In the matter of an arbitration under the UNCITRAL Arbitration Rules

between

1. GRAMERCY FUNDS MANAGEMENT LLC
2. GRAMERCY PERU HOLDINGS LLC

Claimants

v.

THE REPUBLIC OF PERU

Respondent

FINAL AWARD

ARBITRAL TRIBUNAL
Prof. Juan Fernández-Armesto (Presiding Arbitrator)
Mr. Stephen L. Drymer
Prof. Brigitte Stern

SECRETARY OF THE TRIBUNAL
Ms. Marisa Planells-Valero

ASSISTANT TO THE PRESIDENT
Ms. Sofia de Sampaio Jalles

Paris, 6 December 2022

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ABBREVIATIONS AND ACRONYMS

Administering Authority's Fees	ICSID's fees as Administering Authority
Ancillary Claims	Gramercy's claims that (i) *Resolución TC Julio 2013* constitutes a denial of justice in breach of Art. 10.5 of the FTA; (ii) that the *Resoluciones TC* and the *Decretos Supremos* amounted to an indirect expropriation in breach of Art. 10.7 of the FTA; (iii) that the *Resoluciones TC* and the *Decretos Supremos* breached Art. 10.4 of the FTA; and (iv) that the *Decretos Supremos* breached Art. 10.3 of the FTA
Arbitrators' Expenses	The reasonable travel and other expenses incurred by the members of the Arbitral Tribunal
Arbitrators' Fees	The fees of the members of the Arbitral Tribunal
Art(s).	Article(s)
Base Period	The period of time used to determine the parity exchange rate
Bonos Agrarios or Bonos	Bonds issued by the Republic of Peru pursuant to *Ley de Reforma Agraria 1969*
C I	Claimants' Statement of Claim
C II	Claimants' Reply
C III	Claimants' Rejoinder on Jurisdiction
Claimants or **Gramercy**	Gramercy Funds Management LLC and Gramercy Peru Holdings LLC.
Contracting Parties	The United States of America and the Republic of Peru
Contrato	*Contrato de Cesión de Derechos* that formalized the purchase of the Bonos Agrarios by GPH from the original bondholders
C PHB-J	Claimants' Post-Hearing Brief on Jurisdiction
C PHB-M	Claimants' Post-Hearing Brief on Merits and Remedies
CPI	Consumer Price Index
Decreto Nº 653	Decreto Legislativo Nº 653, *Ley de Promoción de las Inversiones en el Sector Agrario*, 30 July 1991

Decretos 2014	DS 17/2014 and DS 19/2014
Decretos 2017	DS 34/2017 and DS 242/2017
Decretos Supremos	DS 17/2014, DS 19/2014, DS 34/2017 and DS 242/2017
Denial of Effective Means Claim	Gramercy's claim that the Peruvian legal system deprived the investor of its right to appeal to the Peruvian Courts
Denial of Justice Claim	Gramercy's claim that the Resolución TC Julio 2013 constituted a denial of justice and breached the Minimum Standard of Treatment of aliens, guaranteed by Art. 10.5 of the FTA
Doc. CE-*x* / CA-*x*	Claimants' factual documents and legal authorities
Doc. R-*x* / RA-*x*	Respondent's factual documents and legal authorities
DS 17/2014	Supreme Decree No. 17-2014-EF, 17 January 2014
DS 19/2014	Supreme Decree No. 19-2014-EF, 21 January 2014
DS 242/2017 or *Texto Único*	Supreme Decree No. 242-2017-EF, 18 August 2017
DS 34/2017	Supreme Decree No. 34-2017-EF, 27 February 2017
Effective Means Clause	Art. 2 and Section 2(c) of the Protocol of the Peru-Italy BIT of 1994
Expropriation Claim	Gramercy's claim that the *Decretos 2014*, issued as mandated by the *Resolución TC Julio 2013*, resulted in the expropriation of GPH's investment
FET	Fair and Equitable Treatment
Final Date	The date which falls three years from the Initial Date, for the purpose of Art. 10.18.1 of the Treaty
First Draft	First draft decision prepared by Justice Eto of Resolución TC Julio 2013
First Waiver	Gramercy's first waiver included in its first Notice of Arbitration of 2 June 2016
GMF	Gramercy Funds Management LLC
GPH	Gramercy Peru Holdings LLC
Gramercy Emerging Markets	Gramercy Emerging Markets Fund Ltd

Hearing	Hearing on jurisdiction and the merits
H-XXX	Hearing presentations
HT, Day [x] (Witness/Expert), p. [x], l. [x]	Transcript of the Hearing
ICSID	International Centre for Settlement of Investment Disputes
ILC Articles	ILC Articles on Responsibility of States for Internationally Wrongful Acts
Impugned Measures	The *Resoluciones TC 2013* and the *Decretos Supremos*
Initial Date	The date when Gramercy acquired or should have acquired knowledge of *Resolución TC Julio 2013* and the damages caused thereby, for the purpose of Art. 10.18.1 of the Treaty
Lapuerta Report	Report by Dr. Carlos Lapuerta to the MEF presented on 21 August 2016
Ley de Reforma Agraria	Decree Law No. 17716, 14 June 1969
Main Claim	Gramercy's claim that the *Decretos Supremos* breached Art. 10.5 of the FTA
MEF	Ministerio de Economía y Finanzas
MFN	Most Favored Nation
MST	Minimum Standard of Treatment
NTS	National Treatment Standard
PARB	Peruvian Agrarian Reform Bond Company, Inc.
Parties	Gramercy Funds Management LLC, Gramercy Peru Holdings LLC and the Republic of Peru
Proyecto de Ley 2006	Land Bonds Bill, 27 March 2006
Proyecto de Ley 2011	Draft Bills N°s 456/2006-CR, 3727/2008-CR and 3293/2008-CR, 16 June 2011
R I	Respondent's Statement of Defense
R II	Respondent's Reply to Jurisdictional Objections and Rejoinder on the Merits
Reasonable Legal Costs	Legal and other costs incurred by the Parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable
Reglamento Complementario	Regulation for the procedure to determine the form of payment of the Bonos Agrarios, approved by DS 17/2014

Reglamento General	Regulation for the procedure of registry, update and payment of the Bonos Agrarios, approved by DS 17/2014
Reservation of Rights	Reservation of rights declared by Gramercy in its first Notice of Arbitration of 2 June 2016
***Resolución* Claims**	Gramercy's claims with respect to *Resolución TC Julio 2013*
Resolución TC Agosto 2013	Constitutional Tribunal Order, Exp. No. 022-96-I/TC 8 August 2013
Resolución TC Julio 2013	Constitutional Tribunal Order, Exp. No. 022-96-I/TC 16 July 2013
Resolución TC Noviembre 2013	Constitutional Tribunal Order, Exp. No. 022-96-I/TC 4 November 2013
Resoluciones TC 2013	*Resoluciones TC Julio, Agosto* and *Noviembre 2013*
Respondent/Peru/The Republic	The Republic of Peru
R PHB-J	Respondent's Post-Hearing Brief on Jurisdiction
R PHB-M	Respondent's Post-Hearing Brief on Merits and Remedies
Second Waiver	Gramercy's second waiver included in its amended Notice of Arbitration of 18 July 2016
Seminario Report	Report by Prof. Bruno Seminario to the MEF presented on May 2011
Sentencia TC 2001	Constitutional Tribunal Decision, Exp. No. 022-96-I/TC, 15 March 2001
Treaty or FTA	United States-Peru Free Trade Agreement signed on 12 April 2006, and which entered into force on 1 February 2009
Tribunal's Other Costs	The reasonable costs of expert advice and of other assistance required by the Arbitral Tribunal
UNCITRAL Rules	UNCITRAL Arbitration Rules of 2013
USS	Submission of the United States of America
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969
Voto Singular	Voto Singular attributed to Justice Mesía Ramírez attached to *Resolución TC Julio 2013*

LIST OF CASES

Abaclat	*Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011
AES	*AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010
Aguas del Tunari	*Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005
Alapli	*Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012
Alpha Projektholding	*Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010
Ambiente Ufficio	*Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013
Apotex	*Apotex Inc. v. United States of America, UNCITRAL*, Award on Jurisdiction and Admissibility, 14 June 2013
Aven	*David Aven et al. v. Republic of Costa Rica*, DR-CAFTA, Case No. UNCT/15/3, Final Award, 18 September 2018,
Azinian	*Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999
Ballistini	*Ballistini case, French-Venezuelan Commission (1902)*, Award (1905), 10 U.N.RI.A.A. 18 at 20
Barcelona Traction	*Case concerning the Barcelona Traction, Light and Power Company Limited*, Judgment (Merits) (5 February 1970), I.C.J. Reports 3 (1970)
Berkowitz	*Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) 30 May 2017
Bilcon	*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015
Biwatter Gauff	*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008
B-Mex	*B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019

Brown	*Robert E. Brown (United States) v. Great Britain*, Award, 23 November 1923, 6 U.N.R.I.A.A.
Chattin	*B. E. Chattin (United States) v. United Mexican States*, General Claims Commission, Award, 23 July 1927, 4 U.N.R.I.A.A.
Chevron I	*Chevron v. Republic of Ecuador, UNCITRAL*, Partial Award on the Merits, 30 March 2010
Chevron II	*Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018
Chorzów	*Case Concerning the Factory at Chorzów (Germany v Poland),* Merits, PCIJ Series A No 17 (1928)
Crystallex	*Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016
Duke Energy	*Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008
EDF	*EDF Services Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009
Eduardo Vieira	*Sociedad Anónima Eduardo Vieira v. República de Chile,* ICSID Case No. ARB/04/7, Award, 21 August 2007
ELSI	*Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy),* I.C.J. Reports 1989, p. 15, Judgment, 20 July 1989
EuroGas	*EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017
Fedax	*Fedax N.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997
Flughafen	*Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A. v. Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014
Franck Charles Arif	*Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award, 8 April 2013
Greentech	*Greentech Energy Systems A/S, et al v. Italian Republic*, SCC Case No. V 2015/095, Final Award, 23 December 2018
Guaracachi	*Guaracachi e tal. v. Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014
Impregilo	*Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005

Jan de Nul	*Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008
Klöckner	*Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award, 21 October 1983
KT Asia	*KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013
Lao Holdings	*Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014
Lauder	*Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001
Lemire (Award)	*Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011
Lemire (Jurisdiction)	*Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010
LETCO	*Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Decision on Jurisdiction, 24 October 1984
Levy and Gremcitel	*Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015
LG&E	*LG&E Energy Corp, LG&E Corp, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006
Lion	*Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021
Loewen	*Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003
Lucchetti	*Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005
Maffezini	*Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000
Mason	*Mason Capital LP and Mason Management LLC v. Republic of Korea*, Case No. 2018-55, Decision on Preliminary Objections, 22 December 2019

MCI	*M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007
Mesa	*Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016
Metalclad	*Metalclad v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000*
Mobil	*Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuel*a, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010
Mobil Investments	*Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018
Mondev	*Mondev International Ltd v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002
Occidental	*Occidental Exploration and Production Company v. The Republic of Ecuador,* LCIA Case No. UN3467, Award, 1 July 2004
OI European	*OI European Group B.V. v. Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015
Oostergetel	*Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012
Pac Rim	*Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012
Pawlowski	*Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021
Petrobart	*Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, 29 March 2005
Philip Morris	*Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015
Phoenix Action	*Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009
Pope & Talbot	*Pope & Talbot, Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000
Poštová Banka	*Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015
Renco I	*The Renco Group v. Republic of Peru,* ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction*, 15 July 2016*

Renta 4	*Renta 4 S.V.S.A, et al, v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009
Resolute Forest Products	*Resolute Forest Products v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction, 30 January 2018
Rusoro	*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016
S.D. Myers	*S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000
Salini	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001
Saluka	*Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006
SOABI	*Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction, 1 August 1984
Société Générale	*Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927 (UNCITRAL), Award on Preliminary Objections to Jurisdiction, 19 September 2008
Société Générale	*Société Générale v. Dominican Republic*, LCIA Case No. UN 7929 (UNCITRAL), Award on Preliminary Objections to Jurisdiction, 19 September 2008
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003
Thunderbird	*International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, 26 January 2006
Tidewater	*Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013
Tza Yap Shum	*Señor Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Award, 7 July 2011*
Vacuum Salt	*Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994
Vivendi I (Annulment)	*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Decision on Annulment, 2 June 2002
Von Pezold	*Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015
Waste Management I	*Waste Management Inc. v. United Mexican States I*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000

Waste Management II	*Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004

I. INTRODUCTION

1. This case concerns a dispute submitted on the basis of the United States-Peru Free Trade Agreement signed on 12 April 2006, and which entered into force on 1 February 2009 ("**Treaty** or **FTA**"). The UNCITRAL Arbitration Rules of 2013 ("**UNCITRAL Rules**") govern this arbitration, except to the extent modified by the Treaty.

2. The claimants are Gramercy Funds Management LLC and Gramercy Peru Holdings LLC ("**Claimants**" or "**Gramercy**"), two limited liability companies organized under the laws of the State of Delaware (USA).

3. The respondent is the Republic of Peru ("**Respondent**" or "**Peru**").

4. Claimants and Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page 2.

5. This dispute relates to a series of judicial and governmental measures regarding the repayment scheme for certain government-issued land reform bonds.

II. PROCEDURAL HISTORY

6. On 1 February 2016, Claimants served a Notice of Intent to Commence Arbitration to Respondent pursuant to Article 10.16.2 of the Treaty, together with exhibits CE-01 to CE-40.

7. On 15 April 2016, Claimants filed an Amended Notice of Intent to Commence Arbitration.

8. On 2 June 2016, Claimants filed a Notice of Arbitration and Statement of Claim, together with the Witness Statement of Robert S. Koenigsberger (**CWS-1**) and the Expert Reports of Sebastian Edwards (**CER-1**) and Delia Revoredo Marsano de Mur (**CER-2**), along with exhibits Doc. CE-41 to Doc. CE-259 and Doc. CA-01 to Doc. CA-46.

9. On 5 July 2016, Respondent filed its Response to Claimants' Notice of Arbitration and Statement of Claim, along with exhibits Doc. R-1 to Doc. R-58.

10. On 18 July 2016, Claimants filed an Amended Notice of Arbitration and Statement of Claim.

11. On 5 August 2016, Claimants confirmed their appointment of Mr. Stephen L. Drymer, a national of Canada, as arbitrator. On the same date, Claimants filed their Second Amended Notice of Arbitration and Statement of Claim, together with the Amended Witness Statement of Robert S. Koenigsberger (**CWS-2**) and the Amended Expert Report of Delia Revoredo Marsano de Mur (**CER-3**).

12. On 25 August 2016, Respondent confirmed its appointment of Prof. Brigitte Stern, a national of France, as arbitrator.

13. On 6 September 2016, Respondent filed its Response to Claimants' Second Notice of Arbitration and Statement of Claim, along with exhibits Doc. R-59 to Doc. R-70.

14. On 29 March 2017, the Parties jointly requested that the Secretary-General of ICSID select the third and presiding arbitrator in this case, in her capacity as appointing authority under Article 10.19(3) of the Treaty. On 3 April 2017, the Secretary-General acknowledged receipt of the Parties' request.

15. On 27 April 2017, pursuant to the Parties' agreement, the Secretary-General provided the Parties with a list of seven candidates for presiding arbitrator and invited them to strike or rank the candidates in their order of preference. Each Party submitted its completed list on 8 May 2017.

16. On 9 May 2017, the Centre informed the Parties that the list procedure did not result in the selection of a mutually agreeable candidate. On 18 May 2017, the Parties further agreed to request to the Secretary-General an additional list of five candidates for presiding arbitration.

17. On 31 May 2017, the Secretary-General provided the Parties with the additional list of five candidates and also invited them to strike or rank the candidates in their order of preference. Each Party submitted its completed list on 7 June 2017. On 8 June 2017, the Centre informed the Parties that the additional list procedure did not result in the selection of a mutually agreeable candidate.

18. On 6 December 2017, Respondent requested that the Secretary-General make the appointment of the presiding arbitrator. On 12 December 2017, the Secretary-General confirmed that, pursuant to Respondent's request and unless otherwise agreed by the Parties, she would proceed to appoint at her discretion the presiding arbitrator in this case in accordance with Article 10.19 of the Treaty.

19. On 14 December 2017, Peru conveyed its understanding that the Secretary-General would provide the Parties, in exercising her discretion to appoint the presiding arbitrator, with an additional list of five candidates for their consideration.

20. On 15 December 2017, Claimants objected, *inter alia*, to the provision of an additional list of candidates. In doing so, Claimants indicated that, "if the Secretary-General is to appoint the presiding arbitrator, she should do so directly at her discretion, following any further consultation with the parties she considers advisable".

21. On 18 December 2017, Respondent restated its request that the Secretary-General proceed to the appointment of the presiding arbitration in this case.

22. On 5 January 2018, the Centre noted that the Parties did not agree to the Secretary-General providing a further list of candidates for presiding arbitrator and that, as a result of this disagreement and in the exercise of her discretion, the Secretary-General would proceed to directly appoint the President of the Tribunal.

23. On 1 February 2018, the Secretary-General informed the Parties of her intention to appoint Prof. Juan Fernández-Armesto, a national of the Kingdom of Spain, as presiding arbitrator, and invited the Parties to comment.

24. On 9 February 2018, having not received any observations from the Parties on the proposed appointment of Prof. Fernández Armesto, the Secretary-General informed the Parties that she would proceed with this appointment.

25. On 13 February 2018, the Secretary-General appointed Prof. Fernández Armesto as the third and presiding arbitrator in this case pursuant to Article 10.19 (3) of the Treaty.

26. On 4 May 2018, the Tribunal held a first session with the Parties by teleconference. The Parties and the Tribunal discussed the draft Terms of Appointment, the draft Procedural Order No. 1, and the Procedural Timetable.

27. On 9 May 2018, Prof. Fernández Armesto informed the Secretary-General of the Parties' agreement to appoint ICSID as Administering Authority for this proceeding. On 10 May 2018, the Secretary-General, on behalf of the Centre, accepted the

appointment. Ms. Marisa Planells-Valero, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

28. On 22 May 2018, the Tribunal and the Parties executed the Terms of Appointment. The Terms of Appointment provided, *inter alia*, that the applicable procedural rules would be the UNCITRAL Rules, that the procedural languages would be English and Spanish, and the appointment of Dr. Luis Fernando Rodríguez as Assistant to the President.

29. On 1 June 2018, as per the Tribunal's instructions, the Parties simultaneously submitted a first round of pleadings on the issues of point of contact and the non-aggravation measures to be observed throughout this proceeding. Respondent's pleading was accompanied by exhibits Doc. R-71 to Doc. R-225 and Doc. RA-1 to Doc. RA-23, and Claimants' pleading was accompanied by exhibits Doc. CE-260 to Doc. CE-278.

30. On the same date, the Tribunal circulated a revised version of draft Procedural Order No.1, seeking the Parties' final comments. The Parties submitted their positions on 15 June 2018. In doing so, Respondent requested, *inter alia*, the inclusion of a provision on third-party funding in the Order.

31. On 15 June 2018, the Parties simultaneously submitted a second round of pleadings on the issues of point of contact and non-aggravation measures. Respondent's pleading was accompanied by exhibits Doc. R-226 to Doc. R-254 and Doc. RA-24 to Doc. RA-46 and Claimants' pleading was accompanied by exhibits Doc. CE-279 to Doc. CE-281.

32. On 29 June 2018, following exchanges between the Parties regarding Respondent's request of 15 June 2018, the Tribunal noted that both Parties had confirmed not having financial assistance from a third-party, and invited the Parties to inform of any change of circumstances in the future.

33. On the same date, the Tribunal issued its Procedural Order No. 1, establishing the Procedural Timetable and the rules for conduct of the proceeding, and its Procedural Order No. 2 providing that the seat of this arbitration would be Paris, France.

