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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN THE MATTER OF THE EXTRADITION OF ALEJANDRO TOLEDO MANRIQUE.	Case No. 19-mj-71055 MAG (TSH) **MOTION TO DENY EXTRADITION REQUEST**

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INTRODUCTION

The Republic of Peru seeks the extradition of Alejandro Toledo in connection with allegations of influence peddling, collusion, and money laundering. Peru has not formally charged Dr. Toledo with any of these crimes, however. Instead, the case against Dr. Toledo remains in the preliminary investigation phase. Because the U.S.-Peru Treaty forbids extradition unless and until the individual has actually been *charged* with the alleged crimes, Peru's request for extradition must be denied. Moreover, even if Dr. Toledo had been formally charged, the treaty still would forbid his extradition because Peru has failed to include a copy of the formal charging document in its request. For both of these reasons, Peru's extradition request should be denied.

OVERVIEW OF THE CASE

I. Operation Car Wash (*Lava Jato*)

The instant extradition request arises out of a larger investigation, dubbed Operation Car Wash, into corruption and payoffs in Brazil. While originating in Brazil, the allegations of bribery have spread to targets throughout Latin America and the United States. One target in that investigation is Odebrecht S.A., a Brazilian conglomerate that includes in its holdings the largest construction company in Latin America. While these prosecutions have netted significant evidence about widespread pay-for-play corruption in Brazil and ten other countries, they have also been marred by substantiated allegations of politically motivated prosecutorial misconduct.

In Brazil, leaked communications revealed judicial and prosecutorial misconduct that included an apparent conspiracy to disqualify Luiz Inácio Lula da Silva ("Lula") from running as a candidate against eventual victor Jair Bolsonaro in the 2018 presidential election. Sergio Moro, the presiding judge of the Car Wash investigation, whose leaked communications revealed improper coaching of prosecutors in the Lula case, was appointed Minister of Justice and Public Security by Bolsonaro shortly after the election.[1]

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[1] "Over the course of more than two years, Moro suggested to the prosecutor that his team change the sequence of who they would investigate; insisted on less downtime between raids; gave strategic advice and informal tips; provided the prosecutors with advance knowledge of his decisions; offered constructive criticism of prosecutorial filings; and even scolded [lead prosecutor] Dallagnol as if the prosecutor worked for the judge." *See* "Breach of Ethics: Leaked Chats Between Brazilian Judge and Prosecutor Who Imprisoned Lula Reveal Prohibited Collaboration and Doubts Over Evidence," *The*

Prosecutorial misconduct has not been limited to the Brazilian investigation. In Peru, prosecutors in a Car Wash related investigation involving Odebrecht employee Jorge Simoes Barata as a key cooperating witness were caught on multiple recordings coaching a cooperating witness to change statements. Recordings turned over to *The Intercept* reveal the prosecutors in that case repeatedly discussed with another cooperating witness changing his statements to match those made by Barata. Further, the prosecutors discuss deliberately omitting statements and documents provided by the cooperating witness from their presentation to Magistrate Richard Concepción Carhuancho, as well as their belief that Magistrate Concepción was more likely than another judge to overlook discrepancies in their evidence.[2] Jorge Barata, the cooperating witness in that case, is also a key cooperating witness in the investigation of Dr. Toledo, and Magistrate Concepción is the same magistrate presiding over the investigation of Dr. Toledo.

In Dr. Toledo's case, cooperating witnesses Barata and Josef Maiman have both been given numerous opportunities to "amend" their prior testimony when confronted with new or contradictory evidence, an approach consistent with the practice of manipulation of evidence revealed by *The Intercept* in the corollary investigation. Dr. Toledo's defense in Peru and the United States continues to investigate and develop evidence of these practices, which will be presented to the Court in a future motion.

II. The Ongoing Investigation in Peru

On February 3, 2017, Peruvian prosecutors publicly initiated a preliminary investigation of Dr. Toledo, Jorge Barata, and Josef Maiman relating to allegations of influence peddling and money laundering in connection with the awarding of contracts for the Interoceanic Highway. *See* Report on the Status of the Investigation, prepared by Dr. Toledo's Peruvian counsel, Roberto Su (hereinafter "Status Rpt."), attached hereto as Exhibit A.

On February 9, 2017, Magistrate Concepción granted the prosecutor's request for an order of

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Intercept (June 19, 2019), available at https://theintercept.com/2019/06/09/brazil-lula-operation-car-wash-sergio-moro/.

[2] *See* "In Peru's Operation Car Wash, Prosecutors and Witness Doctored Testimony to Avoid Contradictions," *The Intercept* (Nov. 3, 2019), available at https://theintercept.com/2019/11/03/peru-operation-car-wash-prosecutors/.

