close to reaching a new deal, in mid-February 2018, Petroperú held a joint public press conference with Aguaytía at which Petroperú falsely alleged that Maple was not complying with its obligations towards Petroperú, Aguaytía and CEPSA. Petroperú's Director for Corporate Management and Communications, Ms. Beatriz Alva Hart, claimed that Maple was in violation of the 2014 Lease Agreement by purportedly failing to allow Petroperú to use the Refinery to sell its own products, and announced that Petroperú intended to commence arbitration proceedings against Maple—an issue that the parties had discussed and put to rest almost two years earlier.<sup>35</sup> Ms. Hart further falsely claimed that Aguaytía and CEPSA had broken off relations with Maple because of Maple's failure to pay its invoices.<sup>36</sup> Aguaytía, in turn, had by then sued Maple in arbitration and had clearly decided to collude with Petroperú.<sup>37</sup>

43. The allegation that Maple had not paid CEPSA was false; CEPSA subsequently denied these allegations and confirmed Maple's good standing.<sup>38</sup>

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crude for the Pucallpa Refinery"); *see also* El Comercio, *Petro-perú entablará arbitraje contra Maple por refinera*, February 15, 2018, **Ex. C-35**.

<sup>34</sup> *See* El Comercio, *Refinera de Pucallpa cierra operaciones*, January 22, 2018, **Ex. C-33**.

<sup>35</sup> *See* El Comercio, *Petro-Perú entablará arbitraje contra Maple por refinera*, February 15, 2018, **Ex. C-35**; *see also* Letter from Maple to Petroperú, February 19, 2018, **Ex. C-36**.

<sup>36</sup> *Id.*

<sup>37</sup> Aguaytía commenced arbitration against Maple under the parties' natural gasoline purchase agreement in October 2017, alleging breach of contract. Maple, in turn, has asserted counterclaims relating to Aguaytía's own misconduct, including failure to deliver contractual quantities, business torts, and disregard of the project's contractually stabilized tax regime.

<sup>38</sup> *See e.g.*, *Semana Económica, Maple, de la refinera de Pucallpa, negó tener impagos con su proveedor*, February 19, 2018, **Ex. C-37**.

Petroperú even issued a correction.<sup>39</sup> The damage, however, was already done. Repsol and other potential commercial partners (including longstanding clients with whom Maple was negotiating offtake agreements) decided to put the potential deals on hold, expressing unease about doing a deal with Maple in the wake of Petroperú's threats of arbitration.

#### **D. Recent Threat to Sue Maple and Terminate Maple's Lease Agreement**

44. Having cut off all lifelines for the Refinery, Petroperú accelerated Maple's demise by threatening arbitration proceedings over Maple's refusal to cede part of the Refinery for Petroperú's commercial use and, later, threatening to terminate the Lease Agreement for non-payment of rent. On April 24, 2018, Petroperú invoked the dispute resolution procedure under the 2014 Lease Agreement, which requires negotiations prior to arbitration under the Rules of the Lima Chamber of Commerce.<sup>40</sup> Three days later, Maple and Petroperú representatives met in Maple's offices in Lima to discuss the parties' dispute, but failed to reach agreement.<sup>41</sup>

45. Instead of commencing arbitration in accordance with the parties' agreement, however, Petroperú chose to take the dispute into its own hands. Three days later, by letter dated April 30, 2018 and received on May 3, 2018, Petroperú demanded payment of over US\$361,000 for the second quarter's rent on the Refinery by May 18, 2018.<sup>42</sup> No doubt the reason that Petroperú chose to proceed in this way is that the 2014 Lease Agreement contains a "sudden death" clause, which provides that the Lease Agreement can be terminated 15 calendar days after Petroperú's notice of an outstanding payment.<sup>43</sup> Maple responded that Petroperú was in breach of contract and that Maple's obligation to pay the rent was therefore suspended pursuant

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<sup>39</sup> See Letter from Petroperú to Maple, March 1, 2018, **Ex. C-38**.

<sup>40</sup> See Letter from Petroperú to Maple, April 24, 2018, **Ex. C-39**; see also *cf.* 2014 Lease Agreement, **Ex. C-13**, Sections 15.1, 15.2, 15.3.

<sup>41</sup> See Draft Minute of Direct Negotiations Meeting between Maple and Petroperú, April 27, 2018, Lima, Peru, **Ex. C-40**.