34. On 2 July 2018, the Tribunal circulated a draft Procedural Order No. 3 on document production, seeking the Parties' comments. The Parties submitted their positions on 9 July 2018. On 12 July 2018, the Tribunal issued its Procedural Order No. 3 establishing the rules governing document production.

35. On 9 July 2018, the Tribunal circulated a draft Procedural Order No. 4 on third-party submissions, inviting the Parties' comments. Claimants submitted their comments on 13 July 2018, and Respondent, on 16 July 2018.

36. On 16 July 2018, Claimants filed their Third Amended Notice of Arbitration and their Statement of Claim ("**C I**"), together with the Second Amended Witness Statement of Robert S. Koenigsberger ("**CWS-3, Koenigsberger I**"), the Amended Expert Report of Sebastian Edwards ("**CER-4, Edwards I**"), the Second Amended Expert Report of Delia Revoredo Marsano de Mur ("**CER-5, Revoredo**"), and a chronology of the

events underlying the dispute, along with exhibits Doc. CE-224A, Doc. CE-224B and Doc. CE-282 to Doc. CE-338.

37. On 25 July 2018, the Tribunal issued its Procedural Order No. 4 establishing the rules governing third-party submissions.

38. On 3 August 2018, the Tribunal informed the Parties of the unavailability of the World Bank facilities in Paris (France) during the dates scheduled for the Hearing in Procedural Order No. 1 and inquired whether the Parties would be agreeable to hold the Hearing at the ICC facilities in Paris (France). On 8 August 2018, Claimants confirmed their agreement to hold the Hearing at the ICC facilities in Paris. On 9 August 2018, Respondent informed of their disagreement with the Tribunal's proposal. On 14 August 2018, the Tribunal invited the Parties to confer and reach an agreement on the venue for the Hearing.

39. On 29 August 2018, the Tribunal issued Procedural Order No. 5 on the issues of point of contact and non-aggravation measures, directing the Parties to abstain from any action or conduct that may result in an aggravation of the dispute.

40. On 5 October 2018, the Parties informed the Tribunal of their agreement to hold the Hearing at the World Bank in Washington, DC "subject to their joint agreement that Paris would remain the legal seat of arbitration and that doing so would not provide a basis for jurisdiction to U.S. courts". The Parties jointly requested the Tribunal to issue an order reflecting this agreement. On 12 October 2018, the Tribunal acknowledged the Parties' agreement and understanding regarding the Hearing venue and the legal seat of arbitration.

41. On 26 November 2018, due to a scheduling conflict of one of the arbitrators and with the Parties' agreement, the Tribunal confirmed the new dates for the Hearing from 11 to 15 February 2020.

42. On 14 December 2018, Respondent filed its Statement of Defense ("**R I**"), together with the Witness Statements of Betty Armida Sotelo Bazán ("**RWS-1, Sotelo I**") and Luis Miguel Castilla Rubio ("**RWS-2, Castilla I**"), the Legal Opinions of W. Michael Reisman ("**RER-1, Reisman I**") and Oswaldo Hundskopf ("**RER-2, Hundskopf I**"), and the Expert Reports of Norbert Wühler ("**RER-3, Wühler I**"), Pablo E. Guidotti ("**RER-4, Guidotti I**"), and Brent C. Kaczmarek and Isabel S. Kunsman ("**RER-5, Quantum I**"), along with exhibits Doc. R-255 to Doc. R-1019 and Doc. RA-47 to Doc. RA-307.

43. On 11 January 2019, in accordance with the Procedural Timetable, the Parties simultaneously submitted their Document Production Schedules ("**DPS**").

44. On 1 February 2019, the Parties simultaneously submitted their responses to the DPS.

45. On 8 February 2019, the Parties exchanged their DPS Responses to the Objections raised by the other Party and produced the non-contested documents.

46. On 15 February 2019, the Parties submitted to the Tribunal the final version of their DPSs. In the following days, the Parties exchanged additional communications regarding the Parties' document production requests.

47. On 8 March 2019, the Tribunal issued Procedural Order No. 6 ruling on each Party's document production requests.

48. Shortly after, an incident arose between the Parties involving the production of certain documents. Claimants and Peru exchanges additional communications on this matter.

49. On 9 April 2019, the Parties and the Tribunal held a conference call to address the document production issue. At the Tribunal's direction, Claimants filed a further submission on 16 April 2019, and Respondent on 24 April 2019.

50. On 10 May 2019, the Tribunal issued Procedural Order No. 7, finding that the documents at issue were confidential and that the Tribunal and the Parties were to use them only in connection with this arbitration. The Tribunal invited the Parties to confer an enter into a confidentiality agreement.

51. On 14 May 2019, following exchanges between the Parties, the Tribunal issued an updated Procedural Calendar.

52. On 21 May 2019, pursuant to the updated Procedural Calendar, Claimants filed their Statement of Reply and Answer to Objections ("**C II**"), together with the Reply Witness Statement of Robert S. Koenigsberger ("**CWS-4, Koenigsberger II**"), the Witness Statements of Robert Lanava ("**CWS-5, Lanava I**"), Robert Joannou ("**CWS-6, Joannou**"), [redacted] ("**CWS-7, [redacted]**"), [redacted] ("**CWS-8, [redacted]**"), [redacted] ("**CWS-9, [redacted]**"), the Reply Expert Report of Sebastian Edwards ("**CER-6, Edwards II**"), and the Expert Reports of Ambassador Peter Allgeier ("**CER-7, Allgeier I**"), Prof. Rodrigo Olivares-Caminal ("**CER-8, Olivares-Caminal I**"), Prof. Mario Castillo Freyre ("**CER-9, Castillo**"), and Alfredo Bullard ("**CER-10, Bullard**"), along with exhibits CE-339 to CE-752 and CA-73 to CA-208.

53. On 22 May 2019, due to changes in the availability of the three Members of the Tribunal and with the Parties agreement, the Tribunal informed the Parties that the Hearing dates were moved back to 10 to 14 February 2020. The Tribunal issued an updated Procedural Calendar.

54. Pursuant to Procedural Order No. 7, since the Parties were unable to reach an agreement, each Party submitted a draft of their proposed confidentiality orders to the Tribunal. Claimants did so on 3 June 2019, and Respondent on 5 June 2019.

55. On 7 June 2019, the Tribunal issued Procedural Order No. 8 governing the use of confidential documents in this arbitration.

56. On 17 June 2019, Respondent requested that the Tribunal reject Gramercy's efforts to withhold non-redacted versions of certain exhibits related to ownership and valuation,

to unilaterally designate additional documents as confidential, and to submit a new version of their Reply. On 18 June 2019, Claimants opposed Respondent's request alleging, *inter alia*, that the redacted information was unrelated to any issue in dispute and that Peru had failed to identify any prejudice resulting for the designation of additional documents as confidential. Claimants further clarified that they only intended to submit an errata version of their Reply, correcting certain typographical and citation errors.

57. On 18 June 2019, Respondent requested, *inter alia*, that the Tribunal strike from the record the witness statements submitted by Robert Lanava, Robert Joannou, and [redacted] and the expert reports submitted by Prof. Mario Castillo Freyre and by Alfredo Bullard (the "**Testimonial Evidence**") together with any citations thereto. Peru argued that Gramercy had deliberately chosen to withhold this evidence until its Reply, rather than submitting it together with its Statement of Claim, in breach of the Tribunal's directions in Procedural Order No. 5 regarding the non-aggravation of the dispute. On 20 June 2019, Claimants asked the Tribunal for directions regarding Peru's application.

58. On 21 June 2019, the United States of America filed a non-disputing party submission, pursuant to Article 10.20.2 of the Treaty.

59. On 28 June 2019, following exchanges between the Parties, the Tribunal ruled on the redaction of protected exhibits and the resubmission of documents already produced. The Tribunal also granted Claimants' request for authorization to file a corrected version of its Reply. By this same communication, the Tribunal invited Claimants to provide comments by 8 July 2019 on Respondent's request to strike the Testimonial Evidence from the record and on Claimants' alleged aggravation of the dispute.

60. On 30 June 2019, Respondent provided additional comments regarding its request to strike the Testimonial Evidence from the record together with exhibits Doc. R-1020 to Doc. R-1027. On 8 July 2019, Claimants submitted their comments on Respondent's pending applications, attaching exhibits Doc. CE-753 to Doc. CE-757.

61. On 9 July 2019, Claimants filed a corrected and redacted version of their Reply.

62. On 14 July 2019, Respondent reiterated its request regarding the exclusion of certain evidence attached to Claimants' Reply.

63. On 20 July 2019, the Tribunal issued Procedural Order No. 9 rejecting Respondent's request to strike the Testimonial Evidence from the record as it considered that those documents were responsive to arguments and evidence submitted in Peru's Statement of Defense. The Tribunal also reiterated its directive for both Parties to abstain from any action that may result in an aggravation of the dispute.

64. On 13 September 2019, Respondent filed its Statement of Rejoinder ("**R II**"), together with the Second Witness Statement of Betty Armida Sotelo Bazán ("**RWS-3, Sotelo II**"), the Second Witness Statement of Luis Miguel Castilla ("**RWS-4, Castilla II**"), the Witness Statement of Carlos Alberto Herrera Perret ("**RWS-5, Herrera**"), the

Supplemental Legal Opinion of W. Michael Reisman ("**RER-6, Reisman II**"), the Second Legal Opinion of Oswaldo Hundskopf ("**RER-7, Hundskopf II**"), the Legal Opinion of Eduardo García-Godos ("**RER-8, García-Godos**"), the Supplementary Report of Norbert Wühler ("**RER-9, Wühler II**"), the Second Report of Pablo Guidotti ("**RER-10, Guidotti II**"), and the Second Quantum Report of Brent C. Kaczmarek and Isabel S. Kunsman ("**RER-11, Quantum II**"), along with exhibits Doc. R-1028 to Doc. R-1219 and Doc. RA-308 to Doc. RA-418.

65. On 30 September 2019, the President of the Tribunal consulted with the Parties regarding their availability to change the Hearing dates. Following exchanges between the Parties, on 17 October 2019, the Tribunal confirmed that the dates of the Hearing were to remain unchanged. The Tribunal also noted that the Parties disagreed over a modification to the extension of the Hearing and directed the Parties to confer and try to reach an agreement by 24 October 2019.

66. On 25 October 2019, the Parties informed the Tribunal of their inability to reach an agreement on the extension of the Hearing and submitted their positions on the matter. On 5 November 2019, the Tribunal informed the Parties of its decision to extend the duration of the Hearing for two days. The Hearing would thus last seven days in total, from 7 to 14 February 2020 (except on 9 February 2020).

67. On 8 November 2019, the Tribunal circulated an updated Procedural Calendar reflecting the new Hearing dates.

68. On that same date, Claimants informed the Tribunal of recent actions taken by Peruvian prosecutors and courts affecting Prof. Mario Castillo Freyre, one of Claimants' expert witnesses on Peruvian law, which could have an impact on Prof. Castillo's participation in the Hearing and invited Respondent to provide its views on the situation. Respondent provided comments on 20 November 2019. Additional comments on this matter were received from Claimants on 21 November 2019.

69. On 13 November 2019, Claimants filed their Rejoinder to Peru's Objection to Jurisdiction ("**C III**"), together with the Rebuttal Witness Statement of Robert S. Koenigsberger ("**CWS-10, Koenigsberger III**"), the Reply Witness Statement of Robert Lanava ("**CWS-11, Lanava II**"), the Reply Expert Report of Ambassador Peter Allgeier ("**CER-11, Allgeier II**"), and the Reply Expert Report on Jurisdiction of Prof. Rodrigo Olivares-Caminal ("**CER-12, Olivares-Caminal II**"), along with exhibits Doc. CE-758 to Doc. CE-777 and Doc. CA-209 to Doc. CA-227.

70. On 19 November 2019, following exchanges between the Parties, the Tribunal ruled on a procedural incident that had arisen between the Parties with regard to the redactions to the public version of R II. In doing so, the Tribunal granted Claimants' request for Respondent to redact certain references to confidential documents and the names of, and other references to, the three bondholders that have provided testimony in the arbitration. Additionally, the Tribunal rejected Claimants' request that Respondent redact some specific terms used in C III.

71. On 20 November 2019, Claimants, *inter alia*, submitted exhibits Doc. CE-778 to Doc. CE-781 which would supplement C III (the "**Supplementary Exhibits**"). On that same date, Respondent objected to the incorporation of these materials into the record indicating that it would respond in due course.

72. On 22 November 2019, the Tribunal proposed the appointment of Ms. Krystle Baptista Serna to replace Mr. Luis Fernando Rodríguez as Assistant to the President and invited the Parties to confirm their acceptance of the appointment. Claimants and Respondent confirmed their agreement on 25 and 27 November 2019 respectively.

73. On 6 December 2019, the Parties submitted the list of witnesses and experts that they wished to cross examine at the Hearing. In their communication, Claimants requested that the Tribunal treat Prof. Reisman's opinions as part of Respondent's legal submissions, adding that if Prof. Reisman was to appear at the Hearing, he would need to do so as part of Respondent's counsel team, and not as an expert witness.

74. On 10 December 2019, Claimants noted that Respondent intended to call Justice Delia Revoredo for cross-examination and reiterated that Justice Revoredo was unable to appear at the Hearing for medical reasons, as already indicated in C II. Claimants further noted that in Procedural Order No. 9, the Tribunal had already taken note of the fact that Justice Revoredo was unable to appear from cross-examination and that it would give her written testimony the weight that it considered appropriate in light of that circumstance.

75. On 17 December 2019, Peru commented, *inter alia*, on Claimants' communication of 20 November 2019 introducing the Supplementary Exhibits. Respondent argued that the introduction of these documents was outside the permissible scope of Claimants' submission because they did not relate to jurisdictional matters and was in breach of Procedural Order No. 1. On this basis, Peru requested that such documents be excluded from the record of this arbitration or, in the alternative, an opportunity to make a focused submission of responsive documents. Peru also requested that the Tribunal reject Claimants' request of 6 December 2019 to redesign the role of Professor Reisman in this arbitration. Additionally, Peru questioned Justice Revoredo's ability to testify at the Hearing and informed that its fact witness Luis Miguel Castilla was unable to travel outside of Peru to be cross-examined at the Hearing.

76. On that same date, Claimants requested that Respondent clarify its statement regarding Mr. Castilla's inability to travel outside of Peru introducing exhibits Doc. CE-782 and Doc. CE-783 and Respondent requested that the Tribunal disregard Claimants' submission and unauthorized new documents. On 20 December 2019, Claimants requested the Tribunal's directions regarding Mr. Castilla's appearance at the Hearing. Further communications on the matter were exchanged by the Parties on that same date.

77. Also on 20 December 2019, Claimants responded to Respondent's request of 17 December 2019 to exclude the Supplementary Exhibits. Claimants argued, *inter alia*, that these documents were in the public domain and publicly available to Peru, they were responsive to Respondent's R I and R II, and substantively relevant to the case.

By this same communication, Claimants also provided further comments regarding their request that the Tribunal treat Prof. Reisman's opinions as part of Respondent's legal submissions, together with new legal authority Doc. CA-228, and on Peru's objections to the legitimacy of Justice Revoredo's health concerns.

78. On 8 January 2020, the Tribunal held a pre-hearing conference call with the Parties by telephone conference. During the pre-hearing conference call, the Parties and the Tribunal discussed the Parties' procedural applications pending before the Tribunal and the outstanding matters relating to the organization of the Hearing.

79. On 10 January 2020, the Tribunal informed the Parties of its decision regarding the outstanding procedural issues discussed at the pre-hearing conference call. In particular, the Tribunal admitted the Supplementary Evidence, following Respondent's acquiescence as expressed at the pre-hearing conference call, and confirmed that Prof. Reisman was to participate at the Hearing as an expert witness in international law. The Tribunal further noted that Justice Revoredo was not available to testify at the Hearing for medical reasons and that at the pre-hearing conference call Respondent had expressed its willingness to have Mr. Castillo testify via video conference instead of Ms. Revoredo. Additionally, the Tribunal noted the Parties' agreement on the conditions for examination of Peru's quantum experts and provided a deadline for the Parties to submit all evidence justifying requests that Mr. Herrera and Mr Castilla, for Respondent, and Mr. Castillo, for Claimants, testify by videoconference.

80. On 28 January 2020, the Tribunal issued Procedural Order No. 10 concerning the organization of the Hearing.

81. The Hearing was held at the World Bank C Building in Washington, D.C. from 7 to 14 February 2020 (except on 9 February 2020). The following persons were present at the Hearing:

Tribunal:	
Prof. Juan Fernández Armesto	President
Mr. Stephen L. Drymer	Arbitrator
Prof. Brigitte Stern	Arbitrator
Assistant to the President:	
Ms. Krystle M. Baptista	Assistant to the President
ICSID Secretariat:	
Ms. Marisa Planells-Valero	Secretary of the Tribunal
For the Claimants:	
Counsel:	
Mr. Mark W. Friedman	Debevoise & Plimpton
Ms. Ina C. Popova	Debevoise & Plimpton
Mr. Carl Riehl	Debevoise & Plimpton
Ms. Floriane Lavaud	Debevoise & Plimpton

Ms. Berglind Halldorsdottir Birkland	Debevoise & Plimpton
Mr. Guilherme Recena Costa	Debevoise & Plimpton
Ms. Sarah Lee	Debevoise & Plimpton
Mr. Duncan Pickard	Debevoise & Plimpton
Mr. Julio Rivera Rios	Debevoise & Plimpton
Ms. Mary Grace McEvoy	Debevoise & Plimpton
Mr. Thomas G. McIntyre	Debevoise & Plimpton
Mr. Luis Bedoya	Rodrigo, Elias & Medrano
Mr. Francisco Cardenas Pantoja	Rodrigo, Elias & Medrano

Parties:

Mr. James Taylor	Gramercy Funds Management LLC
Mr. Joshua M. O'Melia	Gramercy Funds Management LLC
Mr. Nick Paolazzi	Gramercy Funds Management LLC
Mr. Thomas Norgaard	Gramercy Funds Management LLC

Experts:

Mr. Peter Allgeier
Mr. Mario Castillo Freyre*
Mr. Rodrigo Olivares-Caminal
Prof. Alfredo Bullard
Mr. Sebastian Edwards

Other:

Mr. Brian Thompson	Immersion Legal
Mr. Samuel Weglein	Analysis Group
Mr. Milan Pejnovic	Bullard, Ezcurra & Falla

For the Respondent:

Counsel:

Mr. Jonathan C. Hamilton	White & Case LLP
Ms. Andrea Menaker	White & Case LLP
Mr. Rafael Llano	White & Case LLP
Mr. Francisco Jijón	White & Case LLP
Mr. Jonathan Ulrich	White & Case LLP
Mr. Frank Panopolous	White & Case LLP
Mr. John Dalebroux	White & Case LLP
Mr. Alejandro Martinez de Hoz	White & Case LLP
Ms. Sandra Huerta	White & Case LLP
Ms. Soledad Pena	White & Case LLP
Ms. Sophia Castillero	White & Case LLP
Ms. Audrey Vivas	White & Case LLP
Mr. John Contrera	White & Case LLP
Ms. Julianna Goodman	White & Case LLP
Mr. Mark Cuevas	White & Case LLP

Parties:	
Ambassador Hugo de Zela	Republic of Peru
Mr. Ricardo Ampuero	Republic of Peru
Ms. Monica Guerrero	Republic of Peru
Ms. Giovanna Zanelli	Republic of Peru
Mr. Alberto Hart	Republic of Peru
Witnesses:	
Mr. Luis Miguel Castilla Rubio*	
Mr. Carlos Alberto Herrera Perret*	
Ms. Betty Armida Sotelo Bazán	
Experts:	
Mr. Eduardo García-Godos	
Mr. Pablo Emilio Guidotti	
Dr. Oswaldo Hundskopf	
Mr. Rafael Artieda	With Dr. Hundskopf
Mr. Brent Kaczmarek	
Ms. Isabel Kunsman	
Mr. W. Michael Reisman	
Ms. Mahnoush Arsanjani	With Prof. Reisman
Mr. Norbert Wühler	
* *by videoconference*	
Non-Disputing Party – United States of America:	
Ms. Lisa Grosh	U.S. Department of State
Ms. Nicole Thornton	U.S. Department of State
Ms. Margaret Sedgewick	U.S. Department of State
Mr. John Daley	U.S. Department of State
Ms. Amy Collins	U.S. Department of Treasury
Court Reporters:	
Ms. Dawn Larson	B&B Reporters
Mr. Dionisio Rinaldi	D-R Esteno
Interpreters:	
Ms. Silvia Colla	Interpreter
Mr. Daniel Giglio	Interpreter
Mr. Charles Roberts	Interpreter

82. At the Hearing, Claimants' executives disclosed that in 2017 a Gramercy related entity acquired an interest in certain Peruvian Land Bonds ("**Tranche 2 Bonds**"), a transaction which would be separate from those at issue in this arbitration. Following this disclosure, the Tribunal invited Respondent to file a submission on its possible procedural actions regarding the Tranche 2 Bonds. The Tribunal also admitted into the record hearing exhibits H-1 to H-19, consisting of the Parties presentations to assist oral arguments and the oral presentations by the experts.