"prisión preventiva," or preventive prison. This practice, which is authorized under Peruvian law, permits people who are under investigation to be imprisoned for up to three years, "potentially without actually being indicted."[3] Increasingly, this practice has come under fire both internationally and within Peru, due to its aggressive use, which allows for years of pre-charge detention, "a term unthinkable in many democracies, even for suspects facing overwhelming evidence of the most heinous crimes."[4]

On March 7, 2017, the investigation was expanded to include allegations of collusion. A 36-month time period was set for the preliminary investigation, allowing it to continue until February 3, 2020. *See* Status Rpt. at 1-2.

On January 31, 2020, the prosecutor requested an extension of time to continue its investigation. On March 4, 2020, the court granted the prosecution an additional three months, continuing the investigation period through June 4, 2020. Later that month, however, a national lockdown was declared in response to the COVID-19 pandemic, and all administrative, public, and private activities were suspended until June 30, 2020. As a result, the preliminary investigation period in this case has now been extended to September 20, 2020. *See id.*

Also, on January 31, 2020, Dr. Toledo's Peruvian counsel moved for a Procedure for the Protection of Rights (*Tutela de Derechos*), which would order the prosecutor to carry out investigation requests previously made by the defense in 2017, 2018, and 2019. The court set a hearing for March 24, 2020 to consider that request. Due to the national lockdown, however, that hearing has not yet taken place. Until that hearing occurs, and the court rules on whether the prosecutor is obligated to comply with the investigation requests made by Dr. Toledo, the prosecutor is barred from concluding the investigation. *See id.*

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[3] *See* Simeon Tegel, "Ex-president's suicide brings more criticism of Peru's pretrial detentions," *The Washington Post* (Apr. 20, 2019), available at https://www.washingtonpost.com/world/the_americas/suicide-of-former-president-brings-criticism-of-perus-pretrial-detentions/2019/04/18/.

[4] *See id.*

ARGUMENT

I. The Role of the Courts in International Extradition Proceedings

"Authority over the extradition process is shared between the executive and judicial branches." *Munoz Santos v. Thomas*, 830 F.3d 987, 991 (9th Cir. 2016) (en banc). The process begins in the executive branch. The foreign government seeking extradition submits its request to the State Department, which reviews the request to determine whether it appears to fall within the scope of the applicable extradition treaty. *Id.* If so, the United States Attorney files a complaint seeking provisional arrest with an eye toward extradition. *Id.* (citing *Vo v. Benov*, 447 F.3d 1235, 1237 (9th Cir. 2006), and 18 U.S.C. § 3184).

At that point, the process moves to the judicial branch, where a judge must decide whether to certify the extradition. *Id.* Before an extradition request can be certified, the government must establish: (1) that the alleged offense "falls within the terms of the extradition treaty between the United States and the requesting state"; and (2) that "there is probable cause to believe the person committed the crime charged."[5] *Id.* (citations omitted).

If the judge declines to certify the extradition, the case is dismissed and the extraditee must be released. The decision to deny certification is unreviewable. *See In re Extradition of Strunk*, 293 F. Supp. 2d 1117, 1140 n.29 (E.D. Cal. 2003) (citations omitted). Once an extradition request has been rejected by the court, "the Government's sole recourse is to submit a request to another extradition magistrate." *United States v. Doherty*, 786 F.2d 491, 492-93 (2d Cir. 1986); *see also Strunk*, 293 F. Supp. 2d at 1140 n.29.

If the judge certifies the extradition, that decision "is not subject to direct appeal but may be challenged collaterally through habeas corpus review" pursuant to 28 U.S.C. § 2241. *Prasoprat v. Benov*, 421 F.3d 1009, 1013 (9th Cir. 2005) (citations omitted). If habeas relief is denied, the extraditee can appeal that decision to the Ninth Circuit. *See Munoz Santos*, 830 F.3d at 1001; 28 U.S.C. §§ 1291, 2253. If the certification is upheld, the matter returns to State Department, which makes the final decision whether to carry out the extradition. *See* 18 U.S.C. § 3186.

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[5] This motion addresses only the first issue: whether the allegations against Dr. Toledo fall within the scope of the extradition treaty. The issue of whether there is probable cause will be addressed in a future motion.