<sup>42</sup> See Letter from Petroperú to Maple, April 30, 2018, **Ex. C-41**; see also Letter from Maple to Petroperú, May 14, 2018, **Ex. C-42**.

<sup>43</sup> See 2014 Lease Agreement, Section 14.2.1, **Ex. C-13**.

to Article 1426 of the Peruvian Civil Code,<sup>44</sup> but to date Petroperú has not confirmed that it will not seek to terminate the Lease Agreement.

#### **IV. PERU'S BREACHES OF ITS TPA OBLIGATIONS**

46. Claimant's investments in Peru, including shares in Maple and the Lease Agreement itself, are covered by the TPA. The TPA applies to "measures adopted or maintained by a Party relating to: (a) investors of another Party; [and] (b) covered investments[.]"<sup>45</sup> The TPA defines investors of another Party to include "an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party."<sup>46</sup> The TPA defines "investment," in turn, as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment," including "shares, stock and other forms of equity participation in an enterprise" and "leases."<sup>47</sup> Disputes relating to Claimant's investment must therefore be resolved pursuant to international law, as mandated by the TPA.<sup>48</sup>

47. Peru's retaliatory campaign to drive Maple out of business violates Peru's international law obligations under the TPA: (i) to accord Maple treatment no less favorable than that accorded to Peru's own investors, including Petroperú (Article 10.3); (ii) to accord Claimant's investment the minimum standard of treatment required under international law, including fair and equitable treatment (Article 10.5); and (iii) not to indirectly expropriate Claimant's investment without compensation (Article 10.7).

48. Claimant accordingly hereby gives notice that, pursuant to TPA Article 10.16, unless the Parties' dispute is promptly resolved to its and Maple's satisfaction, it intends to commence an international arbitration against Peru seeking redress for Peru's violations of its TPA obligations.

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<sup>44</sup> See Letter from Maple to Petroperú, May 16, 2018, **Ex. C-43**.

<sup>45</sup> TPA, **Ex. C-10**, Art. 10.1.

<sup>46</sup> *Id.*, Article 10.28.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, Article 10.22.

**A. Breach of Article 10.3: National Treatment**

49. By enacting Supreme Decree 266 and imposing a less favorable IGV regime on Maple than it did on Petroperú and other similarly-situated investors, Peru has violated Article 10.3 of the TPA. That Article provides, in pertinent part:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

50. Petroperú and Maple are “in like circumstances”—they both operate refineries, they both purchase crude and natural gas in the jungle region to feed those refineries, and they compete for feedstock with the same customers. Through Supreme Decree 266, however, Peru caused Maple to be the *only* oil refining company with operations in the Amazonian jungle region that is not able to recoup IGV from its own sales. Petroperú became entitled to recoup its IGV payments under Supreme Decree 266, but Maple did not. By discriminating against Maple and in favor of Petroperú through Supreme Decree 266, Peru has breached Article 10.3 of the TPA.

**B. Breach of Article 10.5: Minimum Standard of Treatment**

51. By its conduct in the entirety, Peru has breached Article 10.5 of the TPA. Article 10.5 provides, in pertinent part:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of

treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the legal systems of the world; and (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

52. Regardless of how the standard set forth in Article 10.5 of the TPA is construed, the measures Peru has taken, either individually or collectively, plainly fall below that standard. Among other things, Peru (including through its State-owned oil companies) has: targeted Maple—and Maple alone—to continue to bear an IGV burden that it lifted for Maple’s competitors and customers, despite the promise of fiscal stability on which it induced Maple to invest in the Aguaytía Project; explicitly avowed its intention to deprive Maple of its investment in the Refinery; gone to economically irrational lengths to prevent Maple from being able to obtain feedstock to keep the Refinery running; publicly and falsely accused Maple of non-compliance with its contracts with Petroperú and others; quashed all of Maple’s attempts to find other avenues to salvage its business; and, instead of resolving any commercial differences through the contractually-agreed arbitration mechanism, clearly intends to seek unilateral termination of the Lease Agreement.