83. On 21 February 2020, at the Tribunal's request, Claimants submitted a letter from Mr. Sebastian Edwards with additional comments on his calculations and on slide 43 of Mr. Brent Kaczmarek and Ms. Isabel Santos Kunsman's Hearing presentation.

84. On 2 March 2020 Respondent requested that Claimants produce certain documents regarding the Tranche 2 Bonds and that the Tribunal establish a post-hearing phase addressing Gramercy's production of documents and the Parties' Post Hearing Briefs ("**Respondent's Petition**"). On 4 March 2020 the Tribunal invited Claimants to respond to Respondent's Petition by 19 March 2020. On 18 March 2020, Claimants requested an extension until 23 March 2020 to respond to Respondent's Petition and Respondent opposed Claimants' request. On that same date, the Tribunal granted Claimants' request. On 24 March 2020, Claimants submitted their response to Respondent's Petition.

85. On 16 April 2020, the Tribunal issued Procedural Order No. 11 regarding Respondent's Petition.

86. On 22 April 2020, following exchanges between the Parties, the Tribunal confirmed that the Post-Hearing Oral Arguments would be held on 17-18 November 2020.

87. On 30 April 2020, Claimants submitted certain documents relating to the Tranche 2 Bonds. On 21 May 2020, Respondent alleged that Gramercy had failed to comply with the Tribunal's orders in Procedural Order No. 11 in connection with the production of documents related to the Tranche 2 Bonds.

88. By letter of 9 June 2020, following exchanges between the Parties, the Tribunal decided on certain redactions to the public version of the Hearing transcript to be published on the ICSID website, and on the production of the Tranche 2 Bonds documents and requested additional affidavits from Gramercy's chief legal officer and lead external counsel as provided in Annexes III and IV of Procedural Order No. 3.

89. On 17 June 2020, Claimants provided the requested affidavits and confirmed that they were not in possession of any additional documents relating to the Tranche 2 Bonds Purchase responsive to the Tribunal's orders in Procedural Order No. 11.

90. On 1 July 2020, pursuant to Procedural Order No. 11, the Parties filed simultaneous Initial Post-Hearing Briefs. Claimants filed their Post-Hearing Brief on Merits and Quantum, together with an Appendix prepared with the assistance of Prof. Edwards and hearing exhibit H-20 ("**C PHB-M**"). Respondent filed their Post-Hearing Brief on Jurisdiction ("**R PHB-J**").

91. On 4 August 2020, Respondent requested a one-month extension until 15 September 2020 for the submission of the second round of Post-Hearing Briefs. On 6 August 2020, Claimants opposed Respondent's request and proposed a one-week extension. Respondent replied on 7 August 2020. On that same day the Tribunal granted the Parties a two-week extension until 31 August 2020 for the filing of their Reply Post-Hearing Briefs.

92. On 31 August 2020, the Parties filed simultaneous Reply Post-Hearing Briefs. Claimants filed their Post-Hearing Brief on Jurisdiction, together with a letter from Prof. Sebastian Edwards ("**Prof. Edwards' Letter**") and legal authorities Doc. CA-229 to Doc. CA-238 ("**C PHB-J**"). Respondent filed its Post-Hearing Brief on Merits and Quantum, together with an Appendix prepared by its Quantum Experts ("**R PHB-M**").

93. On 4 September 2020, Respondent requested, *inter alia*, that the Tribunal strike from the record of this proceeding the following materials submitted by Claimants with their C PHB-J: (a) legal authorities Doc. CA-229 to Doc. CA-238, (b) Prof. Edwards' Letter; and (c) any and all references to those materials in C PHB-J, including in paragraphs 7, 9, 11, 18, 38, 48, 49, 55, 67 and 90. Respondent also requested an opportunity to submit a post-hearing rejoinder.

94. On 11 September 2020, Claimants responded indicating, *inter alia*, that Prof. Edwards' Letter was not a new expert submission but a response to a specific request from the Tribunal at the Hearing. Additionally, Claimants submitted that the introduction of five new legal authorities was justified by extraordinary circumstances and indicated that it did not object to Peru being allowed to submit a targeted response of no more than two pages from its Quantum Experts explaining any disagreement they have with the mathematical accuracy of Prof. Edwards's corrections and a targeted response of no more than three pages, focused strictly on responding to Gramercy's characterization of the disputed authorities in paragraphs 7, 9, 11, 18, 38, 48, 49, 55, 67 and 90 of C PHB-J. The Parties exchanged further communications on this matter on 14 September 2020.

95. On 7 October 2020, the Tribunal decided to incorporate Prof. Edwards' letter into the record, as it responded to the Tribunal's request to Prof. Edwards at the February Hearing. As to Claimants' legal authorities, the Tribunal noted that Claimants had not followed the procedure established in Procedural Order No. 1 and that the Tribunal had not authorized the submission of additional legal authorities into the record. The Tribunal further indicated that, after the Hearing, it would inform the Parties "whether it required that, in light of their relevance for the adjudication of the case, copies of certain awards or decisions be marshalled into the file". By this same communication, and in light of the health and safety concerns and the restrictions on travel and movement resulting from the COVID-19 pandemic, the Tribunal proposed that the Post-Hearing Oral Arguments be held remotely via Zoom.

96. On 13 October 2020, Respondent commented, *inter alia*, on the Tribunal's decision of 7 October 2020, and the Parties, *inter alia*, agreed to hold the Hearing remotely and made proposals regarding the Hearing schedule.

97. On 21 October 2020, the Tribunal proposed a schedule for the Post-Hearing Oral Arguments.

98. On 5 November 2020, after hearing the Parties' views on the organization of the Hearing, the Tribunal issued Procedural Order No. 12, setting out the procedural rules governing the conduct of the Post-Hearing Oral Arguments.

99. On 8 November 2020, Claimant made additional comments regarding recent actions by Peruvian prosecutors and courts which would affect Prof. Mario Castillo Freyre.

100. The Post-Hearing Oral Arguments were held virtually from 17-18 November 2020. The following persons attended this Hearing:

Tribunal:

Prof. Juan Fernández Armesto	President
Mr. Stephen L. Drymer	Arbitrator
Prof. Brigitte Stern	Arbitrator

Assistant to the President:

Ms. Krystle M. Baptista	Assistant to the President

ICSID Secretariat:

Ms. Marisa Planells-Valero	Secretary of the Tribunal

For the Claimants:

Counsel:

Mr. Mark W. Friedman	Debevoise & Plimpton
Ms. Ina C. Popova	Debevoise & Plimpton
Mr. Carl Riehl	Debevoise & Plimpton
Ms. Floriane Lavaud	Debevoise & Plimpton
Ms. Berglind Halldorsdottir Birkland	Debevoise & Plimpton
Mr. Guilherme Recena Costa	Debevoise & Plimpton
Ms. Sarah Lee	Debevoise & Plimpton
Mr. Duncan Pickard	Debevoise & Plimpton
Mr. Julio Rivera Rios	Debevoise & Plimpton
Ms. Mary Grace McEvoy	Debevoise & Plimpton
Mr. Thomas G. McIntyre	Debevoise & Plimpton
Mr. Luis Bedoya Escurra	Rodrigo, Elias & Medrano
Mr. Francisco Cardenas Pantoja	Rodrigo, Elias & Medrano

Parties:

Mr. Robert Koenigsberger	Gramercy Funds Management LLC
Mr. James Taylor	Gramercy Funds Management LLC
Mr. Gustavo Ferraro	Gramercy Funds Management LLC
Mr. Robert Joannou	Gramercy Funds Management LLC
Mr. Robert Lanava	Gramercy Funds Management LLC
Mr. Joshua M. O'Melia	Gramercy Funds Management LLC
Mr. Thomas Norgaard	Gramercy Funds Management LLC
Mr. Nick Paolazzi	Gramercy Funds Management LLC

For the Respondent:

Counsel:

Mr. Jonathan C. Hamilton	White & Case LLP
Ms. Andrea Menaker	White & Case LLP

Mr. Rafael Llano	White & Case LLP
Mr. Francisco Jijón	White & Case LLP
Mr. Jonathan Ulrich	White & Case LLP
Mr. John Dalebroux	White & Case LLP
Ms. Sandra Huerta	White & Case LLP
Ms. Sophia Castillero	White & Case LLP
Mr. Bruno Marchese	Rubio Leguia Normand

Parties:

Ambassador Hugo de Zela	Republic of Peru
Minister Giovanna Zanelli	Republic of Peru
Mr. Alberto Hart	Republic of Peru
Mr. Oliver Valencia	Republic of Peru
Mr. Ricardo Ampuero	Republic of Peru
Ms. Monica Guerrero	Republic of Peru
Mr. Shane Martinez	Republic of Peru

Non-Disputing Party – United States of America:

Ms. Lisa Grosh	U.S. Department of State
Mr. John Daley	U.S. Department of State
Ms. Nicole Thornton	U.S. Department of State
Ms. Margaret Sedgewick	U.S. Department of State
Mr. Edward Rivera	U.S. Department of Commerce
Mr. Khalil Gharbieh	Office of the United States Trade Representative
Ms. Amanda Blunt	Office of the United States Trade Representative

Court Reporters:

Mr. Dante Rinaldi	D-R Esteno
Mr. David Kasdan	B&B Reporters
Ms. Dawn Larson	B&B Reporters

Interpreters:

Ms. Silvia Colla	Interpreter
Mr. Daniel Giglio	Interpreter
Mr. Charles Roberts	Interpreter

101. At the Post-Hearing Oral Arguments, the Parties' closing presentations were introduced into the record as Hearing exhibits H-21 and H-22, and the Tribunal admitted into the record four additional exhibits as H-23, H-24, H-25 and H-26.

102. On 3 December 2020, Respondent informed of the appointment of Ms. Vanessa Rivas Plata Saldarriaga as President of the Special Commission representing Peru in International Investment Disputes in replacement of Mr. Ricardo Ampuero Llerena.

103. On 4 December 2020, Respondent, *inter alia*, noted that, pursuant to the Tribunal's decision of 7 October 2020, legal authorities Doc. CA-229 to Doc. CA-234, Doc. CA-236 and Doc. CA-238 were to be excluded from the record and that any reference to the excluded exhibits was to be stricken from C PHB-J before the publication of this submission on the ICSID Website. Additional communications on this matter were exchanged between the Parties on 7 December 2020.

104. On 11 December 2020, the Tribunal noted its decision of 7 October 2020 to exclude legal authorities CA-229 to 234, 236 and 238 from the record and concluded, on that basis, that any reference made to those exhibits in C PHB-J was to be considered as an allegation made on behalf of a party to be assessed by the Tribunal when rendering the award.

105. On 7 January 2021, Respondent invited Claimants to reconfirm the approach set out at the Hearing regarding the length and content of the Parties' Statements of Costs. Alternatively, Respondent invited the Tribunal to reconfirm such approach and fix a new submission date of 11 January 2021. On that same date, Claimants provided comments on Respondent's request and proposed that the cover letter accompanying the Parties' statements of costs be limited to two pages and agreed to postpone this submission until 11 January 2021, to which Respondent agreed. On 8 January 2021, the Tribunal confirmed the Parties' agreement regarding the submission of the statements of costs.

106. On 11 January 2021, the Parties filed simultaneous Statements of Costs.

107. On 13 April 2021, Claimants submitted a corrected Statement of Cost.

108. On 20 September 2021, counsel for Respondent notified the Centre that the firm White & Case LLP had ceased to represented Peru in this proceeding.

109. On 13 December 2021, Respondent notified the Centre of the appointment of the firm Arnold & Porter Kaye Scholer LLP as its new representatives in this proceeding.

110. Following this change in Respondent's representation, Mr. Drymer filed a disclosure on 15 December 2021, and Prof. Fernández-Armesto filed a disclosure on 20 December 2021.

111. On 24 February 2022, the Tribunal proposed the appointment of Ms. Sofía de Sampaio Jalles to replace Ms. Krystle Baptista Serna as Assistant to the President and invited the Parties to confirm their acceptance to the appointment. Claimants and Respondent confirmed their agreement on 2 March 2022 respectively.

III. OVERVIEW OF THE FACTS

112. This arbitration concerns Gramercy's holding in Peruvian Agrarian Land Reform Bonds ("***Bonos Agrarios***" or "***Bonos***").

113. The *Bonos Agrarios* were issued in the 1970s as a deferred payment to landowners as compensation for the land expropriations implemented by the Peruvian Government through *Decreto-Ley 17716* ("***Ley de Reforma Agraria 1969***")[1]. Under these long-term paper securities, the former landowners and now bondholders had the right to claim from the Government an annual payment comprising part of the principal – which represented the value of the expropriated land – and the interest accrued, for a period between 20 and 30 years[2].

114. Due to the hyperinflation that the Republic of Peru experienced during the 1970s and 1980s, the real value of the *Bonos Agrarios* was gradually reduced to nil; bondholders stopped claiming the annual payments and simply retained and stored the paper securities.

115. Between 2006 and 2008, Gramercy acquired 9,700 *Bonos Agrarios* from their original owners (or their heirs).

1. THE AGRARIAN LAND REFORM

116. In 1969, the Military Government of Juan Velasco Alvarado promulgated the Decree Law 17716, *Ley de Reforma Agraria 1969* which enabled the State to engage in a wide-scale expropriation of lands. Between 1969 and 1979, the State expropriated from private owners 15,826 parcels of land, comprising more than nine million hectares[3].

117. The *Ley de Reforma Agraria 1969* established that the expropriated landowners would receive a substantial part of the compensation for their lands not in cash but in *Bonos*[4], paper securities issued by the Peruvian State formalizing an acknowledgement of debt.

118. In 1979, the Government issued Decree Law No. 22749 that made the Bonds freely transferable[5] and, for a certain time, they were freely traded on the Lima stock exchange[6]. Thereafter, trading continued to be legal through *ad hoc* transactions between private individuals[7].

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[1] Doc. CE-1.
[2] Doc. CE-1, Arts. 173 and 174.
[3] Doc. CE-2, p. 171.
[4] Doc. CE-1, Art. 177.
[5] Doc. CE-16, Art. 5.
[6] CER-8, Olivares-Caminal I**,** para. 79.
[7] RER-10, Guidotti II, paras. 22-23.

119. Under this process, the Republic of Peru issued *Bonos* with an aggregate amount of 13.280 billion Soles Oro[8].

2. HYPERINFLATION AND CURRENCY DEVALUATION

120. Peru's economic policies would eventually result in severe inflation, reaching an 80% annually in the late 1970s[9]. In the 1980s, the inflation remained at more than 60% annually, reaching unprecedented levels of 12,000% in August 1990[10]. As a result of this hyperinflation, in 1985 the Government was forced to change currency, from Soles de Oro to Inti, establishing that one Inti was equal to 1,000 Soles de Oro[11]; and again in 1991, from Inti to Nuevo Soles (the contemporary currency, now simply denominated Soles[12]), fixing the exchange rate as one Nuevo Sol equal to 1,000,000 Intis.

121. The *Bonos Agrarios* did not include any protection against inflation and, by the middle of the 1980's, their value had been eroded and had become worthless[13], to the point that bondholders ceased submitting their *Cupones* for payment[14].

122. In 1992, the paying agent on behalf of the State, the *Banco de Fomento Agropecuario del Perú*, was extinguished[15]. From that moment on, the Republic has made no payment[16].

3. THE FIRST ATTEMPTS TO PAY THE BONDHOLDERS

123. In the early 1990's, there was an attempt by the Government to provide the unpaid compensation to landowners. In 1991 President Fujimori issued the *Decreto Legislativo 653*, which provided that the value of expropriated land had to be paid at market value and in cash, including expropriations which had not been finally settled[17]. But in 1996 Congress reversed track and promulgated the *Ley 26597*[18] – derogating *Decreto Legislativo 653* and establishing that:

- any outstanding *Bonos* would be paid according to their face value (which, as indicated above, was practically worthless), and that

[8] Doc. CE-12, p. 13.
[9] Doc. CE-63.
[10] CER-4, Edwards I, para. 26.
[11] Doc. CE-4, Art. 1, 3.
[12] Doc. CE-6; Doc. CE-214.
[13] RER-2, Hundskopf I, para. 58; RER-5, Quantum I, para. 39.
[14] CWS-7, [redacted], para. 12; CWS-8, [redacted], para. 15; CWS-9, [redacted], para. 13.
[15] Doc. CE-7; RER-2, Hundskopf I, para. 32.
[16] CER-4, Edwards I, para. 27. It would be only from 2009 onwards where Peru would resume payment of certain Bonos Agrarios by order of the Peruvian Courts in legal proceedings initiated by certain bondholders (See para. 307 *infra*) and through the Bondholder Process (See Section **X.1.8.** *infra*).
[17] Doc. CE-66 Art. 15; see CER-5, Revoredo, para. 21.
[18] Doc. CE-84.

- the readjustment for inflation specified in Art. 1236 of the Civil Code should not be applied to these *Bonos*[19] (thus reaffirming that they should be paid at nominal value).

4. THE SENTENCIA TC 2001

124. In 1996, the *Colegio de Ingenieros del Perú*, the professional association representing Peruvian engineers, opened a new battlefront, by challenging before the Republic's highest Court, the *Tribunal Constitucional*, the constitutionality of *Ley 26597*. They pleaded that the provisions in that law establishing that the *Bonos* should be paid at their nominal (practically inexistent) value, was in breach of the Peruvian Constitution, which in its Art. 70 guarantees that expropriation must be for proper cause and against effective payment of the asset's value.

125. In 2001, the *Tribunal Constitucional* issued the *Sentencia TC 2001*, which settled the constitutional dispute submitted by the *Colegio de Ingenieros* and declared the payment regime for the *Bonos* under Art. 2[20] of *Ley 26597* unconstitutional for two reasons:

- Because the regulation amounted to "*un regimen confiscatorio*" [21] and

- Because it breached the "principio valorista inherente a la propiedad" [22].

126. The "*principio valorista*" is a general principle of Peruvian law, enshrined since 1984 in Art. 1236 of the Civil Code, a principle which seeks to preserve the value of a debt, protecting it against fluctuations caused by inflation (or deflation) that might affect the original balance of the parties' rights and obligations[23].