II. Extradition Is Prohibited by Article I of the Treaty Because Peru Has Not Charged Dr. Toledo With Any of the Alleged Offenses

Article I of the U.S.-Peru Extradition Treaty identifies the three categories of people who are potentially subject to extradition. It provides: "The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State have [1] charged with, [2] found guilty of, or [3] sentenced for, the commission of an extraditable offense." Extradition Treaty Between the United States of America and the Republic of Peru, July 26, 2001, U.S.-Peru, TIAS No. 03-825 (hereinafter "Treaty" or "U.S.-Peru Treaty"), art. I. Here, while Dr. Toledo is the subject of an ongoing investigation, that investigation has not resulted in any actual criminal charges.[6] Because Peru has not yet charged Dr. Toledo with a crime, Article I prohibits his extradition.

A. To Interpret the Terms of a Treaty, the Court Applies the Ordinary Principles of Statutory Construction

Courts interpret treaties using standard principles of statutory construction. *See United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."); *Air France v. Saks*, 470 U.S. 392, 397 (1985) ("The analysis must begin ... with the text of the treaty and the context in which the written words are used."). While "[e]xamination of the plain language" of the statute or treaty "always marks the starting point," the court also "look[s] to the design of the statute [or treaty] as a whole." *United States v. Fiorillo*, 186 F.3d 1136,1146 (9th Cir. 1999) (citations and internal quotations omitted); *see also United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010) (noting that the court must consider not only the language itself, but also "the specific context in which that language is used, and the broader context of the statute as a whole").

In the case of the U.S.-Peru Treaty, the plain language of Article I permits extradition only where the person sought has been charged, convicted, or sentenced. In addition, when Article I is read in the context of the rest of the treaty, it is evident that a person cannot be considered "charged" unless and until there is a formal charging document.

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[6] There has been no suggestion that Dr. Toledo has been convicted of, or sentenced for, an extraditable offense.

B. Under Article I, Formal Charges Are a Prerequisite for Extradition

The plain language of Article I restricts extradition to three groups of people: "persons whom the authorities in the Requesting State have [1] charged with, [2] found guilty of, or [3] sentenced for, the commission of an extraditable offense." Treaty, art. I. By its terms, the Treaty prohibits the extradition of individuals who have not yet been charged with a crime.

While Article I does not define the term *charged*, its meaning is evident when Article I is read with reference to "the broader context of the [Treaty] as a whole." *Gallegos*, 613 F.3d at 1214. In particular, Article I must be read in conjunction with Article VI, which enumerates the specific documents that must be provided in support of an extradition request.

Article VI requires different documents depending upon the status of the extraditee. If the person sought has been convicted, the request must include "a copy of the judgment of conviction or, if such copy is not available, a statement by a competent judicial authority that the person has been found guilty." Treaty, art. VI § 4(a). If the person sought has been both convicted and sentenced, the request must also be accompanied by "a copy of the sentence imposed" and "if applicable, a statement establishing to which extent the sentence has been carried out." Treaty, art. VI § 4(c). Finally, if the person sought has only been charged, the request must include, *inter alia*, "a copy of the warrant or order of arrest issued by a judge or other competent authority," and "a copy of the charging document." Treaty, art. VI § 3(a)-(b).

By requiring a formal charging document, Article VI § 3 makes it clear that it is not enough for a person to be suspected or under investigation; extradition is not permitted unless the requesting country can demonstrate that the person is the subject of formal, written charges. Any other interpretation would violate a "basic canon of statutory interpretation, which is equally applicable to interpreting treaties," requiring courts "to avoid readings that render statutory language surplusage or redundant." *Sacirbey v. Guccione*, 589 F.3d 52, 66 (2d Cir. 2009); *see also United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003) (citations omitted) (noting the "fundamental canon of statutory construction that a statute should not be construed so as to render any of its provisions mere surplusage"). If it were enough for the extraditee to be under investigation or suspected of a crime, this could be verified simply by providing a copy of the arrest warrant. But Article VI § 3 requires

more than an arrest warrant; it requires proof that the person has actually been charged.

C. Dr. Toledo Has Not Yet Been Charged With Any of the Alleged Offenses

1. This Court Makes an Independent Determination of Whether Dr. Toledo Has Been Charged

Whether an alleged offense is "within the provisions of an extradition treaty" is a question that lies "within the sole purview of the requested state." *United States v. Van Cauwenberghe*, 827 F.2d 424, 429 (9th Cir. 1987) (citing *Johnson v. Brown*, 205 U.S. 309, 316 (1907)). For this reason, the Court cannot simply accept Peru's assertion that Dr. Toledo has been charged with an extraditable offense; instead "[t]he Court is clearly required to conduct an independent analysis." *In re Extradition of Sainez*, 2008 WL 366135, *5 (S.D. Cal. 2008) (rejecting government's argument that "the Court may rely upon Mexico's proclamation that the arrest warrant is valid"); *see also, e.g.*, *Aguasvivas v. Pompeo*, 405 F. Supp. 3d 347, 355 (D.R.I. 2019)[7] (rejecting the Dominican Republic's assertion that the extraditee had been "charged," where no formal charging document existed); *Sacirbey*, 589 F.3d at 69 (rejecting Bosnia's assertion that its "intent to prosecute" satisfied the treaty's requirement that the person sought be the subject of charges in the requesting country).[8]