53. Peru cannot escape its international liability by hiding behind its State-owned oil companies. Article 10.1.2 of the TPA expressly states that Peru’s obligations under the treaty “shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.”<sup>49</sup> That is the case for each of Petroperú and PERUPETRO, which exercise governmental authority in

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<sup>49</sup> *Id.*, Article 10.1.2.

carrying out certain of their functions, and whose management is appointed by, and includes members of, the Peruvian central Government.<sup>50</sup>

54. Peru's politically motivated campaign of retaliation against Maple, executed through various levers of State power and influence, violates the international law minimum standard of treatment, is unfair, inequitable and discriminatory, is contrary to Claimant's legitimate expectations, and breaches Article 10.5 of the TPA.

### C. Breach of Article 10.7: Expropriation

55. By depriving Claimant of substantially the entire value of its investment in the Refinery, Peru has indirectly expropriated Claimant's investment in breach of Article 10.7 of the TPA. Article 10.7.1 of the TPA provides as follows:

No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 10.5 [Minimum Standard of Treatment].

56. Peru has not satisfied any—much less all—of the TPA's conditions for a permitted expropriation. Peru's retaliatory campaign to drive Maple out of the Refinery has no legitimate public purpose, was implemented in a discriminatory

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<sup>50</sup> See e.g., Law No. 26221, Organic Hydrocarbons Law, **Ex. C-3**, Article 6 (stating that PERUPETRO's functions include e.g., "to negotiate and enter into contracts with private persons through the power conferred by the State under this law") and Article 8 (stating that "*The State grants PERUPETRO S.A. the right of ownership* over the extracted Hydrocarbons for the purpose that it may enter into Contracts for exploration and exploitation or exploitation of these materials") (emphasis added); see also Law No. 26225, the "Organization and Functions Law" for PERUPETRO, **Ex. C-4**, Articles 10-12 (stating that the "political organization, direction and administration of PERUPETRO" is headed by the General Shareholders Committee, the Board, and the General Manager; that the General Shareholders Committee is composed by three members, all of which are appointed by the Ministry of Energy and Mines; and that the Board is composed by five members, three of which represent the Ministry of Energy and Mines, and two of which represent the Ministry of Economy and Finance); Petroperú Bylaws, **Ex. C-1**, Arts. 22, 47 (stating that the General Shareholders Committee is the "supreme organ" of Petroperú; that the Committee is composed by five members, including the Minister of Energy Mines, which heads the Committee, and four members which are appointed by the Government through a Supreme Decree, and that the Board is composed by six members: five are designated by the General Shareholders Committee, and one member is designated by Petroperú workers).

manner, did not comply with due process or Peru's Article 10.5 obligations, and of course has not been accompanied by prompt, adequate and effective compensation. Neither does it constitute "non-discriminatory regulatory actions by a Party [to the TPA] that are designed and applied to protect legitimate public welfare objectives."<sup>51</sup> Instead, it is a deliberate targeting of Maple for purely political reasons and to the benefit of the State, which stands to recover the Refinery if the Lease Agreement terminates.

#### **V. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED**

57. Peru's conduct has caused, and is continuing to cause, Claimant and Maple significant loss and damage. Among other things:

- a. The discriminatory tax treatment of Maple, in violation of national treatment, has depressed Maple's ability to compete in the market.
- b. The Frontera deal, had it not been thwarted, would have generated significant value on its own terms over several decades, and would also have guaranteed the continued operation of the Refinery.
- c. The Refinery, had it been able to operate without Peru's undue interference and with the benefit of the Frontera supply, would also have generated significant earnings through the end of the contractual term, even before any extension consistent with industry practice.

58. Accordingly, as compensation for the harm resulting from Peru's breaches of the TPA, Claimant intends to seek damages presently estimated to be in excess of US\$590 million.

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59. Claimant sends this Notice reluctantly. Claimant and Maple have at all times preferred an amicable solution with the Government, and continue to do so. They remain ready to meet with Government representatives to explore solutions at the Government's earliest convenience.

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<sup>51</sup> See TPA, **Ex. C-10**, Annex 10-B, Art. 3(b). Annex 10-B to the TPA elaborates on the US and Peru's shared understanding in respect of conduct constituting an indirect expropriation.

60. However, should the Parties prove unable to find an amicable, mutually-agreeable solution to the dispute, Claimant will have no choice but to initiate arbitration against Peru, alleging breaches of Articles 10.3, 10.5 and 10.7 of the TPA. Claimant reserves its right to amend or supplement this Notice, including the requested relief and the amount claimed, and to seek relief for additional breaches arising from Peru's past, current, or future conduct.



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