127. The *Ley 26597* had sought to exclude the *Bonos* from the readjustment for inflation, and the *Sentencia TC 2001* found that such exclusion was contrary to the Peruvian Constitution: since the *Bonos* formalized compensation for the expropriation of agrarian property, a category of debt subject to the "*principio valorista*", the securities incorporating such debt must also be subject to the same regime. One issue remained unresolved: Art. 1236 of the Civil Code simply establishes the general principle that debts subject to the "*principio valorista*" must be readjusted as of the date of payment – but does not provide any further guidance on how the revaluation is to be made. The *Sentencia TC 2001* did not say whether the readjustment of the *Bonos* was to be carried out by dollarization, by applying the Consumer Price Index, or by some other financially appropriate methodology[24].

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[19] RER-5, Quantum I, para. 46.
[20] The Sentencia TC 2001 also declares the unconstitutionality of Art. 1 of Ley 26597, but this declaration is irrelevant for the present dispute.
[21] Doc. RA-211, *Fundamento Jurídico* 2.
[22] Doc. RA-211, *Fundamento Jurídico* 7.
[23] CER-9, Castillo, para. 57.
[24] RER-2, Hundskopf I, para. 79.

5. CONGRESS ATTEMPTS TO REGULATE THE PAYMENT OF THE *BONOS*

128. Following the issuance of the *Sentencia TC 2001*, Congress made several efforts to adopt a law regulating the update and procedure for payment of the *Bonos*, in line with the principles set forth in *Sentencia TC 2001*[25].

Congress' first attempt

129. On 14 July 2001, Congress created a special committee to study and propose the appropriate legislative measures to enforce the *Sentencia TC 2001*[26].

130. Between 2001 and 2006, six different draft bills were introduced in Congress related to the Agrarian Bonds, none of which became law[27]. In March 2006, Congress approved a new draft law (the "***Proyecto de Ley 2006***")[28], with the following key provisions:

- First, payments would be made by an exchange of the *Bonos Agrarios* for new updated government bonds, with a 15-year maturity, that would accrue a 6.7% interest and would be adjusted for inflation[29];

- Second, the *Bonos Agrarios* would be revalued using the CPI *Lima Metropolitana*[30].

131. During the process of *Proyecto de Ley 2006*, the Ministry of Economy had calculated the outstanding debt to be USD 3.121 billion, using the CPI *Lima Metropolitana*[31].

132. The *Proyecto de Ley 2006* was never adopted due to President Alejandro Toledo's veto[32].

Congress' further attempts

133. A second mayor attempt occurred between 2007 and 2011, when three draft bills were introduced in Congress, none of which became law[33]. The last effort came in 2011, when the Agrarian Commission in Congress recommended the approval of the new *Proyecto de Ley 2011*, similar in all relevant aspects to the 2006 draft, except that the new government bonds delivered in exchange would have a maturity of 30 years[34].

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[25] Doc. CE-12, p. 8.
[26] Doc. CE-12.
[27] Doc. CE-12, referring to Draft Bills No. 578/2001-CR, No. 7440/2002-CR, No. 8988/2003-CR, No. 10599/2003/CR, No. 11459/2004-CR and No. 11971/2004-CR.
[28] Doc. CE-115.
[29] Doc. CE-115, Art. 10, Art. 13, and Art. 15.
[30] Doc. CE-115., Art. 8.
[31] Doc. CE-12, p. 13.
[32] Doc. CE-116.
[33] Doc. CE-160, referring to Draft Bills N° 456/2006-CR, No. 3727/2008-CR and No. 3293/2008-CR.
[34] Doc. CE-160, p. 17, *Ley que crea el Procedimiento de Canje de Bonos de la Deuda Agraria*, Art. 5.

134. Upon the announcement by President Alan García that he would veto this draft bill, Congress desisted and abandoned its efforts to pass legislation[35].

6. GRAMERCY'S INVESTMENT

135. Between 2006 and 2008, at a time when the Peruvian Congress and Government were still engaged in discussions regarding the appropriate methodology to update the value of the *Bonos*, one of the Claimants, Gramercy Peru Holdings LLC ("**GPH**") purchased 9,656 *Bonos Agrarios* from their legitimate holders – local Peruvian individuals[36].

136. GPH transferred into Peru and paid to the sellers USD 33.2 million[37]. The *Bonos* were endorsed in favor of GPH and a notarized *Contrato* was executed between GPH and each bondholder[38].

7. THE RESOLUCIÓN TC JULIO 2013 AND THE DECRETOS SUPREMOS

137. By 2011, the uncertainties regarding the methodology to revalue the *Bonos* continued and the *Colegio de Ingenieros del Perú*, the entity which had filed the initial *recurso de inconstitucionalidad*, again approached the *Tribunal Constitucional* seeking an order compelling enforcement of the *Sentencia TC 2001*.

138. Two years later, on 16 July 2013, the Tribunal Constitucional issued its *resolución ejecutoria* (the "**Resolución TC Julio 2013**")[39]:

- Establishing that the *Bonos* should be revalued applying a dollarization methodology, and

- Ordering the *Ministerio de Economia y Finanzas* ("**MEF**") to issue a *Decreto Supremo* regulating the procedure for the registry of bondholders, for the quantification and revaluation of the *Bonos,* and for the payment of the debt.

139. The MEF, the Congress, and certain bondholders formulated appeals and requests for clarification of *Resolución TC Julio 2013*. In two further *Resoluciones* ("***Resolución TC Agosto 2013***" and "***Resolución TC Noviembre 2013***"), the Tribunal Constitucional dismissed the challenges and provided additional clarifications[40].

140. In 2014, complying with the instructions of the *Tribunal Constitucional*, the MEF issued *Decreto Supremo* 17/2014 (the "**DS 17/2014**")[41], that was amended three days

[35] Doc. CE-164.
[36] C II, para. 5.
[37] In RER-11, Quantum II, 72, Peru's expert acknowledges that Claimants quantify their investment at USD 33.2 million, and that he concurs with that valuation.
[38] Doc. R-701, Clause 2.
[39] Doc. CE-17.
[40] Doc. CE-183 and Doc. CE-180.
[41] Doc. CE-37.

later through a second *Decreto Supremo* (the "**DS 19/2014**")[42] (the "***Decretos Supremos 2014***").

141. Two years thereafter, in June 2016, Claimants filed the present arbitration, arguing that the measures adopted by Peru, and more specifically that the successive *Resoluciones* from the *Tribunal Constitucional* and the *Decretos 2014* breached the assurances provided in the Treaty.

142. In February 2017, the MEF issued a new *Decreto Supremo 34/2017* (the "**DS 34/2017**")[43], later corrected in August of that same year by *Decreto Supremo 242/2017* (the "**DS 242/2017**")[44], which derogated the *Decretos Supremos 2014*.

[42] Doc. CE-38.
[43] Doc. CE-269.
[44] Doc. CE-275 and Doc. CE-276.

IV. RELIEF SOUGHT BY THE PARTIES

143. Claimants request in their respective Post-Hearing Briefs on Jurisdiction and Merits the following relief:

> "a. Dismiss Peru's objections to jurisdiction and admissibility;
>
> b. Declare that it has jurisdiction over Gramercy's claims and that such claims are admissible[45];
>
> […]
>
> a. Declare that Peru breached Articles 10.3, 10.4, 10.5, and 10.7 of the Treaty;
>
> b. Order Peru to pay monetary damages in an amount that would wipe out all the consequences of its illegal acts, in an amount reflecting:
>
> i. the contemporary equivalent of the value of Gramercy's Land Bonds at the time they were issued, which was approximately US$1.80 billion as of May 31, 2018, which continues to compound at an interest rate of 7.22%, to be further updated as of the date of the award;
>
> ii. in the alternative to (i), the value that Gramercy would likely have obtained under the original majority opinion for the 2013 CT Order or in court proceedings in Peru, which was approximately US$841 million as of May 31, 2018, and which continues to compound at the interest rates set forth in the Land Bonds, to be further updated as of the date of the award;
>
> iii. in the further alternative to (i) and (ii), the value that Gramercy would likely have obtained through a good-faith implementation of the 2013 CT Order, which was approximately US$845 million as of May 31, 2018, and which continues to compound at the interest rates set forth in the Land Bonds, to be further updated as of the date of the award;
>
> iv. in the further alternative to (i) through (iii), the fair market value of Gramercy's Land Bonds immediately before Peru's breaches, which was approximately US$550 million, plus interest at commercial, annually-compounding rates, such as the rate of the real return on debt in Peru, from the date of the breach through the date of the award;
>
> c. Order Peru to bear all the costs of the arbitration and reimburse Gramercy's professional fees and expenses;

[45] C PHB-J, para. 96.

> d. Order Peru to pay interest at commercial, annually compounding rates, such as the rate of the real return on debt in Peru, on all amounts ordered from the date of the award until full payment is received; and
>
> e. Order any other such relief as the Tribunal may deem appropriate"[46].

144. Respondent requests in its respective Post-Hearing Briefs on Jurisdiction and Merits that the Tribunal:

> "Dismiss Gramercy's claims in their entirety for lack of jurisdiction and/or lack of admissibility[47];
>
> […]
>
> Dismiss Gramercy's claims in their entirety;
>
> Award Peru such further and other relief as the Tribunal may deem appropriate, including with respect to the Gramercy conduct detailed throughout this proceeding; and
>
> Award Peru all costs incurred in connection with this proceeding due to Gramercy's failure and its persistently unacceptable conduct throughout this proceeding"[48].

[46] C PHB-M, para. 149.
[47] R PHB-J, para. 114.
[48] R PHB-M, para. 138.

V. JURISDICTION

145. Consent is the cornerstone of jurisdiction. Art. 10.17 of the Treaty establishes that both Peru and the U.S. "[consent] to the submission of a claim to arbitration under this Section in accordance with this Agreement". Art. 10.18 of the Treaty, titled "Conditions and Limitations on Consent of Each Party", provides mandatory preconditions that a protected investor must meet in order to establish the consent to arbitrate of the disputing Contracting Party. Failure to do so will result in the concomitant lack of jurisdiction of the tribunal.

146. Invoking Art. 10.18, Peru raises eight jurisdictional objections, arguing that it has not consented to arbitrate this dispute and that consequently the Tribunal lacks jurisdiction. The Tribunal will analyze and dismiss the eight objections in turn (**V.1.** through **V.7.**), albeit in an order different from that adopted by Respondent (and dealing with Respondent's objections on abuse of process and non-retroactivity in one section). The Tribunal will conclude

- That the *Bonos* constitute a protected investment under the Treaty (**V.1.**),
- That the Tribunal has jurisdiction *ratione temporis* to adjudicate this dispute and that Claimants did not engage in an abuse of the Treaty (**V.2.**),
- That GPH's First Waiver was invalid, and that the Second Waiver, which fully complied with the Treaty, was submitted together with the Amended Notice of Arbitration dated 18 July 2016 (**V.3.**),
- That none of the claims submitted within the Notice of Arbitration was time-barred under Art. 10.18.1 of the Treaty (**V.4.**),
- That GPH and GFM meet the requirements to be considered as protected investors; GPH through its direct ownership of 9,656 *Bonos Agrarios* and GFM through its [redacted]% indirect participation in GPH (**V.5.**),
- That Respondent's denial of benefits exception is time-barred and in any case is meritless (**V.6.**), and
- That the lack of authentication of the *Bonos* does not constitute a jurisdictional objection, and the issue will be addressed in the *quantum* section of this decision (**V.7.**).

V.1. WHETHER THE *BONOS* CONSTITUTE A PROTECTED INVESTMENT (FIFTH OBJECTION)

1. RESPONDENT'S POSITION

147. Respondent argues that Gramercy did not make an investment under the Treaty. Gramercy's efforts to convert the domestic *Bonos Agrarios* into an international investment rely on a purely literal, out-of-context reading of the Treaty, as well as on a misplaced emphasis on U.S. negotiating policies, all in contravention of mandatory rules of interpretation of treaties[49].

148. Peru agrees with the U.S.'s Non-Disputing Party Submission that the enumeration of a type of asset in Art. 10.28 is not dispositive; for an asset to be an investment it must also possess the characteristics of an investment[50]. Annex 10-F – that governs public debt – does not expand the definition of investment; its purpose is to exclude potential claims arising from Peru's decision to restructure its debt[51].

149. Respondent recalls that the *Bonos* were issued in unique domestic historical circumstances, in domestic currency, under domestic law, with recourse to domestic Courts, as compensation for expropriated lands – and not as vehicles for international investment, economic contribution or development[52]. The special nature of the *Bonos Agrarios* implies that these securities do not have the characteristics of an investment[53], since they are not loans incurred by the Government to finance its activities and to develop the economy[54].

Characteristics of an investment

150. First, the Republic says that the *Bonos* do not have the characteristics of an investment, since they do not meet any of the *Salini* criteria[55], that are incorporated in the Treaty text[56]:

- Gramercy made no contribution to acquire the *Bonos*, but rather used the funds from third-party investors[57];

- There is no duration: Gramercy sold the interest in the *Bonos* even before it acquired the securities; Gramercy sought to monetize claims to payment that were

[49] R PHB-J, para. 79.
[50] R PHB-J, para. 81.
[51] R PHB-J, para. 87.
[52] R II, para. 121.
[53] R II, para, 130.
[54] R II, paras. 126-128.
[55] R I, para. 205.
[56] R PHB-J, para. 85.
[57] R PHB-J, para. 89.

immediately (indeed, past) due, and not to hold bonds over time to receive periodic payments of interest and repayment of principal[58];

- Gramercy incurred no risk, because it repackaged the *Bonos* for sale outside Peru; any profits or losses are to be passed on to the various beneficial owners[59];

- Gramercy made no contribution to the economic development in Peru; Gramercy actively engaged in measures to undermine the economy in an attempt to pressure the Republic to settle[60].

151. Second, Claimants acquired distressed *Bonos Agrarios* subject to a longstanding domestic dispute, with the speculative aim of enriching themselves and their non-Peruvian investors[61]. Gramercy's acquisition of the *Bonos* is incompatible with the Treaty's object and purpose as reflected in the Preamble – including, among others, to promote broad-based economic development, to create new employment opportunities and to improve labor conditions and living standards[62].

152. Third, the negotiating history of the Treaty underscores that the *Bonos* were never considered as investments, either by Peru or by the U.S. The negotiating minutes make no mention of the *Bonos*[63]. The disputes with American investors had nothing to do with the *Bonos* – including the *LeTourneau* case[64].

153. Fourth, the landowners who were forced to sell their land were not investors, and consequently the *Bonos* were not issued by Peru as bonds for investment[65].

154. Peru invokes *Poštová,* where the tribunal found that Greek sovereign bonds did not qualify as protected investments under the applicable treaty; with respect to *Abaclat*, Peru argues that the Argentine sovereign bonds at issue in that case – which the tribunal deemed protected investments – had a very specific nature: they were issued to attract foreign capital and where subject to foreign law; accordingly, they cannot be compared to the *Bonos* in this case[66].

2. CLAIMANTS' POSITION

155. Claimants argue that the text of the Treaty is fatal to Peru's objection, since in its Art. 10.28 it explicitly provides that "[f]orms that an investment may take" include

[58] R PHB-J, para. 89.
[59] R PHB-J, para. 89.
[60] R II, para. 141; R PHB-J, para. 89.
[61] R II, para. 138.
[62] R I, para. 203; R II, para. 139; R PHB-J, para. 93.
[63] R PHB-J, para. 96.
[64] R PHB-J, para. 98.
[65] R II, para. 145.
[66] R I, paras. 207-211; R II, para. 147.

"bonds" and "other debt instruments"; additionally, Annex 10-F expressly regulates "public debt" as a protected investment[67].

156. First, the ordinary meaning of "bonds", "debt instruments", and "public debt" (both in English and Spanish) confirm that the *Bonos Agrarios* are covered investments[68]. The enumerated list in Art.10.28 gives context to the Treaty's requirement that an asset have the characteristics of an investment, by identifying certain assets that almost certainly satisfy that requirement. The distinction that the Treaty's footnote 12 draws between debt obligations of longer or shorter duration confirms that *Bonos*, with 20 to 30-year maturities, are precisely the kind of obligations that are "more likely" to have the characteristics of an investment[69]. The Treaty does not distinguish between types of bonds, public debt, or debt instruments, whether modern or otherwise[70].

157. Second, the supplementary means of treaty interpretation confirm that the *Bonos* are the kind of public debt that the Contracting Parties deliberately agreed to include in the scope of the Treaty:

- The Contracting Parties specifically negotiated the inclusion of all public debt, except bilateral debt, in the Treaty[71];

- The Contracting Parties specifically discussed Peru's pending investment disputes arising out of the *Reforma Agraria* (the *LeTourneau* and *Jaime Muro-Cruousillat* expropriation disputes), and decided not to exclude the *Reforma Agraria* from the scope of the Treaty[72]; and

- The Contracting Parties specifically excluded "Public Debt" in other treaties[73].

158. Third, Claimants submit that the Treaty's Preamble cannot be interpreted as an additional jurisdictional requirement to limit the Contracting Parties' broad definition of investment in Art. 10.28[74].

159. Fourth, Claimants argue that the *Bonos Agrarios* have the characteristics of an investment, which consist of the basic elements of contribution, profit and risk[75]:

- Gramercy committed USD 33 million of new foreign capital to acquire the *Bonos,* through GPH[76];

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[67] C II, para. 32.
[68] C II, paras. 35-53.
[69] C III, para. 60.
[70] C III, para. 67.
[71] C PHB-J, para. 28.
[72] C PHB-J, para. 27.
[73] C II, paras. 98-118.
[74] C II, para. 119; C III, para. 80.
[75] C II, paras. 67, 96; C III, para. 90.
[76] C II, para. 69; ;C PHB-J, paras. 20, 23.

- Gramercy had an expectation of gain or profit[77]; and

- Gramercy assumed risk in acquiring the *Bonos*, regarding exactly how and when Peru would satisfy this debt; the Treaty expressly says that the purchase of sovereign debt entails commercial risk[78].

160. The *Bonos* cannot be disqualified from protection solely because they were issued in the domestic market, in domestic currency and subject to domestic courts; there is no Treaty requirement that the investment must be subject to foreign law or be denominated in foreign currency; the Treaty only demands that the investment be made in the territory of Peru[79]. Peru made the *Bonos* transferable, including to foreign investors, without stipulating any conditions[80].

161. Claimants add that Peru cannot impose the *Salini* criteria, including the contribution to economy prong or the duration, as mandatory jurisdictional requirements[81]; that said, if the Tribunal were to consider additional characteristics like contribution to Peru's economic development and sufficient duration, these are met by the *Bonos*[82]:

- The *Ley de Reforma Agraria* of 1969 states that the land reform "will contribute to the Nation's social and economic development"[83]; Gramercy injected millions of USD into the local economy, which had a multiplier effect and did contribute to Peru's development; and

- The duration requirement is also satisfied, because the *Bonos* have long maturities by nature; moreover, Gramercy acquired them over a decade ago; investment tribunals have generally held that a period of two to five years is sufficient to satisfy the duration criterion in *Salini*[84].

162. Claimants rely on *Abaclat*, *Ambiente Ufficio* and *Alemanni*, which concluded that State bonds, and even more remote securities derived from them, possessed the inherent characteristics of an investment[85]. Finally, Claimants aver that *Poštová* is inapposite, because the applicable Slovakia-Greece BIT in that case was materially different in that it did not expressly include "bonds" or "public titles or obligations" in the list of covered investments[86].