2. Under Peruvian Law, an Individual Is Not Charged Until the Preliminary Investigation and Examination Stages are Complete, and the Court Issues an Order of Prosecution

In Peru, a criminal case consists of three distinct stages: first, the preliminary or investigative phase; second, the middle or examination phase; and finally, the trial. *See* Declaration of Moisés Aguirre Lucero ("Aguirre Decl."), attached hereto as Exhibit B, at ¶ 3; *see also* Declaration of Zully Robles Apumayta ("Robles Decl."), attached hereto as Exhibit C, at ¶ 3.

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[7] Appeal docketed September 19, 2019 (1st Cir. No. 19-1937).

[8] *Matter of Assarsson*, 635 F.2d 1237 (7th Cir. 1980), and *Emami v. U.S. Dist. Court for the Northern Dist. of Calif.*, 834 F.2d 1444 (9th Cir. 1987), are not to the contrary. Neither of those cases held that the magistrate court is precluded from determining whether there are actual charges pending in the requesting country. Rather, they held that once the magistrate judge determines whether there are charges pending, that determination is generally unreviewable. *See Assarsson*, 635 F.2d at 1240 ("We do not review the magistrate's determination that Assarsson was 'charged,' because we hold that it is not reviewable on *habeas corpus*.") (emphasis added); *see also Emami*, 834 F.2d at 1448 (holding that while the question "[w]hether a treaty conditions extradition upon the filing of formal charges is a question cognizable on appeal from the denial of a petition for habeas corpus," the magistrate court's factual that formal charges have or have not been filed is reviewable "only if the treaty itself conditions extradition on the existence of formal charges").

During the investigation phase, the "objective is to gather items of evidence that allow the prosecutor to determine whether a crime has occurred, and to decide whether to seek charges against a particular individual." Robles Decl. at ¶ 3. Once the investigation is finished, the prosecutor must decide either to dismiss the case or to seek a formal charge from the Preliminary Investigation Court. *See id.; see also* Aguirre Decl. at ¶ 4. Notably, "[o]nce the prosecutor requests a formal charge from the court, no further investigation by the prosecutor is permitted." Aguirre Decl. at ¶ 4.

If the prosecutor chooses to pursue a formal charge, the case proceeds to the examination phase. *See id.* at ¶ 5 During this stage, the judge of the Preliminary Investigation Court must hold a preliminary hearing. *Id.* The presence of the accused's attorney at this hearing is "mandatory." *Id.* At the preliminary hearing, the accused has the right not only to object to the prosecutor's evidence, but also to present his own exculpatory evidence. *Id.* If, at the conclusion of the preliminary hearing, the judge determines that a formal charge is warranted, the judge issues the Order of Prosecution (*Orden de Enjuiciamiento*). *Id.*; *see also* Robles Decl. at ¶ 3. The Order of Prosecution is the formal charging document that "commences the prosecution and causes the accused to be 'charged.'" Aguirre Decl. at ¶ 5.

The requirements for a valid Order of Prosecution are set forth in Article 353 of the Peruvian Code of Criminal Procedure. *See id.* Under the Code of Criminal Procedure, "a person is not 'prosecuted' or 'charged' unless the court has issued a writ of prosecution in accordance with Article 353." *See* Declaration of José F. Palomino Manchego ("Palomino Decl."), attached hereto as Exhibit D, at ¶ 4.

Pursuant to Article 353, the Order of Prosecution must include all of the following:

(1) the names of the accused and the victims, if it is possible to identify them;

(2) the crime(s) charged, with code citations, and any alternate or corollary classifications;

(3) the types of evidence admitted and, if relevant, the applicable standards of proof;

(4) the parties; and

(5) the order assigning the parties of record to the oral trial judge.

See Aguirre Decl. at ¶ 5.