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[77] C II, para. 70; C III, para. 101.
[78] C II, para. 71; C III, para. 103; C PHB-J, para. 22.
[79] C II, para. 73.
[80] C II, para. 76.
[81] C III, para. 92.
[82] C II, para. 88.
[83] Doc. CE-1, Art. 1.
[84] C II, para. 92.
[85] C II, para. 93.
[86] C II, paras. 130-145; C III, paras. 122-128; C PHB-J, para. 18

3. THE U.S. POSITION

163. In its Non-Disputing Party Submission, the U.S. says that the *chapeau* of Art. 10.28 of the Treaty makes clear that the definition encompasses every asset that an investor owns or control, directly or indirectly, that has the characteristics of an investment. Subparagraph (c) of the definition lists, among forms that an investment may take, bonds, debentures, other debt instruments and loans. The enumeration of a type of asset in Art. 10.28, however, is not dispositive as to whether the particular asset meets the definition of investment; it must still always possess the characteristics of an investment[87].

164. Annex 10-F addresses certain limitations on claims with respect to the non-payment or restructuring of a public debt. This Annex does not limit or expand the definition of investment under Art. 10.28. As long as the public debt that is owned or controlled by an investor has the characteristics of an investment, it is an investment for purposes of the Treaty[88].

4. THE TRIBUNAL'S DECISION

165. Under this objection, the Republic submits that the *Bonos Agrarios* do not qualify as investment for two reasons:

- First, the *Bonos* do not fit within the properly construed definition of "bonds, debentures, other debt instruments, and loans" used in Art. 10.28 of the Treaty; and

- Second, the *Bonos* in any case do not have the characteristics of an investment, as required in the *chapeau* of the definition.

166. Claimants' position is the contrary: they argue that the *Bonos* fit within the category of "bonds, debentures, other debt instruments, and loans", that they also meet the characteristics of an investment, and that Peruvian public debt is specifically considered as an investment under the Treaty.

167. The Tribunal must decide this dispute "in accordance with th[e] [Treaty] and applicable rules of international law" (as Art. 10.22 of the Treaty mandates). To do so, the Tribunal will first establish the applicable Treaty provisions (**4.1.**), will then briefly summarize the facts surrounding the *Bonos* and their acquisition by GPH (**4.2.**), and will finally apply the Treaty provisions to the proven facts (**4.3.**).

4.1 TREATY PROVISIONS

168. Art. 10.28 provides the following definition of "investment"[89]:

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[87] USS, para. 18.
[88] USS, para. 19.
[89] Doc. CE-139 [the "**Treaty**"], Art. 10.28.

> "**investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".

169. The definition then adds a list of "[f]orms that an investment may take", which includes in paragraph (c):

> "(c) bonds, debentures, other debt instruments, and loans".

The equivalent terms used in Spanish are:

> "*(c) bonos, obligaciones, otros instrumentos de deuda y préstamos*".

170. The Treaty includes two footnotes, which are referenced at the end of paragraph (c):

> "[Footnote] 12: Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.
>
> [Footnote] 13: Loans issued by one Party to another Party are not investments".

The text in Spanish reads as follows:

> "[*Nota al pie de página*] *12: Es más probable que algunas formas de deuda, como bonos, obligaciones y pagarés a largo plazo, tengan las características de una inversión, mientras que es menos probable que otras formas de deuda, tales como reclamos de pago de vencimiento inmediato y como resultado de la venta de bienes o servicios, tengan estas características.*
>
> *Nota al pie de página 13: Los préstamos otorgados por una Parte a otra Parte no son considerados inversiones*".

171. Finally, Annex 10-F is dedicated to "Public Debt". It reads as follows[90]:

> "1. The Parties recognize that the purchase of debt issued by a Party entails commercial risk. For greater certainty, no award may be made in favor of a claimant for a claim under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A) with respect to default or non-payment of debt issued by a Party unless the claimant meets its burden of proving that such default or non-payment constitutes an uncompensated expropriation for purposes of Article 10.7.1 or a breach of any other obligation under Section A.
>
> 2. No claim that a restructuring of debt issued by a Party other than the United States breaches an obligation under Section A may be submitted to, or if already submitted continue in, arbitration under Section B if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after

[90] Treaty, Annex 10-F.

such submission, except for a claim that the restructuring violates Article 10.3 or 10.4.

3. Notwithstanding Article 10.16.3, and subject to paragraph 2 of this Annex, an investor of another Party may not submit a claim under Section B that a restructuring of debt issued by a Party other than the United States breaches an obligation under Section A (other than Article 10.3 or 10.4) unless 270 days have elapsed from the date of the events giving rise to the claim".

4.2 PROVEN FACTS

A. The *Bonos* and their characteristics

172. Between 1969 and 1979, the Republic of Peru carried out the *Reforma Agraria* and in that process it expropriated from private owners 15,826 parcels of land, comprising more than nine million hectares[91]. Art. 173 of the *Ley de Reforma Agraria 1969* authorized the Government to issue "*Bonos de la Deuda Agraria*" up to a certain ceiling[92]:

> "*Art. 173º: Autorízase al Poder Ejecutivo para que, a solicitud del Ministerio de Agricultura y Pesquería, emita Bonos de la Deuda Agraria hasta por la suma de Quince Mil Millones de Soles de Oro (S/. 15,000'000.00)*".

173. The purpose of the *Bonos* was to compensate the owners of the expropriated land, as established in Art. 177[93]:

> "*4º - Cuando las cantidades por pagar en Bonos de la Deuda Agraria contengan fracciones de un mil soles de oro (S/. 1,000.00), éstas se pagarán en efectivo, aunque excedan los límites establecidos en el presente artículo*".

174. The *Ley de Reforma Agraria 1969* established three types of *Bonos Agrarios*, all denominated in Soles Oro, Peru's official currency at the time, called *Clase A, B* and *C*[94]:

- *Clase A* accrued an interest of 6% and had a maturity of 20 years,
- For *Clase B* interest was 5%, and the maturity 25 years, and
- For *Clase C*, 4% and 30 years.

[91] Doc. CE-2, p. 171.
[92] Doc. CE-1, Art. 173.
[93] Doc. CE-1, Art. 177.
[94] Doc. CE-1, Art. 174.

175. The principal was to be paid in equal annual payments, and the interest that accrued on the outstanding principal was to be paid together with the principal, against delivery of the corresponding *Cupón*[95].

176. The *Bonos Agrarios* were issued as a paper security that formalized an acknowledgement of debt by the State in favor of one or more nominally identified persons:

> "*El Estado reconoce deber a* [name of the identified beneficiary] *DIEZ MIL SOLES ORO, pagaderos en* [20, 25 or 30 depending on the class] *armadas anuales a partir de la fecha de colocación, contra entrega de los correspondientes cupones de amortización, numerados del 1 al* [20, 25 or 30], *anexos a este título*"[96].

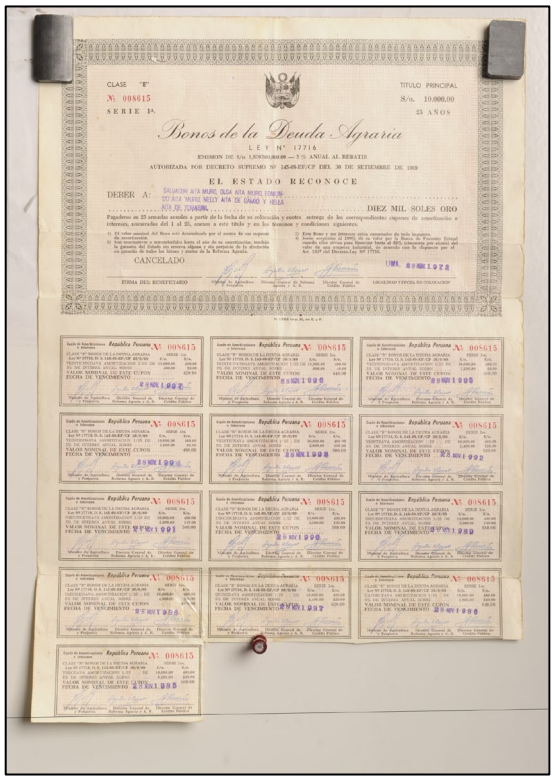
177. Each "***Cupón***" then incorporated the annual payment ("*armada*") which the Republic undertook to perform and which consisted of two elements:

- The pro rata portion of principal (in a 25-year *Bono Clase B*, 400 Soles Oro per year), plus

- The interest accrued for that year, at the corresponding interest rate (5% for a *Bono Clase B*).

178. The "*armadas*" declined year by year, because interest payments became smaller as the principal was partially paid. In a *Bono Clase B*, the nominal amount of the *Cupones* declined from 1100 Soles Oro in the first year, to 420 Soles Oro in the 25th year, as shown in the following example of a *Bono Clase B*[97]:

[95] Doc. CE-1, Art. 174.
[96] Doc. CE-120.
[97] Doc. CE-120.



B. Purchase by GPH

179. Between 2006 and 2008, GPH purchased 9,656 *Bonos Agrarios* from their legitimate holders – local Peruvian individuals[98]. GPH transferred into Peru and paid to the sellers approximately USD 33.2 million[99]. The *Bonos* were endorsed in favor of GPH and a notarized *Contrato* was executed between GPH and each bondholder[100].

4.3 DISCUSSION

180. The Treaty defines "investment" as an "asset" – a very wide concept which encompasses contracts or objects with value, represented as credits in the balance sheets of merchants[101]. But the Treaty immediately adds a qualification: all investments are assets, but not all assets are investments. For an asset to qualify as an investment, it must share "the characteristics of an investment".

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[98] C II, paras. 5, 137.
[99] RER-11, Quantum II, para. 213; CWS-6, Joannou, para. 7; Doc. CE-711.
[100] Docs. R-701 to R-982, Clause 2.
[101] See the definition of "asset" in *Black's Law Dictionary*: "1. An item that is owned and has value. 2. (*pl.*) The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill. 3. (*pl.*) All the property of a person (esp. a bankrupt or deceased person) available for paying debts or for distribution" (Garner, B. A., & Black, H. C., *Black's Law Dictionary*, 9th ed. St. Paul (2009), p. 134).

181. After this tautological definition, the Treaty adds a list of eight categories of "[f]orms that an investment may take"[102]:

- Category (a) refers to "an enterprise" – the paradigmatic form of direct investment, in which an investor creates or acquires a lasting interest, normally associated to control, in an enterprise located in the host State;

- Category (b) is ancillary to the first category: it refers to securities (including shares) which formalize an equity participation in an enterprise;

- Category (c) refers to loans, formalized in securities (bonds, debentures) or in contracts; the Treaty does not restrict the borrowing to a certain class of individuals (*e.g.*, enterprises); the only exclusion refers to loans granted by a State Party to another State Party – such loans are explicitly excluded from the category of investments[103];

- Category (d) refers to futures, options, and other derivatives – again without restricting the issuer to a certain class of individuals;

- Category (e) refers to certain contracts (*e.g.*, turnkey or construction contracts);

- Categories (f) and (h) refer to certain rights *in rem* (*e.g.*, ownership, lease, mortgage or pledge) over movable or immovable property, including intellectual property rights;

- Category (g) finally mentions certain concessions and other administrative permits conferred pursuant to domestic law.

182. The Tribunal will

- first discuss whether Gramercy's *Bonos* fit within the "form of an investment" as defined in paragraph (c) of Art. 10.28 (**A.**), then

- determine whether the Treaty considers public debt as a protected investment (**B.**),

- and lastly, analyze whether the *Bonos* have the characteristics of an investment (**C.**),

- finalizing with conclusions (**D.**) and case law (**E.**)

A. Bonds are a form of investment admitted by the Treaty and the *Bonos* constitute bonds

183. Paragraph (c) of the definition of "investment" in Art. 10.28 of the Treaty reads as follows:

[102] Treaty, Art. 10.28.
[103] Treaty, Footnote 13.

> "[…] Forms that an investment may take include:
>
> […]
>
> (c) bonds, debentures, other debt instruments, and loans;[12, 13]".

Footnotes 12 and 13 provide further guidance:

> "12. Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.
>
> 13. Loans issued by one Party to another Party are not investments".

184. The first question which the Tribunal must address is whether the *Bonos Agrarios* acquired by GPH fall within the "form of an investment" defined in paragraph (c) of the definition of "investment". Respondent argues that they do not, invoking the Treaty's object and purpose, while Claimants hold the contrary position, submitting that the literal text of the Treaty is fatal to Peru's objection.

185. The Tribunal sides with Claimants.

a. Discussion

186. Under Art. 31.1 of the VCLT the Tribunal must interpret the Treaty

> "in accordance with the ordinary meaning to be given to the terms of the treaty in their context".[104]

187. The ordinary meaning of the words used by the Contracting Parties does not give rise to any doubt: the investment may take the form of "bonds, debentures, other debt instruments and loans", with the only exception that "[l]oans issued by one [State] Party to another [State] Party are not investments".

188. The English term "bonds" is translated into Spanish as "*bonos*". Both terms convey the idea of a financial operation, where an entity issues, to the bearer or in favor of certain identified individuals, a series of numbered, transferable securities with attached sub-securities (normally known as coupons), which formalize a long-term interest-bearing debt[105].

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[104] Doc. CA-121, Art. 31.1.

[105] Prof. Olivares-Caminal gives as primary definition of bond a "document written and sealed containing a confession of a debt" and as secondary definition, by reference to Black's Law Dictionary, as a "written promise to pay money"; (see CER-8, Olivares-Caminal I, para. 24, referencing Doc. CA-161 and Doc. CE-383); Black's Law Dictionary provides a third definition: "a long-term, interest bearing debt instrument issued by a corporation

189. This is precisely the situation of the *Bonos Agrarios*: numbered paper securities entitled "*Bonos Agrarios*", with attached "*Cupones*" issued by the Republic in favor of certain individual bondholders, freely transferable and formalizing an acknowledgement of debt by the Republic, such debt to be repaid in 20, 25 or 30 "*armadas*" or yearly payments, together with interest accruing at a rate of 6%, 5% or 4% p.a., and each *armada* being payable against presentation of one of the 20, 25 or 30 *Cupones* attached to the security.

190. The *Bonos Agrarios* squarely meet the requirements to be considered as "*bonos*" under paragraph (c) of the definition of investment. As Prof. Olivares-Caminal explained[106],

> "the [*Bonos Agrarios*] may not share all [the] characteristics of modern or contemporary bonds, but that in no way alters their essence".

191. The *Bonos Agrarios* were issued long before the Treaty was concluded. If the Contracting Parties had meant to exclude them from the purview of the Treaty, they could easily have done so, either by complementing Footnote 13 or by including them in Annex I (which sets out pre-existing measures that are not subject to some or all of the obligations in the Treaty) or Annex II (which lists specific sectors or activities for which the Contracting Parties may retain existing, or adopt new, measures that are not Treaty compliant). If Peru had intended to exclude any measure related to its historical *Reforma Agraria*, it could have availed itself of the Treaty mechanisms designed for that purpose.

192. But Peru did not do so.

193. Summing up, the Tribunal finds that the *Bonos Agrarios* constitute bonds, one of the forms which an investment may take under paragraph (c) of the definition of investment in Art. 10.28 of the Treaty[107].

b. Counter-arguments

194. The Republic submits three counter-arguments to the inclusion of the *Bonos* as one of the forms of investment under paragraph (c) of Art. 10.28 of the Treaty.

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or governmental entity, [usually] to provide for a particular financial need", which specifically reflects the *Bonos Agrarios*; (Doc. CE-718, p. 5); and notes that the *Bonos* provided Peru with the means to acquire the expropriated lands while postponing payment (CER-12**,** Olivares-Caminal II, para. 7); Dr. Guidotti's definition of a bond is similar: "[i]t's a contract that essentially provides a schedule of payments, sometimes with coupons, sometimes with not, and that has certain characteristics, and it is issued in exchange for resources" (HT(ENG), Day 6 (Guidotti), p. 2304, ll. 2-7).

[106] HT(ENG), Day 4 (Olivares-Caminal), p. 1484, ll. 13-15.

[107] In her Dissenting Opinion, para. 88, Arbitrator Stern argues that **"a sale is not an investment"** (emphasis in the original). The argument is difficult to follow. A sale always implies a purchase. And the purchase of assets (be it an enterprise, shares, bonds…) is the normal legal instrument used by investors to acquire an investment. Sale/purchase agreements are indeed the standard form of formalizing investments.

(i) The *Bonos* have unique characteristics

195. First, Respondent argues that the *Bonos Agrarios* are not bonds, because they were issued in unique historical circumstances, in domestic currency, under domestic law, with recourse to domestic Courts and as compensation for the expropriation of lands[108].

196. The Tribunal does not endorse Respondent's reasoning.

197. The *Bonos Agrarios* do have certain characteristics which distinguish them from other forms of sovereign debt, because they were issued in Peru in favor of Peruvian citizens, and because the debt incorporated in the securities derives from expropriations under the *Reforma Agraria.* As Respondent's expert Dr. Guidotti says, they were not designed to attract investors and were not marketed on road shows[109]. But that does not detract from their character as bonds. Bonds come in many variations and do not lose their status by being denominated in domestic currency, by being issued in the local market or by originating from the expropriation of land.

(ii) Gramercy's purchase of *Bonos* is incompatible with the Treaty's object and purpose

198. Second, Respondent avers that Gramercy acquired *Bonos* with the speculative aim of enriching itself, and that such conduct is incompatible with the Treaty's object and purpose.

199. The Tribunal again disagrees.

200. Under Art. 31.1 of the VCLT, the Tribunal must interpret the Treaty "in accordance with [its] ordinary meaning" and "in the light of its object and purpose". The Treaty's object and purpose may be induced from its Preamble, which refers to "broad-based economic development in order to reduce poverty" and to the creation of "new employment opportunities" and the improvement of "living standards".

201. Whether or not Gramercy's aim was to enrich itself, as Respondent argues (it being noted in passing here that the purchase of assets in the expectation of gain or profit is one of the intrinsic characteristics of an investment, as discussed below), the Tribunal does not find that its purchase of *Bonos Agrarios* against the payment to Peruvian bondholders of a total price of USD 33.2 million is incompatible with the Treaty. The Peruvian sellers held securities issued by the Republic, which had matured decades before, but still remained unpaid; by selling the securities to Gramercy, the bondholders were able to "reduce [their] poverty" and to improve their "living standards" – two of the stated purposes of the Treaty which undoubtedly concern the overall economic development of the State (in this regard, see the discussion in para. 242 *infra*).

[108] R I, para. 5.
[109] RER-10, Guidotti II, para. 4.

(iii) The *Bonos* are distressed public debt

202. Third, Respondent emphasizes that GPH was purchasing "distressed [Government] bonds", *i.e.*, public debt issued by the Republic, which had matured, remained unpaid and was subject to a long-standing dispute; in Respondent's opinion, the purchase of defaulted public debt cannot be considered as a protected investment[110].

203. GPH indeed purchased the *Bonos* many years after their stated maturity. But this fact does not affect the nature of the *Bonos* as protected investments. Paragraph (c) of the Treaty covers investments formalized as bonds and does not require that the securities be non-matured. Respondent has not been able to submit a convincing reason why the distinction between matured and non-matured bonds should be relevant in this context. The Tribunal is loath to read into the Treaty an additional requirement, which has no support at all in the Treaty language and no apparent connection with its object and purpose.

204. *Ubi lex non distinguit, nec nos distinguere debemus*.

B. Public debt is an investment protected by the Treaty and the *Bonos* constitute public debt

205. The *Bonos Agrarios,* having been issued by the Peruvian State, constitute public debt.

206. Is public debt a category of investment protected by the FTA, or is the protection limited to bonds issued by companies and private individuals?

207. The definition of "investment" in Art. 10.28 refers to "bonds, debentures, other debt instruments, and loans" and does not explicitly clarify whether it includes public debt issued by the Peruvian State, or whether it is limited to bonds, debentures, other debt instruments and loans issued by private individuals and companies.

208. To establish the proper meaning of Art. 10.28, Art. 31.1 of the VCLT mandates that the "ordinary meaning" of the terms be examined "in their context".

Contextual interpretation

209. In this case, the context is constituted by Annex 10-F and Footnote 13 of the FTA. These rules clarify that public debt (with the exception of State-to-State loans) is one of the categories of investment specifically protected by the Treaty:

- Annex 10-F is entitled "Public Debt" and establishes the general principle

  "that the purchase of debt issued by a Party entails commercial risk"

[110] R PHB-J, paras. 93-94.

and then provides specific rules for the protection of investors who hold public debt, including certain situations where the Republic of Peru has undertaken a general restructuring of its public debt;

- There is only one exception to the rule that public debt constitutes a protected investment: under Footnote 13, loans issued by one State Party to the other State Party, are not considered as investments; this exclusion reinforces, *a contrario sensu,* that loans issued by a State Party (including those formalized in bonds) which are held by private investors of the other State Party, must be considered as protected investments.

Supplementary means of interpretation

210. Art. 32 of the VCLT permits the use of supplementary means of interpretation "in order to confirm the meaning resulting from the interpretation according to application of article 31". Among these supplementary means are "the preparatory works of the treaty and the circumstances of its conclusion".

211. The history of the negotiations between Peru and the U.S. clearly shows that the Contracting Parties specifically negotiated the inclusion of all public debt, except State-to-State loans.

212. Peru and the U.S. discussed this point from the outset and through 12 negotiating rounds of the Andean-US FTA. This issue arose at the start of the negotiations because the Contracting Parties' model investment treaties had opposing approaches: Peru's model BIT of 2000 expressly excluded public debt, while the U.S. model BIT of 2004 contained no such limitation[111]. Hence, from the first negotiation round, the Contracting Parties identified as an area of disagreement the issue of whether or not to include public debt as a protected investment[112]. In the sixth round, the U.S. presented as a counterproposal an Appendix that specified the treatment of public debt, which did not meet the expectations of the Andean States, including Peru[113]. But in the seventh round, Peru was prepared to concede on the inclusion of public debt, provided that the Annex satisfied its expectations[114]. In the eighth round an agreement to exclude bilateral public debt was reached[115], and in the tenth round, Peru accepted the inclusion of public debt, in exchange for a properly worded Annex[116]:

> "*La deuda pública ya no constituye para Perú un tema sensible, pues el anexo propuesto por EE.UU. satisface plenamente los intereses del* [*Ministerio de Economía y Finanzas*]".

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[111] Doc. CE-389; C II, para. 100.
[112] Doc. CE-416, p. 26. The Peruvian *Ministerio de Comercio Exterior y Turismo* prepared detailed summaries of the succeeding negotiation rounds, which provide an official view of the development of the negotiation.
[113] Doc. CE-431, para. 28.
[114] Doc. CE-433, para. 31.
[115] Doc. CE-436, para. 13.
[116] Doc. CE-439, p. 22.

213. The official summary of the thirteenth negotiating round, prepared by the Government of Peru, summarizes the final outcome of the negotiation on the issue of public debt[117]:

> "*La definición [de inversión] contiene una lista ilustrativa, no limitativa, de elementos que incluyen, entre otros, la adquisición de acciones en una empresa; los instrumentos de deuda (incluyendo la deuda pública, salvo la deuda bilateral); los contratos de concesión, producción y similares* […]" (Emphasis added)

214. The detailed record of the Treaty negotiations, as reported by Peru itself, confirms that the Parties discussed the issue of whether public debt should fall within the scope of protected investments, and that they ultimately agreed that it should, with the only exception of State-to-State loans. In exchange for this inclusion, Peru obtained Annex 10-F, which (*inter alia*) excludes treaty coverage if a negotiated restructuring of Peruvian public debt is ongoing.

Conclusion

215. The supplementary means of interpretation thus confirms the result of the application of general rules of treaty interpretation: public debt of the Republic of Peru (whether in the form of *Bonos* or otherwise, and with the sole exception of State-to-State loans[118]) are protected investments under the Treaty.

C. The *Bonos* meet the characteristics of an investment

216. But this is not the end of the analysis.

217. In its submission, the U.S. argues that the enumeration of a type of asset in Art. 10.28 is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; such asset must still possess "the characteristics of an investment"[119].

218. The Tribunal agrees.

219. It is not sufficient for a U.S. citizen to own or control one of the forms of investment enumerated in Art. 10.28, or that the Treaty considers Peruvian public debt as an investment; to benefit from protection under the Treaty, the asset in question must also have the intrinsic "characteristics of an investment".

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[117] Doc. CE-447, para. 55, internal footnotes omitted.
[118] Respondent stresses, based on the deposition of Peru's negotiator, Sr. Herrera, that the *Bonos* were never mentioned during the discussions (R PHB-J, para. 96). It is likely that the discussion remained at a high level, and that the specific categories of public debt were never discussed in detail. But that does not detract from the fact that the U.S. proposed, and Peru eventually accepted, that public debt be considered as a protected investment – *quod est decidendum.*
[119] USS, para. 18; See also R II, paras. 130-132.

The "characteristics of an investment"

220. What are these intrinsic "characteristics of an investment", which distinguish an investment from a non-investment?

221. The issue is one of the *quaestiones vexatae* of investment arbitration, and the Peru-US FTA, like other investment treaties, does not provide a clear-cut answer. The reason for this is closely connected with the origin of the term "investment", which was developed in the economic/financial (and not in the legal) realm and describes the economic "process" of converting money into assets in the expectation of income.

222. For economists, the process occurs in a wide variety of situations, *e.g.*, when an investor:

- Creates or controls a business enterprise;
- Acquires ownership of real estate for profit;
- Buys a portfolio of shares, bonds or derivatives; or
- Operates an administrative concession.

223. From an economic perspective, these "processes" are unified by the fact that the investor transforms cash into an asset, in the expectation of receiving a return. But from a legal perspective, the processes differ significantly; in legal terms, investments can be formalized using a wide variety of legal institutions:

- The creation of a local branch;
- The incorporation or acquisition of a local company;
- The purchase of debt securities;
- The awarding of a concession;
- The performance of a construction or other type of contract; or
- The acquisition of ownership or other rights *in rem* over property.

224. The correlation is imperfect: not every incorporation (*e.g.*, of an NGO), not every contract (*e.g.*, the sale for export of a tractor) and not every acquisition of ownership (*e.g.*, the purchase of a car for private use) constitutes an investment. The same legal institution can serve to formalize an investment or a non-investment, depending on the economic characteristics of the transaction.

The Treaty's non-exhaustive list

225. Faced with these difficulties, the Treaty does not establish a unitary definition of the characteristics with which all investments must comply; instead, the Treaty proposes a non-exhaustive list of three alternative characteristics, which are typical of investments:

- The first is the "the commitment of capital or other resources" by the investor;

- The second is that the investor acts in "the expectation of gain or profit"; note that the Treaty does not require that the investor "perform an entrepreneurial or economic activity"; the concept used is much wider: that the investor seeks to make a profit as a consequence of the investment; the necessary consequence is that non-entrepreneurial activity, which is performed in the expectation of gain or profit (*e.g* the purchase of a portfolio of listed shares or bonds by a professional investor, in the expectation of making a gain or profit), constitutes an investment;

- The third is that the investor, as a consequence of the investing activity, engages in "the assumption of risk".

The enumeration of these characteristics is linked by an "*or*", implying that it is not necessary that an asset possess all of these characteristics. That said, the more characteristics an asset possesses, the more its character as an investment is reinforced.

226. The Treaty adds a supplementary rule in Footnote 12. Certain assets are "more likely" to be investments, while other assets are "less likely" to be so:

- The "more likely" assets are "bonds, debentures, and long-term notes"; while

- The "less likely" assets are "claims to payment that are immediately due and result from the sale of goods or services".

227. Three additional characteristics of investments may be induced from this qualification:

- First, that debt formalized in securities like bonds or notes is more likely to be an investment than debt formalized simply in contract;

- Second, that long term debt is more likely to be an investment, compared to debt which is immediately due;

- Third, that debt resulting from financial lending transactions is more likely to be an investment than that resulting from the sale of goods and services.

a. Discussion

228. The *Bonos Agrarios* purchased by GPH meet the six characteristics which are typical of an investment under the FTA[120]:

229. (i) Commitment of capital or other resources: GPH made a contribution of capital amounting to USD 33.2 million, which flowed to the Peruvian holders of the *Bonos*.

230. (ii) Duration: Long-term debt is more likely to be considered as an investment than short-term securities. The term of the *Bonos Agrarios* varied from 20 to 30 years – a very long maturity by all accounts; when it bought the *Bonos*, GPH was also not making a short-term investment; although the *Bonos* had matured, uncertainty surrounded their terms of payment; in fact, more than a decade has elapsed since the purchase, without GPH being able to recover its investment

231. (iii) Assumption of risk: GPH assumed an economic or commercial risk of non-payment or default when it purchased the *Bonos*.

232. This risk is different from that assumed by investors in direct investments, where the return depends on the success or failure of an enterprise; where an investor holds bonds formalizing public debt, the risk is effectively contractual and consists in the potential failure of the State to honor its commitments.

233. The Contracting Parties acknowledged in Annex 10-F of the Treaty, entitled "Public Debt", that

> "the purchase of debt issued by a [State] Party entails commercial risk".

234. However, the Contracting Parties agreed that, notwithstanding that principle, foreign investors could submit to arbitration the default or non-payment of sovereign debt and obtain compensation, provided that such default or non-payment was a consequence of a breach of the Treaty:

> "For greater certainty, no award may be made in favor of a claimant for a claim under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A) with respect to default or non-payment of debt issued by a Party unless the claimant meets its burden of proving that such default or non-payment constitutes an uncompensated expropriation for purposes of Article 10.7.1 or a breach of any other obligation under Section A".

235. (iv) Expectation of gain or profit: Gramercy is a professional investment company, which manages investments with the expectation of obtaining a profit; in this case, the expected profit would consist in the difference between the purchase price paid to the local bondholders and the payment eventually received from the Republic.

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[120] In her Dissenting Opinion, para. 107, Arbitrator Stern labels these six characteristics as "exotic". They are simply the application of the requirements established in the text of the FTA.

236. (v) Non-commercial character: the *Bonos* did not arise from a commercial transaction for the sale of goods or services; they derived from a sovereign Government decision to expropriate private lands, and to pay the compensation in the form of long-term, transferable securities.

237. (vi) Securitization: Finally, debt formalized in securities like bonds is more likely to be an investment than debt formalized simply in a contract; in the present case, Gramercy acquired securities.

b. *Salini* criteria

238. Respondent has referred to a frequently used list of characteristic features of an investment, the so-called *Salini* test[121], which includes

- contribution,
- duration,
- risk and
- economic development of the host State.

239. The first three characteristics match those referred to in the Treaty and have been analyzed above.

240. The fourth characteristic, the economic development of the host State, is unique to *Salini*, and has been the object of much controversy[122]. In the present case, where the Preamble of the Treaty proclaims that its purpose is to "promote broad-based economic development in order to reduce poverty", it seems appropriate – as Peru submits[123] – to use the fourth *Salini* criterion as one of the characteristics which an investment should meet, to deserve Treaty protection.

241. Did Claimants' investment contribute to the economic development of Peru?

242. The financial consequence of the purchase of the *Bonos Agrarios* was that USD 33.2 million were paid to Peruvian bondholders and, through them, injected into the Peruvian economy at large. The quantity of the investment may seem modest, but there can be little doubt that it contributed to Peru's economic development: the sellers of the *Bonos* exchanged matured and unpaid public bonds, which had become practically worthless, against a sum of cash, which could be expensed or reinvested in the Peruvian

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[121] Named after the Decision on Jurisdiction in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, Doc. RA-161 ["***Salini***"], paras. 52-57, although used before in *Fedax N.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, Doc. RA-159 ["***Fedax***"], para. 43.
[122] C PHB-J, para. 11. *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, Doc. RA-171 ["***Abaclat***"], paras. 363-364.
[123] R PHB-J, para. 85.

economy. Gramercy created a market where none existed before, transforming an illiquid asset into liquid cash[124].

c. The *Phoenix Action* criteria

243. The tribunal in *Phoenix Action* found that, for an investment to benefit from international protection, the following six elements have to be considered[125]:

- A contribution in money or other assets;
- A certain duration;
- An element of risk;
- An operation made in order to develop an economic activity in the host State;
- Assets invested in accordance with the laws of the host State;
- Assets invested *bona fide.*

244. The first three characteristics in *Phoenix Action* match those in *Salini* and in the FTA and have already been analyzed.

Economic activity

245. The fourth characteristic refers to "an operation made in order to develop an economic activity in the host State".

246. The tribunal in *Phoenix Action* was confronted with a direct, entrepreneurial investment, where the investor owned shares in certain host State companies, and the tribunal analyzed whether the investor genuinely had the intention to engage in economic activities in the host State.

247. In the present case, the investment consists in the acquisition of public debt – a possibility specifically permitted by the FTA. In such case, the very nature of the protected investment precludes the possibility that the operation be made "in order to develop an economic activity in the host State"; this requirement can only be met where the investor has made a direct investment in an enterprise located in the host State (as happened in the factual situation underlying *Phoenix Action*).

248. Because the Treaty explicitly provides for the protection of non-entrepreneurial investments such as the purchase of public debt, where an investor purchases public debt, the requirement that the investment consist of an operation "to develop an economic activity in the host State" obviously does not apply, because only

[124] CER-8, Olivares-Caminal I, para. 78.
[125] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Doc. RA-100, ["***Phoenix Action***"], para. 114.

entrepreneurial investments may result in an economic activity being performed in the host State. The equivalent requirement for non-entrepreneurial investments is that the investor acts with the intent to obtain a profit, and Art. 10.28 of the FTA specifically lists the "expectation of gain or profit" as one of the typical characteristics of investment[126].

249. The Tribunal has already concluded that Gramercy indeed invested with the expectation to obtain a profit.

250. As regards the last two criteria in *Phoenix Action* (compliance with host State legislation and good faith), Respondent is not alleging that Gramercy breached any Peruvian regulation when it made its investment, and the Tribunal will find that Gramercy's conduct was not abusive (see Section **V.2.** *infra*).

251. The Tribunal concludes that Gramercy's investment in public debt in Peru also meets the six *Phoenix Action r*equirements.

d. Respondent's counter-arguments

252. Respondent denies that the *Bonos* acquired by GPH meet any of the characteristics of an investment[127]:

253. First, the Republic says that Gramercy made no contribution by itself, but rather used funds from third-party investors.

254. The Tribunal does not agree with this argument: GPH is a U.S. corporation, with separate personality, which purchased the *Bonos* with its own funds; the source of these funds were the shareholders of GPH, who contributed equity to finance the acquisition[128]. Mr. Lanava, an officer of GPH, testified that money from GPH's investors was "capitalized into GPH", which purchased the *Bonos* with these resources[129].

255. The evidence thus shows that GPH made the contribution itself, using (as corporations are entitled to do, and regularly do) the funds provided as equity by its shareholders.

256. Second, the Republic says that Gramercy sold the interest in the *Bonos* even before it acquired the securities.

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[126] In her Dissenting Opinion, para. 112, Arbitrator Stern says that "[i]f such strange species as a non-entrepreneurial investment were to exist, any person buying a lottery ticket would be an investor!". The argument is without any merit: a lottery ticket is not one of the forms of investment provided for in the FTA – while bonds in general, and public debt, in particular, are.
[127] R PHB-J**,** para. 89.
[128] Doc. CE-703.
[129] HT(ENG), Day 2 (Lanava), p. 724, ll. 12-22, and – p. 725, ll. 1-2.

257. This averment is factually wrong: GPH purchased the *Bonos* between 2006 and 2008, with equity provided by its shareholders, and has not sold or transferred the *Bonos* since then.

258. Third, the Republic says that GPH incurred no risk; the allegation is again factually wrong: if GPH is unable to collect under the *Bonos*, it runs the financial risk of suffering a loss. Since GPH has separate legal personality, the loss will be suffered directly by it – not by its shareholders. GPH's shareholders may eventually lose a part or the totality of their equity participation; but that does not detract from the fact that, in first instance, it is the company itself that bears the financial risk of the investment.

259. Fourth, the Republic says that Gramercy made no contribution to the economic development of Peru, but rather engaged in a campaign in the US, to pressure the Republic to settle.

260. The Tribunal understands the Republic's annoyance with some of the tactics employed by Gramercy in its effort to convince Peru to accept a settlement which satisfied the investor's high expectations. Gramercy, however, sees things differently: the *Sentencia TC 2001*, which apparently clarified the legal standing of the *Bonos Agrarios*, was issued in 2001, and 20 years later, the problem still remains unresolved, notwithstanding Gramercy's repeated requests and proposals. This lack of progress arguably goes a certain way to explain Gramercy's tactics.

261. In any case, the public relations and lobbying campaign, waged (properly or improperly) by Gramercy against Peru, is totally irrelevant to the issue of whether the investment made in 2008 and 2009 contributed to the economic development of Peru. In this regard, the Tribunal has already established that GPH's payment to Peruvian citizens of the purchase price of USD 33.2 million, in exchange for the sale of the *Bonos*, represented a foreign capital injection, which, in addition to alleviating poverty, contributed to the economic development of the country[130].

D. Conclusion

262. The Republic submits that the *Bonos Agrarios* do not fall within the definition of "bonds, debentures, other debt instruments, and loans" used in paragraph (c) of Art. 10.28 of the Treaty, and that the *Bonos* do not have the characteristics of an investment, as required in the *chapeau* of the definition.

263. The Tribunal has carefully analyzed the Republic's objection, and comes to the opposite conclusion: the *Bonos Agrarios*

- Are "bonds", and as such fit within the form of investment described in paragraph (c);

[130] See para. 136 *supra*.

- Constitute public debt, a category of investment protected under the Treaty, as expressly confirmed by Annex 10-F and ratified *a contrario sensu* by Footnote 13; and

- Meet the six characteristics which the Tribunal has identified as typical of investments under the FTA: commitment of capital, expectation of profit or gain, assumption of risk, long term duration, non-commercial character, and contribution to the host State's economic development.

E. Case law

264. The Tribunal's conclusions are confirmed by case law. There are a number of awards in which tribunals have found that bonds or other securities issued by States constitute protected investments.

Fedax

265. In 1997, the *Fedax* tribunal decided that the promissory notes were indeed protected investments since they met all the features that the doctrine generally considers an investment entails, *i.e.*, "a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development"[131]. The tribunal emphasized that these transactions were different from ordinary commercial transactions because they were issued under Venezuela's Law on Public Credit and involved a fundamental public interest[132].

Ambiente Ufficio, Abaclat and Alemanni

266. These three cases stem from the same factual background, *i.e.*, Argentina's efforts to restructure its sovereign debt following the 2001 financial crisis. The tribunals found that they had jurisdiction *ratione materiae,* given that bonds/security entitlements constitute a protected investment both under the ICSID Convention and under the definition provided in Art. 1(1)(a)-(f) of the Argentina-Italy BIT.

267. As regards the *Salini* test, the tribunal in *Ambiente Ufficio* found that[133]:

- Bonds issued as a whole amounted to a substantial contribution on the investor's part;

- The relevant minimum duration is the duration of the bonds, as confirmed in *Fedax*;

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[131] *Fedax*, para. 43.
[132] Shortly thereafter, the *Salini* Tribunal would use these same criteria (referred to as the *Salini* test from then on) to conclude that a construction contract constituted an investment under the ICSID Convention. In addition, the Tribunal established that these criteria should be considered globally, rather than individually.
[133] *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, Doc. RA-173 ["***Ambiente Ufficio***"], paras. 482-487.

- What is at stake is not an ordinary commercial risk given the risk of the host State's sovereign intervention (which was manifest in Argentina's default and restructuring);

- Bonds and securities have to be deemed a single economic operation, satisfying the regularity of profits and return criteria with the interests that are supposed to be paid periodically; and

- The volume of the bonds involved certainly satisfied the prerequisite of a significant contribution to the host country.