As soon as the judge issues the Order of Prosecution, the Preliminary Investigation Court loses

jurisdiction. *See id.* The case moves to the Criminal Judge who oversees the trial. *Id.*

3. Because Peru's Case Remains in the Investigation Phase and the Court Has Not Issued an Order of Prosecution, Dr. Toledo Has Not Yet Been Charged as Required by Article I

The case against Dr. Toledo remains in the investigation phase. *See* Status Rpt. at 1-2; *see also* Aguirre Decl. at ¶ 7; Palomino Decl. at ¶ 5; Robles Decl. at ¶ 4. As Moisés Aguirre, an expert on Peruvian extradition law, explains: "The intermediate phase cannot begin until the prosecution has completed its investigation. Yet the prosecution's investigation remains active." Aguirre Decl. at ¶ 7. Not only was the investigation ongoing when Peru submitted its extradition request, but Peru's prosecutors sought and obtained an *extension* of the investigation period in March of this year. *See* Status Rpt. at 1. Currently, the investigation is set to continue until September 20, 2020. *See id.* Even then, the prosecutor cannot terminate the investigation period where, as here, there remains a pending request for a *Tutela de Derechos*. *See id.* at 1-2.

Indeed, "[e]ven if the prosecution ha[d] completed its investigation, there is still no way that Dr. Toledo could be lawfully charged with a crime. There has not been a preliminary hearing. He has not been given an opportunity, through his attorney, to challenge the prosecutor's evidence against him. Nor has Dr. Toledo been given an opportunity, through his attorney, to present exculpatory evidence." *See* Aguirre Decl. at ¶ 7. And, "[m]ost fundamentally, Judge Richard Concepcion Carhuancho of the First National Preliminary Investigation Court has not dictated a charging document, as required by Article 353. Nor has jurisdiction transferred to the trial court." *Id.*

Before an individual can be "charged" in Peru, the investigation must be concluded, the preliminary hearing must be held, and the judge must issue an Order of Prosecution. Here, none of these events have occurred. Because Dr. Toledo has not been charged with any of the offenses for which Peru seeks extradition, Article I of the Treaty requires that the extradition request be denied.

III. Extradition Is Prohibited Because Peru Has Failed to Produce the Charging Document, as Required by Article VI of the Treaty

Even if Peru had actually charged Dr. Toledo with the alleged offenses, extradition would still be prohibited because Peru has failed to comply with Article VI of the Treaty.

As noted above, Article VI identifies the documents that the requesting country is required to submit in support of its extradition request. *See* Treaty, art. VI. Section 2 of Article VI identifies the supporting documents required for every extradition request, regardless of whether the individual has been convicted or only charged. *See* Treaty, art. VI ¶ 2. Sections 3 and 4, in turn, identify the supporting documents that are required based on the status of the case in the requesting country. Section 3 lists the documents required where the individual has been charged, but not yet convicted. Section 4 lists the documents required where the individual has been convicted (or convicted and sentenced).

When the person sought has been charged but has not yet gone to trial, § 3 requires that the extradition request include:

> (a) a copy of the warrant or order of arrest issued by a judge or other competent authority;
>
> (b) a copy of the charging document; and
>
> (c) such evidence as would be sufficient to justify the committal for trial of the person if the offense had been committed in the Requested State.

Treaty, art. VI § 3.

If, on the other hand, the person sought has been convicted, § 4 requires that the extradition request include:

> (a) a copy of the judgment of conviction or, if such copy is not available, a statement by a competent judicial authority that the person has been found guilty;
>
> (b) evidence or information establishing that the person sought is the person to whom the finding of guilt refers; and
>
> (c) a copy of the sentence imposed, if the person sought has been sentenced, and, if applicable, a statement establishing to what extent the sentence has been carried out.

Treaty, art. VI § 4.

In Dr. Toledo's case, Peru has failed to comply with § 3(b) of Article VI because its extradition package does not include a copy of the Order of Prosecution.

A. Article VI Requires Peru to Provide a Copy of the Formal Charging Document

When construing a treaty or statute, the language of the document itself "is the first and, if the language is clear, the only relevant inquiry." *United States v. Lettiere*, 640 F.3d 1271, 1274 (9th Cir.

2011). Here, "the language is clear": Paragraph (3)(b) explicitly requires "a copy of the charging document." *See also Aguasvivas*, 405 F. Supp. 3d at 354-55 (holding that where an extradition treaty requires both an arrest warrant and "a copy of the document setting forth the charges against the person sought," the "plain language of the Treaty" requires the requesting country to produce the formal charging document).