268. As to the concept of investment under the Argentina-Italy BIT, the tribunal in *Abaclat* concluded that Art. 1(1) "cannot be seen to have intended to adopt a restrictive approach". Observing the context of the terms listed in lit (c), the tribunal found that the bonds constitute *obligations* and/or at least *public securities* in the sense of that particular provision[134].

Poštová

269. Respondent has invoked *Poštová*[135] in support of its position. However, *Poštová* is inapposite.

270. The case concerned a Slovak bank named *Poštová*, which had acquired a substantial portfolio of Greek government bonds in the secondary market and, in the context of the Greek sovereign debt crisis, suffered losses caused by the debt exchange. The tribunal held that it had no jurisdiction *ratione materiae* because sovereign debt did not qualify as an investment under the language of the particular BIT at issue[136]:

> "Neither Article 1(1) of the Slovakia-Greece BIT nor other provisions of the treaty refer, in any way, to sovereign debt, public titles, public securities, public obligations or the like. The Slovakia-Greece BIT does not contain language that may suggest that the State parties considered, in the wide category of investments of the list of Article 1(1) of the BIT, public debt or public obligations, much less sovereign debt, as an investment under the treaty.
>
> The only reference to bonds in the Slovakia-Greece BIT is in Article 1(1)(b) which refers to '"*shares in and stock and debentures of a company and any other form of participation in a company*'. The text leaves no doubt that the bonds referred to under Article 1(1)(b) are only bonds issued by a company – debentures of a company – not sovereign debt in general, or bonds issued by either State party to the treaty, in particular".

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[134] *Abaclat*, paras. 354-356.
[135] R I, paras. 210-211.
[136] *Poštová Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, Doc. RA-179 ["***Poštová Banka***"], paras. 332-333. The tribunal acknowledged that the language of the Slovakia-Greece BIT was different from the one of the Argentina-Italy BIT.

271. Relying on the principles of treaty interpretation, the tribunal concluded that the parties did not intend to include every type of asset under the scope of the BIT, in spite of the broad definition. In particular:

- Although State parties considered some types of bonds as investment, the scope was limited to bonds issued by a company;

- the tribunal also found that bonds are different to loans, and Greek government bonds cannot be considered as loans[137];

- Greek bonds did not qualify as a claim to money, since, according to the BIT, "the claim to money must arise under a contractual relationship", and in that case "Poštová Banka never entered into a contract with Respondent […]".

272. *Poštová* can therefore be distinguished from the present case in one fundamental aspect: the language of the underlying Treaty. The US-Peru FTA not only specifically includes debt instruments in its investment definition of Art 10.28 (paragraph c), but further clarifies in its footnote 12 that "[s]ome forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment" (Emphasis added). Finally, Annex 10-F is specifically dedicated to "Public Debt" and provides that, while investment in public debt carries *ex lege* commercial risk, foreign investors can submit to arbitration the default or non-payment of sovereign debt and obtain compensation if they prove that such default or non-payment is a consequence of a breach of the Treaty.

[137] *Poštová Banka*, paras. 334-350.

V.2. WHETHER CLAIMANTS ARE SEEKING THE RETROACTIVE APPLICATION OF THE TREATY OR INCURRING IN ABUSE (FIRST AND SECOND OJECTIONS)

1. RESPONDENT'S POSITION

273. Respondent's first and second objections are premised on two facts:

- First, that for many years before the acquisition of the *Bonos* by Claimant, the securities had been subject to litigation in Peruvian Courts and various unsuccessful attempts at resolution had been made in the Peruvian political branches; the *Bonos* were thus burdened with a pre-existing domestic dispute[138];

- Second, that Gramercy "took over the existing litigation" by Peruvian bondholders, filed in Peruvian courts before the acquisition of the *Bonos* by Gramercy[139].

274. Based on these alleged facts, the Republic argues

- that Claimants' claims imply a retroactive application of the Treaty, contrary to Art. 10.1.3 (**1.1.**) and

- that, even if Art. 10.1.3. has not been breached, Claimants are incurring in an abuse of process, which makes their claims inadmissible (**1.2.**)

1.1 NON-RETROACTIVITY

275. The Republic says that the Tribunal lacks jurisdiction *ratione temporis* because Claimants' claims require that the FTA be applied retroactively to situations which existed before it came into force.

276. First, Peru contends that Claimants' claims are founded on a dispute that predates the Treaty's entry into force. Gramercy understood that the *Bonos* were subject to a decades-old preexisting dispute even before it acquired the securities[140]. That the dispute arose between the original bondholders and the State is irrelevant, because Gramercy knew about the dispute and essentially bought into the dispute with its 2006-2008 acquisitions[141].

277. Second, Respondent contends that, in accordance with Art. 10.1.3, the Treaty does not bind any Party in relation to any act or fact that took place before it entered into force on 1 February 2009. This prohibition on retroactivity applies with equal force to later

[138] R PHB-J, para. 16.
[139] R PHB-J, paras. 18- and 19, citing to Mr. Koenigsberger's testimony during the Hearing.
[140] R II, para. 50.
[141] R II, para. 55.

acts or facts, which are deeply rooted in pre-Treaty situations[142]; prior investment tribunals have established that they cannot exercise jurisdiction where later measures are so intertwined with pre-treaty acts and facts that they cannot be detached and adjudicated separately[143].

278. In this case, significant acts and facts that form the foundation of the Treaty breaches alleged, indeed the essence of the dispute, considerably predate the entry into force of the Treaty. Gramercy purchased bonds that were already embroiled in disputes to which the Government was a party[144]. The acts lying at the heart of Gramercy's claims took place decades before the Treaty entered into force. The *Resoluciones TC 2013* and the *Decretos 2014* and *2017* were all deeply rooted in those pre-treaty acts and facts, and cannot be adjudicated independently of them, as required by Art. 10.1.3[145].

279. Respondent invokes *Berkowitz* in support of its position[146].

1.2 ABUSE OF PROCESS

280. As a subsidiary argument, should the Tribunal find that it has *ratione temporis* jurisdiction, Respondent says that Claimants' claims are inadmissible because Gramercy is incurring in an abuse of process. Invoking the expert report of Prof. Reisman[147], the Republic argues that investment tribunals have become sensitive to the potential misuse of the protection afforded by international investment arbitration and in a number of instances have dismissed cases on the ground of abuse[148].

281. The Republic avers that, in this case, Claimants have indeed incurred in abuse for at least four reasons:

282. First, Gramercy made its investment not in order to engage in national economic activity, but with the unique goal to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration[149]. Gramercy incorporated GPH specifically and solely for the purpose of acquiring the bonds, only five days after the signing of the Treaty[150]. At the time of the acquisition of the *Bonos*, Gramercy was focused on making a Treaty claim, or at a minimum, on having the ability to threaten the Republic with a Treaty claim[151].

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[142] R PHB-J, para. 65.
[143] R II, para. 52.
[144] R I, para. 181.
[145] R PHB-J, paras. 65-67; R II, para. 52; R I, paras. 179-181.
[146] R PHB-J, para. 65.
[147] RER-1, Reisman I, para. 78.
[148] R I, para. 189.
[149] R PHB-J, para. 60; R I para. 194.
[150] R II, para. 29.
[151] R II, para. 30.

283. Respondent invokes *Phoenix Action* in support of its argument[152].

284. Second, Gramercy acquired bond claims already burdened by a domestic dispute, as its own due diligence memorandum proves and as Mr. Koenigsberger's (Gramercy's CEO) testified when he admitted that Gramercy "took over" claims already pending in Peruvian Courts[153]. The preexisting dispute in Peru concerned the same essential subject matter at issue in this Treaty proceeding, *i.e.*, valuation and payment of the bonds, and it is undisputed that Gramercy had in-depth knowledge of the dispute when it decided to acquire the *Bonos*[154].

285. Third, given the existence of a longstanding dispute, it was foreseeable for Gramercy that Peru would implement further measures with respect to valuation and payment of the *Bonos*, which Gramercy might then seek to challenge in a Treaty case[155].

286. Peru invokes *Phoenix Action* and *Philip Morris* in support of its position[156].

287. Fourth, Gramercy did not engage in any economic activity in Peru but organized an attack campaign against Peru to pressure it into a settlement as to the preexisting dispute, while at the same time secretly acquiring still more *Bonos* in 2017. The Treaty was used as an instrument to wield pressure against Peru[157].

2. CLAIMANTS' POSITION

288. Claimants say that both jurisdictional objections are meritless.

2.1 NON-RETROACTIVITY

289. Claimants' initial observation is that Peru's repeated references to a "dispute" about payment of the *Bonos* between Peru and the original bondholders, decades before Gramercy invested, confuses the applicable legal principles. The relevant analysis is whether Gramercy's claims are based on "measures", which allegedly breach the Treaty, and whether those measures are an "act or fact that took place […] before the date of entry into force" – not whether a dispute between Peru and certain domestic bondholders predates the Treaty[158]. This Treaty, unlike others, does not determine temporal jurisdiction by reference to the arising of a dispute, but by reference to the "taking place" of "acts or facts" and by the claims submitted and measures

[152] R I, para. 194, citing *Phoenix Action*, Doc. RA-100 para. 144.
[153] R PHB-J, para. 61.
[154] R II, para. 32.
[155] R PHB-J, para. 61.
[156] R PHB-J, para. 60; R I, para. 191.
[157] R PHB-J, paras. 60-63; R I, paras.189-194; R II, paras. 24-44.
[158] C II, para. 202.

challenged[159]. There could not have been a dispute between Gramercy and Peru before 2009 arising out of measures that only occurred in 2013 and thereafter[160].

290. Claimants aver that the *Resoluciones TC 2013* and the *Decretos 2013* and *2017* are the "measures adopted or maintained by a Party" that constitute a breach, and the Treaty applies to them because they occurred several years after the Treaty's entry into force; Gramercy does not claim that any of the pre-2009 facts (such as the *Reforma Agraria*, the hyperinflation, Peru's default on the *Bonos* or the *Sentencia TC 2001*) constitute Treaty breaches[161].

291. As regards Peru's assertion that the Tribunal lacks temporal jurisdiction because the breaches "are deeply rooted in pre-Treaty acts or facts", Claimants argue that it is wrong and nonsensical:

- It has no basis in the Treaty text, which does not define temporal jurisdiction by the sameness of disputes, but by the occurrence of measures, and

- It flies in the face of the well-accepted principle that facts that predate the Treaty can be taken into account as a factual predicate for subsequent breaches, and do not deprive the tribunal of temporal jurisdiction over that later conduct[162]; tribunals can and should take into account factual background against which the complained-of measures took place[163].

292. Claimants invoke *Tecmed, MCI, Société Général, Renco II* in support of their position[164] and say that *Berkowitz* is inapposite[165].

2.2 ABUSE OF PROCESS

293. Claimants reject Respondent's arguments.

294. First, Gramercy says that it began investing in *Bonos* in 2006, ten years before the commencement of this arbitration, because

- Peru's highest Court had unequivocally confirmed that they entitled Gramercy to be paid their current value, plus interest, and

- Gramercy hoped to catalyze a consensual resolution of the entire *Bonos Agrarios* debt, which would have benefitted Peru and its people[166].

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[159] C III, para. 185.
[160] C III, para. 190.
[161] C PHB-J, para. 65, C II, para. 201, C III, para. 183.
[162] C PHB-J, para. 66.
[163] C II, para. 204.
[164] C PHB-J, para. 55, C II, para. 204.
[165] C II, para. 205; C III, paras. 186-187.
[166] C PHB-J, para. 70; C III, paras. 198-201; C II, paras. 212-217.

295. Gramercy did not purchase the *Bonos* in order to bring a Treaty claim for damages, but rather because it had the legitimate expectation, based on the existing legal framework, that Peru would pay their current value, or at least that Gramercy would be able to initiate Peruvian Court proceedings like so many other bondholders[167].

296. The incorporation of GPH immediately after the signing of the Treaty in 2006 was meaningless: the Treaty did not come into force until 2009[168].

297. Second, Gramercy did not buy claims in domestic litigations, but rather ownership over the bonds themselves, as the purchase agreements show. Gramercy bought the *Bonos* with unclipped *Cupones*, which Peru had failed to pay[169].

298. Claimants add that what Respondent calls the pre-existing domestic dispute was simply the fact that the *Tribunal Constitucional* had issued the *Sentencia TC 2001*, saying that it was unconstitutional to pay the worthless nominal value and that the *Bonos* must be paid at their current value[170].

299. Gramercy repeatedly tried to reach a consensual resolution with Peru[171]. After its conciliation proceedings failed, Gramercy participated in court actions in Peru for a subset of its *Bonos Agrarios*[172].

300. Third, Claimants argue that when they invested in 2006 they were unable to foresee that Peru would implement measures with respect to the valuation and payment of the *Bonos* in breach of the Treaty. Gramercy expected Peru to adopt measures to fairly resolve the debt – not to adopt the *Resoluciones TC 2013* and the *Decretos 2014*, which resulted in a Treaty breach[173].

301. Claimants finally say that the essence of Peru's objection is that Gramercy relied on the existence of treaty protection in deciding whether or not to invest in the *Bonos*. The notion that this is abusive is untenable. This is simply valid corporate planning. Claimants invoke *Isolux* to aver that their conduct was not abusive[174].

3. THE TRIBUNAL'S DECISION

302. Gramercy argues that certain measures which under international law are attributable to the Republic of Peru, the *Resoluciones TC 2013* and the *Decretos 2014* and *2017* (jointly, the "**Impugned Measures**"), were adopted in breach of the obligations and undertakings assumed by the Republic *vis-à-vis* Claimants in the FTA; that the ensuing dispute has not been solved by consultation and negotiation; and that (in accordance

[167] C PHB-J, para. 82; C II, para. 213.
[168] C III, para. 197.
[169] C PHB-J, paras. 73, 77.
[170] C PHB-J, para. 78.
[171] C PHB-J, paras. 84-85.
[172] C HPB-J, para. 86.
[173] C PHB-J, para. 94; C II, para. 212.
[174] C II, para. 216.

with Art. 10.16), Claimants consequently are entitled to submit to arbitration the claim that the Republic has breached the FTA.

303. Respondent says that the Tribunal lacks jurisdiction *ratione temporis* under Art. 10.1.3 of the Treaty, and subsidiarily, that Claimants' claims are inadmissible, because Claimants have incurred in an abuse of process.

304. To solve these two jurisdictional exceptions, the Tribunal

- will first establish the proven facts (**3.1.**),
- it will then decide whether it has jurisdiction *ratione temporis* under Art. 10.1.3 of the Treaty (**3.2.**), and
- finally, it will dismiss the Republic's argument that Claimants incurred in an abuse of process (**3.3.**).

3.1 PROVEN FACTS

305. *Pro memoria*: In 2001, the *Tribunal Constitucional* issued the *Sentencia TC 2001*, which settled the constitutional dispute submitted by the *Colegio de Ingenieros* and declared the payment regime for the *Bonos* under Art. 2[175] of *Ley 26597* unconstitutional.

A. Incorporation of GPH and purchase of the *Bonos*

306. On 17 April 2006, at a time when substantial discussions regarding the appropriate methodology to implement *Sentencia TC 2001* were still ongoing, Gramercy incorporated GPH. The Treaty had been signed five days before, but it was still one year away from legislative approval in the U.S. and Peru, and nearly three years away from U.S. presidential approval and entry into force, which only happened on 1 February 2009[176]. Between 2006 and 2008 (at a time when the Treaty had been signed but was not yet in force) Gramercy acquired over 9,600 *Bonos Agrarios*[177].

B. Procedures before municipal Courts

307. Individual bondholders owning *Bonos* always had the possibility to approach Peru's ordinary Courts, and request that the *Bonos* be paid in full, *i.e.*, after readjusting their value to compensate the effects of inflation. In these cases, as Vice-Minister Sotelo confirmed during the Hearing, the Peruvian State would pay as per the order of the judge[178]. The records from the Ministry of Agriculture reveal that, between 2009 and

[175] The *Sentencia TC 2001* also declares the unconstitutionality of Art. 1 of Ley 26597, but this declaration is irrelevant for the present dispute.
[176] Doc. CE-763.
[177] C I, para. 5.
[178] HT(ENG), Day 3 (Sotelo), p. 908, ll. 9-13; see *e.g.*, Doc. CE-117; Doc. CE-119; Doc. CE-126; Doc. CE-134; Doc. CE-142; Doc. CE-148.

2015, Peru paid six rulings related to *Bonos* in an amount of nearly USD 27 million[179]. The readjustment was made by the Courts applying either the Consumer Price Index, a Central Bank index, and, in some cases, also by dollarizing the debt (*i.e.*, by converting it into USD on the initial date, and changing it back into Peruvian currency on the date of payment)[180].

308. In 2012 (four years after the initial purchase), GPH decided to follow this route to recover the adjusted value of its *Bonos*; it filed with the *Juzgados especializados en lo Civil de Lamabayeque* in Peru seven proceedings requesting that the Judge revalue ("*actualice*") the compensation awarded for the expropriation of certain pieces of agricultural land in the *Reforma Agraria* and formalized in certain *Bonos Agrarios* owned by GPH[181].

309. In due course GPH would waive these procedures, as a prerequisite to starting this arbitration[182].

C. The Impugned Measures

310. In the present arbitration, Gramercy does not impugn pre-treaty measures or situations, such as the fact that the *Bonos* remained unpaid since the 1980's, or that the situation remained unresolved notwithstanding the *Tribunal Constitucional*'s *Sentencia TC 2001.* With respect to these circumstances, the Tribunal notes:

- The non-payment of the *Bonos* was caused by the hyperinflation which affected Peru and made the *Bonos* worthless; there was no deliberate decision of Peru to stop payments owed under the securities; the obligations simply melted away eroded by inflation; in any event, Claimants are not challenging the Republic's conduct in this regard;

- The *Sentencia TC 2001* formed part of the legal framework in place when Claimants decided to invest in Peru (and moreover, they say, underpinned their decision to purchase the *Bonos*); the *Sentencia TC 2001* is a judgement rendered by Peru's highest Court, which since its delivery represented and continues to represent the position of Peruvian law with regard to the proper valuation of the *Bonos*; Claimants do not challenge this principle of Peruvian law; their case is that such principle was subverted by the subsequent *Resoluciones TC 2013* and the *Decretos 2014* and *2017*.

311. The Impugned Measures that, in Claimants' submission, give rise to breaches of Peru's obligations under the FTA are:

[179] C II, para. 228; Doc. CE-592.
[180] RER-2, Hundskopf I, para. 79.
[181] Doc. CE-764; Doc. CE-765; Doc. CE- 766; Doc. CE-767; Doc. CE-768; Doc. CE-770; Doc. CE- 771.
[182] Doc. CE-600 to Doc. CE- 606.

- the *Resoluciones TC 2013,* which are judicial orders, not judgements, issued by the *Tribunal Constitucional* 12 years after the *Sentencia TC 2001*, to facilitate enforcement of the *Sentencia TC 2001*; and

- the *Decretos 2014* and *2017*, which are regulations of general application, issued by the Government of Peru to regulate the authentication, revaluation, and payment of the *Bonos.*

312. The Tribunal notes that Claimants are not rallying against an alleged constant practice of the Peruvian State of not fulfilling its payment obligations[183]. What Claimants allege is that the criteria to update the *Bonos Agrarios* set in *Sentencia TC 2001* were abruptly and arbitrarily changed by the Impugned Measures of 2013 through 2017, causing a significant loss to the value of their investment.