In *Aguasvivas*, the court construed the extradition treaty between the United States and the Dominican Republic. *See id.* at 354. The U.S.-Dominican Republic Treaty requires that "a request for extradition of a person sought for prosecution" be accompanied by both "(a) a copy of the warrant or order of arrest or detention," *and* "(b) a copy of the document setting forth the charges against the person sought." *Id.* The government argued that, notwithstanding the express language of the treaty, a copy of the arrest warrant was sufficient, and the Dominican Republic was not required to also provide a formal charging document in support. *See id.*

The *Aguasvivas* court rejected this argument, explaining: "The plain language of the Treaty supports the requirement that the requesting country must produce a formal charging document in addition to the [arrest] warrant to support extradition." *Id.* at 355. In particular, the court noted that the treaty's "use of the qualifier 'the' instead of 'a' in front of "document setting forth the charges" in § 3(b) signifies that there must be a specific charging document presented." *Id.* This interpretation was also supported by "the canon against surplusage." *Id.* The court reasoned that "[i]f section (b) is to have any meaning, it must impose a requirement beyond what is required by subsection (a). In other words, if a warrant, required by § 3(a), satisfied both the warrant requirement and the charging document requirement, § 3(b) would be stripped of any meaning." *Id.*

The same reasoning applies here. Like the treaty in *Aguasvivas*, the U.S.-Peru Treaty requires a copy of *the* charging document, indicating that "there must be a specific charging document presented." *Id.* This interpretation is confirmed by comparing § 3 of Article VI with § 4. Under § 3, there is only one way to establish that the individual has been charged with the alleged offenses: "a copy of the charging document." Treaty, art. VI § 3(b). By contrast, under § 4, the requesting country can establish that the individual has been convicted by producing either "a copy of the judgment of conviction" *or* "a statement by a competent judicial authority that the person has been

found guilty." Treaty, art. VI § 4(a). When the drafter "'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the drafter] acts intentionally and purposely in the disparate inclusion or exclusion.'" *Chowdhury v. I.N.S.*, 249 F.3d 970, 974 (9th Cir. 2001) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). If the drafters of the Treaty had intended for § 3 to be satisfied something less than the actual charging document, they "had a clear model" of how to do so." *Chowdhury*, 249 F.3d at 973. The drafters could have easily written § 3 to permit a "statement by a competent judicial authority" in lieu of the actual charging document, just as they wrote § 4 to permit a "statement by a competent judicial authority" in lieu of the actual judgment of conviction. The declined to do so. *See id.* at 974 (noting that if drafters had intended two sections of a statute to have the same meaning, "they would have used the same language").

B. The Drafters' Intent to Require a Copy of the Actual Charging Document Is Apparent When the Current U.S.-Peru Treaty Is Compared to Earlier Versions

The current U.S.-Peru treaty is not the original extradition treaty between these two countries. The United States and Peru first entered into an extradition treaty in 1870. *See* Extradition Treaty Between the United States of America and the Republic of Peru ("the 1870 Treaty"), Sept. 12, 1870, U.S.-Peru, 18 Stat. 719 (1874). In 1899, that treaty was superseded by the Treaty Between the United States of America and the Republic of Peru Providing for the Extradition of Criminals ("the 1899 Treaty"), Nov. 28, 1899, U.S.-Peru, 31 Stat. 1921 (1901). The 1899 Treaty remained in force until, more than a century later, the current treaty was signed in 2001.

Unlike the current version of the Treaty, neither the 1870 Treaty nor the 1899 Treaty required the requesting country to submit a charging document. The 1870 Treaty required only that the requesting country provide "a condemnatory sentence, an order of arrest, or of any other process equivalent to such order, in which will be specified the character and gravity of the imputed acts, and the dispositions of the penal laws relative to the case." 1870 Treaty, art. IV. The 1899 Treaty, in turn, required a "duly authenticated copy of the warrant of arrest in the country where the crime has been committed, and of the depositions or other evidence upon which such warrant was issued." 1899 Treaty, art. III. "Where the words of a later statute differ from those of a previous one on the

same or related subject, Congress must have intended them to have a different meaning." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988). The same is true here: The drafters of the current Treaty made an affirmative choice to add "a copy of the charging document" to the list of requirements.

C. Interpreting the Treaty to Require a Copy of the Actual Charging Document Is Consistent With *Assarsson* and *Emami*

In *Matter of Assarsson*, 635 F.2d 1237 (7th Cir. 1980), and *Emami v. U.S. Dist. Court for the Northern Dist. of Calif.*, 834 F.2d 1444 (9th Cir. 1987), the courts held that even though the U.S.-Sweden Extradition Treaty (*Assarsson*) and the U.S.-West German Extradition Treaty (*Emami*) limit extradition to individuals who have been "charged with or convicted of" an extraditable offense, neither treaty requires the requesting country to prove that the individual has, in fact, been formally charged. *See Assarsson*, 635 F.2d at 1243; *Emami*, 834 F.2d at 1448. In both cases, the courts relied on the fact that the treaties did not require the requesting country to provide a charging document. *See Assarsson*, 635 F.2d at 1243 (noting that the charging document had been omitted from the treaty's list of necessary documents, and concluding that "[i]f the parties had wished to include the additional requirement that a formal document called a charge be produced, they could have so provided"); *Emami*, 834 F.2d at 1448 (concluding that, as in *Assarsson*, "the parties had not intended to require such a document because the parties could have specifically included such a requirement but had not") (citing *Assarsson*, 635 F.2d at 1243).

Unlike the treaties at issue in *Assarsson* and *Emami*, the U.S.-Peru Treaty *does* specifically "include the additional requirement that a formal document called a charge be produced." In addition, it is important to recognize that the drafters of the current version of the Treaty made the decision to add the charging-document requirement in 2001, after *Assarsson* and *Emami* had both been decided. As the Supreme Court has noted, "[w]e normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 569 U.S. 633, 648 (2010) (citations omitted). The same is true when countries sign a treaty. *See, e.g., Alvarez-Machain*, 504 U.S. at 665 (where the parties to the treaty where aware of a court decision, "but did not attempt to establish a rule that would in any way curtail the effect" of that decision, the parties are

assumed to have intended that the decision would apply). Here, it is likely that the parties added the charging-document requirement in direct response to the decisions in *Assarsson* and *Emami*.

D. Copies of the Prosecutor's Decisions Do Not Satisfy § 3's Requirement that Peru Include a "Copy of the Charging Document" With Its Extradition Request

In previous pleadings in this case, the government has taken the position that Peru has complied with Article VI § 3(b) by including a series of Prosecutor's Decisions with its request. *See, e.g.*, Govt's Response to Motion for De Novo Determination of Dispositive Matter Referred to Magistrate Judge (Dkt. # 37) at 19 (asserting that the "formal charges" pending against Dr. Toledo are "listed in in Prosecutor's Decision 3 (dated January 21, 2017), Prosecutor's Decision 6 (dated February 3, 2017), Prosecutor's Decision 8 (dated March 8, 2017), and Prosecutor's Decision 13 (dated June 5, 2017)'"). These Prosecutor's Decisions cannot satisfy § 3(b)'s requirements, however, for several reasons.

First, neither the government nor Peru attempts to claim that the Prosecutor's Decisions are actual charging documents. Instead, the government claims that the purported charges against Dr. Toledo "are listed in" the Prosecutor's Decisions. *See* Dkt. 37 at 19. But the Treaty makes clear that a list or summary of charges is insufficient. Where the extraditee has been *convicted* of the offenses, the Treaty gives the requesting country the option of providing a "statement by a competent judicial authority" instead of the actual "judgment of conviction." Treaty, art. VI § 4(a). No such leeway exists under § 3. The only acceptable document is "a copy of the charging document." Treaty, art. VI § 3(b).

Second, the Prosecutor's Decisions cannot be charging documents because the preliminary investigation is still pending. *See* Status Rpt. at 1-2 (noting that the preliminary investigation period has been extended to September 20, 2020). Indeed, the express purpose of the three of the Prosecutor's Decisions was to extend the time period for the investigation. *See* Prosecutor's Decision No. 3, *Decision to File and Continue the Preliminary Investigation*, Extrad. Req. at 3152, 3188 (deciding to "**DECLARE** this investigation **COMPLEX** and thus establish an initial term of eight (8) months for same") (emphasis in original); Prosecutor's Decision No. 6, *Decision to Extend Formalization and Continuation of Preliminary Investigation*, Extrad. Req. at 3191, 3244 (deciding

to "**EXTEND THE FORMALIZATION AND CONTINUATION OF THE PRELIMINARY INVESTIGATION**") (emphasis in original); Prosecutor's Decision No. 8, *Decision of Specification and Extension of Preliminary Investigation*, Extrad. Req. at 3248, 3289 (deciding to "**EXTEND** and continue the preliminary investigation") (emphasis in original).[9]

Finally, as explained in Section II(c), *supra*, the Peruvian Criminal Code provides that a person is not "charged" with an offense until the judge issues a valid Order of Prosecution. No Order of Prosecution has been issued in this case, nor could one be, because there has not yet been a preliminary hearing.

IV. Extradition for the Influence Peddling Allegation Is Prohibited by Article II Because There Is No Dual Criminality

Even if the Court were to conclude that Peru has otherwise complied with the Treaty, extradition still would be prohibited with regard to the allegation of influence peddling because there is no dual criminality.

Like most extradition treaties, the U.S-Peru Treaty incorporates the doctrine of dual criminality, which prohibits extradition unless the alleged offense is "'considered criminal by the jurisprudence or under the laws of both the requesting and requested nations.'" *United States v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993) (quoting *Van Cauwenberghe*, 827 F.2d at 428).

Article II ("Extraditable Offenses") imposes a dual criminality requirement. It provides, in relevant part, that "[a]n offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by deprivation of liberty for a maximum period of more than one year or by a more severe penalty." Treaty, art. II § 1. Such an offenses is subject to extradition regardless of "whether the laws in the Contracting States place the offense within a different category of offenses or describe the offense by different terminology, so long as the underlying conduct is criminal in both States." Treaty, art. II § (3)(a).

Specifically, Article II of the Treaty limits extradition to alleged offenses that are "punishable under the laws in both Contracting States by deprivation of liberty for a maximum period of more

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[9] The purpose of Prosecutor's Decision No. 13 was to articulate "alternate legal descriptions" for the offenses. *See* Prosecutor's Decision No. 13, *Decision Specifying an Alternate Legal Description*, Extrad. Docs. at 3292-97.

than one year or by a more severe penalty." Treaty, art. II § 1.

To meet the dual criminality requirement, it is not enough for the requesting country to demonstrate that "the underlying conduct is criminal." *Khan*, 993 F.2d at 1372. While the two countries may refer to an offense by different names and impose different punishments, the "substantive conduct" must be the same. *Emani*, 834 F.2d at 1450. The government bears the burden of proof to establish that the dual criminality doctrine is satisfied. *See In re Extradition of Platko*, 213 F. Supp. 2d 1229, 1236 (S.D. Cal. July 26, 2002).

Here, Peru's request to have Dr. Toledo extradited for influence peddling must be rejected because the dual criminality doctrine is not satisfied. Peru claims that its influence peddling statute is sufficiently similar to the American crime of bribery as codified at 18 U.S.C. § 201(b)(1). *See* Extrad. Docs. at 84. Peru is mistaken.

Peru's influence peddling statute provides that "[w]hoever, invoking real or simulated influences, receives, makes someone give or promise for himself or for third parties, donations or promises or any other advantage or benefit offering to mediate before a public official or civil servant who hears, is hearing or has heard a judicial or administrative case, shall be punished by" a minimum of four years in prison. *See* Extrad Docs. at 11-12 (quoting Peru Penal Code § 400). According to Peru, Dr. Toledo violated § 400 when he allegedly "agreed to receive the amount of 35 million dollars from company Odebrecht" to "influence[] the [Proinversion Special] Committee for company Odebrecht to win the Peru-Brazil Interoceanic Highway Contract." Extrad. Docs. at 94. Even if these allegations were true, this conduct would not constitute a crime under 18 U.S.C. § 201(b)(1).

Section 201(b)(1) makes it a crime for anyone who,

> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent –
>
> (A) to influence any official act; or
>
> (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (C) to induce such public official or such person who has been selected to be a

> public official to do or omit to do any act in violation of the lawful duty of such official or person.[]

18 U.S.C. § 201(b)(1).

Dr. Toledo's alleged conduct does not qualify as a crime under § 201(b)(1) for two reasons. First, § 201(b)(1) makes it a crime to "offer[] or promise[] anything of value" to a public official. 18 U.S.C. § 201(b)(1). Peru's influence peddling statute, by contrast, makes it a crime to *receive* something of value. There is no allegation that Dr. Toledo "offer[ed] or promise[d] anything of value" to influence the Committee. Peru alleges that Dr. Toledo *received* something of value from Odebrecht. In other words, while Odebrecht's alleged conduct might violate § 201(b)(1), Dr. Toledo's alleged conduct does not.

Second, § 201(b)(1) requires that the individual act "corruptly," with the specific intent to "influence an[] official act"; "influence" a public official to commit or enable fraud; or "induce" the public official to violate his or her "lawful duty." 18 U.S.C. § 201(b)(1). No similar intent is required by Peru's statute. The individual receiving the bribe need only promise to "mediate" on the other person's behalf. There is no requirement that the defendant intend to actually influence an official act, influence a public official to commit or enable fraud, or induce a public official to commit an unlawful act. In the absence of this specific intent, the alleged conduct is not criminal under § 201(b)(1). *See Manta v. Chertoff*, 518 F.3d 1134, 1142 (9th Cir. 2008) ("Because conduct is only criminal if performed with the required intent," the court must consider whether the extraditee is alleged to have acted with the requisite specific intent).

Because Dr. Toledo's alleged conduct is not criminal under 18 U.S.C. § 201(b)(1), the dual criminality requirement is not satisfied and his extradition is prohibited under Article II of the Treaty.

CONCLUSION

For all of the reasons set forth above, Dr. Toledo respectfully requests that Peru's extradition request be denied.

Dated: July 10, 2020

Respectfully submitted,

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