3.2 JURISDICTION *RATIONE TEMPORIS*

313. The jurisdiction *ratione temporis* of an arbitral tribunal is regulated in Art. 10.1.3 of the FTA.

314. Art. 10.1 of the Treaty reads as follows:

> **Article 10.1: Scope and Coverage**
>
> 1. This Chapter applies to measures adopted or maintained by a Party relating to
>
> (a) investors of another Party;
>
> (b) covered investments; […]
>
> 2. […]
>
> 3. For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement. (Emphasis added)

315. The Treaty entered into force on 1 February 2009; consequently, under Art. 10.1.3, Peru is not bound by any act or fact that occurred (or omission which ceased to exist) before that date. While the first paragraph refers to "measures", the third paragraph uses different and wider language: "acts", "facts" and "situations" which ceased to exist. This language includes not only measures adopted or maintained by the host State (the terms "measures" and "acts" being synonyms), but also all other occurrences and omissions. Paragraph 3 clarifies that the home State does not incur in any liability under the Treaty, if the measure was adopted, or the occurrence or omission took place before 1 February 2009.

[183] The contrary position is adopted by Arbitrator Stern in paras. 29-35 of her Dissenting Opinion.

A. Measure, dispute and claim

316. As a preliminary matter, it is helpful to clarify the meaning of three related but distinct concepts used in the FTA: "measure", "dispute" and "claim".

a. Measure

317. Measure is a fundamental concept, because under Art, 10.1, it defines the scope of the Chapter of the Treaty devoted to "Investment":

> "This Chapter applies to measures adopted or maintained by a Party relating to […] investors of another Party [and] covered investments". (Emphasis added)

318. Chapter One of the Treaty, on Initial Provisions and General Definitions, provides a definition of the term "measure", which

> "includes any law, regulation, procedure, requirement, or practice".

319. For the protection afforded by the Treaty to become applicable, it is necessary that the host State adopts or maintains one or more "measures" which affect the covered investment of the protected investor. "Measure" is a unilateral concept because it refers to any "law, regulation, procedure, requirement, or practice"[184] that is "maintained by a [Contracting] Party"[185]. Under customary international law this includes[186]:

- administrative acts performed by the public administration,
- judicial decisions adopted by the jurisdictional power, and
- laws and regulations of general application promulgated by the legislative power or adopted by the public administration.

b. Dispute

320. The axiomatic definition of a dispute under international law was provided in 1924 by the PCIJ in *Mawrommatis Palestine Concessions*[187]:

> "[A] disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".

321. In another case, the ICJ referred to[188]

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[184] Treaty, Art. 1.3 – Definitions of General Application.
[185] Treaty, Art. 10.1.
[186] ILC Articles, Art. 4.
[187] Doc. CA-138, p. 4, Section I, para. 19.
[188] Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, of 30 March 1950, p. 13.

> "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations".

322. The concept of dispute under international law is thus very wide. But three requirements must be met, for there to a be a dispute:

323. First, there must be a disagreement regarding a point of law or fact;

324. Second, the disagreement must be between two parties, which hold opposite views; dispute is a bilateral concept: there can be no dispute with oneself;

325. Third, both parties must be aware that the dispute exists, the matter having been raised by one party and the counter-party showing some sign of opposition[189]; note that the definition does not require that one party actually file a claim against the other; communication by one party, and opposition by the counter-party suffice, as was acknowledged in *Maffezini*[190]:

> "*También se ha comentado acertadamente que la existencia de la controversia presupone un mínimo de comunicación entre las partes, en la que una de ellas plantea el problema a la otra, y ésta se opone a la posición del reclamante en forma directa o indirecta*".

326. In *Impregilo,* the tribunal came to the same conclusion, drawing support for its position from several decisions of the ICJ and of investment arbitration tribunals [191]:

> *"In order to establish the existence of a dispute, 'It must be shown that the Claim of one party is positively opposed by the other'".*

327. In *Eduardo Vieira*, the tribunal summarized the *status quaestionis*[192]:

> "*Para que exista el desacuerdo una de las partes involucradas debe plantear el problema a la otra, y ésta se debe oponer en forma directa o indirecta. A su vez, este desacuerdo implica que una de las partes involucradas se oponga positivamente a la otra*". (Emphasis in the original)

* * *

[189] C. Schreuer: "What is a legal dispute?", In *International Law between Universalism and Fragmentation*, Leiden, The Netherlands: Brill//Nijhoff (2008), p. 961.
[190] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, ["***Maffezini***"], para. 96.
[191] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, Doc. RA-334 ["***Impregilo***"], paras. 301-304, in particular para. 303, citing to *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections*, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 328.
[192] *Sociedad Anónima Eduardo Vieira v. República de Republic of Chile*, ICSID Case No. ARB/04/7, Award, 21 August 2007, ["***Eduardo Vieira***"], para. 249.

328. Although the scope of the FTA is predicated on the concept of "measure", the Treaty also includes a reference to "dispute" in its Art. 10.15:

> **Article 10.15: Consultation and Negotiation**
>
> In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation […] (Emphasis added)

329. An "investment dispute" arises when the host State adopts a measure, which breaches the commitments assumed in the Treaty, and the investor manifests its opposition thereto. If such case, the FTA requires that investors first seek a settlement of the dispute "through consultation and negotiation" with the host State.

c. Claim

330. But if the settlement negotiations fail, the investor is authorized to file a claim against the State, alleging that the State has breached its treaty obligations. And that claim may be adjudicated by international arbitration, under Art. 10.16:

> **Article 10.16: Submission of a Claim to Arbitration**
>
> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim […] that the respondent has breached […] an obligation under [the Treaty] (Emphasis added)

B. Overview

331. Respondent says that Claimants are seeking a retroactive application of the Treaty, contrary to the prohibition set forth in Art. 10.1.3, for two reasons:

- First, because the *Bonos* were already subject to a dispute at the time Gramercy acquired them, and such dispute had arisen before the Treaty's entry into force; accordingly, says the Republic, Gramercy's claims do not meet the requirements of Article 10.1.3 of the Treaty, and the Tribunal does not have jurisdiction *ratione temporis*[193];

- Subsidiarily, the Republic argues that the prohibition on retroactivity applies with equal force to later acts or facts, which are deeply rooted in and intertwined with pre-Treaty situations[194]; in this case, the Impugned Measures were all deeply rooted

[193] R I, para. 181.
[194] R PHB-J, para. 65.

in these pre-treaty acts and facts and cannot be adjudicated independently of them[195].

332. The Tribunal will address and dismiss Respondent's reasons in turn (C. and D.)

C. The Impugned Measures postdate the entry into force of the Treaty

333. Respondent's first argument suffers from a significant problem: it does not conform to the actual wording of the FTA's temporal exclusion clause, which does not refer to disputes, but to measures.

334. It is true, as Respondent says, that certain BITs limit consent to arbitration to disputes arising after their entry into force. Under treaty provisions of this kind, what is decisive for jurisdiction *ratione temporis* is whether a dispute between the host State and the investor has arisen. For example, the BIT between Chile and Peru provided that it would not apply to disputes which arose prior to its entry into force[196], and in *Luchetti* the tribunal found that this was indeed the case of the dispute in question and denied jurisdiction[197].

335. But the FTA is not that type of treaty. Temporal jurisdiction under the FTA is not determined by the initiation of an investment dispute, but by Art. 10.1 of the Treaty[198], which, after defining the scope of coverage by reference to "measures adopted or maintained" by the host State, provides "for greater certainty" that this Chapter of the FTA

> "does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist"

before 1 February 2009, the date when the FTA entered into force.

336. The relevant date for establishing temporal jurisdiction under the US-Peru FTA is thus, by express agreement of the Contracting Parties, not the date when an investment

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[195] R PHB-J, paras. 65-67; R II, para. 52; R I, paras. 179-181.
[196] BIT between the Republic of Peru and the Republic of Chile, signed 2 February 2000 and terminated in 2009, Art. 2: "This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter's territory. It shall not, however, apply to differences or disputes that arose prior to its entry into force". (Emphasis added) "*El presente Convenio se aplicará a las inversiones efectuadas antes o después de la entrada en vigencia del Convenio, por inversionistas de una Parte Contratante, conforme a las disposiciones legales de la otra Parte Contratante, en el territorio de esta última. Sin embargo, no se aplicará a divergencias o controversias que hubieran surgido con anterioridad a su entrada en vigencia*".
[197] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005 ["***Lucchetti***"], paras. 48-59.
[198] The full text of this Article has been transcribed at the beginning of this Chapter; Art. 27 of the VCLT, Doc. CA-121, which establishes the principle of non-retroactivity, starts with the words "[u]nless a different intention appears from the treaty or is otherwise established".

dispute arose, but the date when an impugned "law, regulation, procedure, requirement, or practice"[199] was "adopted or maintained" by the host State.

Gramercy's claim is restricted to the Impugned Measures

337. It is for Claimants to identify the "measures adopted or maintained by a Party" which allegedly constitute a breach of the Treaty. And, in the present case, Gramercy says that the measures against which it claims are the Impugned Measures (the *Resoluciones TC 2013* and the *Decretos 2014* and *2017*) which were adopted by the Republic between four and eight years after the Treaty's entry into force.

338. Respondent's argument that these Impugned Measures fall outside the temporal scope of jurisdiction is untenable, in view of the clear wording of Art.10.1.3 of the FTA and the undisputed fact that the Impugned Measures were adopted by the Republic at least four years after the Treaty's coming into force.

D. Pre-Treaty acts and facts are factual background

339. As a subsidiary argument, Respondent contends that the prohibition on retroactivity of Art. 10.1.3 applies with equal force to measures adopted after the Treaty entered into force in 2009, provided that these measures were deeply rooted in and intertwined with pre-Treaty "acts or facts"[200]; the Republic adds that, in this case, the Impugned Measures were all deeply rooted in these pre-treaty acts and facts and cannot be adjudicated independently of them[201].

340. Claimants disagree: they say that the Tribunal may take into account facts that predate the Treaty as a factual predicate for subsequent breaches, without being deprived of temporal jurisdiction over that later conduct[202].

a. Discussion

341. The Tribunal sides with Claimants.

342. Respondent's argument does not find support in the text of the Treaty: as the Tribunal has already found, the Treaty establishes temporal jurisdiction over "measures adopted or maintained" by a State Party after the entry into force of the Treaty. The FTA does not impose additional limitations or conditions on the measures that a protected investor may challenge. In principle, even if a post-treaty measure is somehow related to pre-treaty acts and facts, it is covered by the scope of the Treaty.

343. Gramercy made its investments in Peru between 2008 and 2009. On 1 February 2009, the FTA came into force. The Impugned Measures against which Claimants now rally

[199] Treaty, Art. 1.3 – Definitions of General Application.
[200] R PHB-J, para. 65.
[201] R PHB-J, paras. 65-67; R II, para. 52; R I, paras. 179-181.
[202] C PHB-J, para. 66.

are the *Resoluciones TC 2013* and the *Decretos 2014* and *2017*, which occurred four, five and eight years after the entry into force of the Treaty.

344. In the Tribunal's opinion, the Impugned Measures constitute actionable alleged Treaty breaches in their own right, and therefore, cannot be excluded from the scope of protection of the Treaty merely because they are related to pre-Treaty acts and facts. The default under the *Bonos* in the 1980's and the *Sentencia TC 2001* are antecedents, which permit the Tribunal to understand the background of the violations of the FTA which allegedly occurred years or decades thereafter. But the Tribunal has not been called upon to rule on the conformity of these pre-treaty acts with the Treaty; accordingly, it will only refer to them to explain the historic background and the remote causes of the Impugned Measures.

b. Case law

Berkowitz

345. Respondent's argument is based on a partial and incomplete reading of the *Berkowitz* decision.

346. This decision was issued under the CAFTA-DR FTA, which entered into force on 1 January 2009 and has a provision identical to Art.10.1.3 of the Treaty. In that case, the claimants sought to bring claims for the expropriation of lands that had been implemented through a series of measures, spanning from 2003 to 2010. The bulk of the expropriation measures (the declaration of public interest and the order commencing the expropriations) had occurred between 2003 and 2008[203]. Other ancillary measures occurred after the entry into force of the CAFTA-DR Agreement. The tribunal concluded that the expropriation measures enacted after entry into force were so linked and "deeply rooted" in pre-entry force measures, that they could not constitute a cause of action *on their own*, and therefore, rejected jurisdiction.

347. In assessing this issue, the tribunal engaged in detailed and articulate reasoning, which this Tribunal believes applies equally in the circumstances of the present case:

> "[…] pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot therefore, in the Tribunal's estimation, constitute a cause of action. Such conduct may constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent (where this is relevant), or to establish estoppel or good faith or bad faith, or to enable recourse to be had to the legal or regulatory basis of conduct that took place subsequently, etc. Pre-entry into force conduct cannot be relied upon, however, to found liability in-and-of-itself in circumstances in which liability could not properly

[203] *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, Doc. RA-150, ["***Berkowitz***"], para. 42.

> rest on the post-entry into force breach that has been alleged and on which the Tribunal's jurisdiction was founded". [204] (Emphasis added)

348. The tribunal clarified that,

> "To be justiciable, a breach that is alleged to have taken place within the permissible period, from a limitation perspective, must, if it has deep roots in pre-entry into force or pre-critical limitation date conduct, be *independently* actionable" [205].

Mondev

349. This general principle was also highlighted in *Mondev*, to which Respondent has referred to substantiate its objection.

350. In that case, a Canadian real estate company impugned the taking of its property by the city of Boston, which occurred prior to the entry into force of the NAFTA. The investor initiated local proceedings to seek redress, including appeals before the Massachusetts Supreme Judicial Court (SJC) and the U.S. Supreme Court, but was unsuccessful. In the NAFTA arbitration, Mondev alleged that it had suffered an unlawful expropriation – through the pre-entry into force taking of its properties by the city – and also challenged the post-entry into force conduct of the U.S. Courts. The tribunal rightly distinguished the two types of claims, from the temporal jurisdiction perspective[206]:

> "Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility".

[204] *Berkowitz*, para. 217.
[205] *Berkowitz*, para. 222.
[206] *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, Doc. RA-62, ["***Mondev***"], para. 70.

Other awards

351. International tribunals have repeatedly held that they may consider the factual background which occurred before the entry into force of the relevant treaty, when assessing the merits of claims.

352. In *Tecmed*, the tribunal was called upon to decide whether the non-renewal of a permit to operate waste landfill constituted a violation of the Spain-Mexico BIT. The permit had been issued 10 months prior to the entry into force of the treaty, but the measures that the investor challenged had taken place post-entry into force. The tribunal noted that the claimant did not impugn pre-entry into force measures, and simply referred to them to contextualize the dispute[207]. The tribunal highlighted the principle of non-retroactivity of the treaty[208], but clarified that[209]:

> "However, it should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force. For this purpose, it will still be necessary to identify conduct —acts or omissions— of the Respondent *after* the entry into force of the Agreement constituting a violation thereof". (Emphasis in the original)

353. Similarly, other decisions, such as *MCI* and *Société Générale*, have acknowledged that, while tribunals cannot exert jurisdiction over impugned acts preceding the entry into force of the treaty, they can take such acts into consideration "for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force"[210].

3.3 ABUSE OF TREATY

354. Respondent submits a subsidiary argument. Assuming that the Tribunal has jurisdiction *ratione temporis*, it says, Claimants' claims should be dismissed because Claimants have committed an abuse of the Treaty:

- Gramercy made its investment with the unique goal to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration;

- The claims it acquired were burdened by a pre-existing domestic dispute,

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[207] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, Doc. RA-65, ["***Tecmed***"], para. 60.
[208] *Tecmed*, para. 63.
[209] *Tecmed*, para. 66.
[210] *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, Doc. CA-133 ["***MCI***"], para. 93; *Société Générale v. Dominican Republic*, LCIA Case No. UN 7929 (UNCITRAL), Award on Preliminary Objections to Jurisdiction, 19 September 2008, Doc. CA-183 ["***Société Générale***"], para. 87.

- At the time of purchase, Gramercy could already foresee the submission of a Treaty claim against Peru, and

- Gramercy did not engage in any economic activity in Peru but organized an attack campaign against Peru to pressure it into a settlement of the preexisting dispute.

355. The Tribunal agrees with the Republic of Peru that treaty claims can indeed fail on abuse grounds. In Lauterpacht's frequently quoted words

> "[t]here is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused".[211]

356. Abuse can affect the recognition or use of substantive or procedural rights. In the present case, Respondent argues that Claimants' abuse is procedural: the submission of Gramercy's claims to international arbitration allegedly constitutes an abuse of process.

357. Neither the FTA nor the UNCITRAL Rules contain any reference to abuse of rights in general, nor to abuse of process in particular[212]. Abuse of rights is a general principle of law recognized by civilized nations under Art. 38.1.c) of the ICJ Statute[213], which reflects the universally accepted principle of good faith[214], and its existence has been accepted by numerous investment arbitration tribunals[215].

Situations which have been considered abusive

358. Under international investment case law,

- if an investment is made (or restructured) with the sole purpose to transform a pre-existing domestic dispute into an international dispute[216]; or

- if an investment is made (or restructured) and the asset is already burdened with a pre-existing dispute with the host-State[217]; or

[211] H. Lauterpacht: "Development of International Law by the International Court", Praeger (1958), p. 164.
[212] The only explicit reference to abuse of process in a protection of investment context is found in Art. 8.-18 of CETA-EU-Canada Comprehensive Economic and Trade Agreement of 2016, Doc. CE-638.
[213] A. El Far: "Abuse of Rights in International Arbitration", OUP (2020), para. 2.43
[214] *Phoenix Action*, para. 144.
[215] *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, Doc. CA-207 ["***Mobil***"], para. 170.
[216] *Phoenix Action,* para. 142.
[217] *Phoenix Action*, para. 137; *Mobil*, para. 205; Tidewater Inc. et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, Doc. CA-189 ["***Tidewater***"], para. 184.

- if an investment is made (or restructured) in anticipation of treaty protection for a specific foreseeable dispute[218]; or

- if an asset is acquired for a nominal price, which does not represent an arm's length transaction[219]; or

- if an investment is made in violation of the international principle of good faith[220],

tribunals, after considering all circumstances of the case, have concluded that the investor's conduct indeed is abusive, with the result that the claim is inadmissible and the tribunal lacks jurisdiction.

Situations which have been considered legitimate

359. A detailed examination of case law reveals that tribunals have also identified certain actions by claimants that are not considered abusive. For example:

- It is legitimate for an investor to make its investment seeking to protect itself from the general risk of future disputes with the host State[221];

- It is legitimate to restructure an investment for the purpose of shielding the investment from possible future disputes with the host State[222];

- It is legitimate to locate the company through which the investment is made in a jurisdiction perceived to provide a beneficial investment protection regime[223].

360. The case law indicates that the dividing line between a legitimate investment (or a legitimate restructuring of an existing investment) and abuse occurs when the investor, at the relevant time,

- is aware that the asset is burdened by an existing dispute with the host State[224],

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[218] Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, Doc. RA-140, ["***Philip Morris***"], para. 539; Levy and Gremcitel S.A. v. Republic of Peru, ICSID Case No. ARB/11/17, Award, 9 January 2015, Doc. RA-135, ["***Levy and Gremcitel***"], para. 185; *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, ["***Lao Holdings***"], para. 70.
[219] *Phoenix Action*, para. 140
[220] *Phoenix Action*, para. 113; *David Aven et al. v. Republic of Costa Rica*, DR-CAFTA, Case No. UNCT/15/3, Final Award, 18 September 2018, Doc. CA-102 ["***Aven***"], para. 224.
[221] *Tidewater*, para. 184.
[222] *Mobil*, para. 204*; Levy and Gremcitel*, para. 184.
[223] *Aguas del Tunari SA v. Republic of Bolivia, ICSID Case No. ARB/02/3*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, Doc. CA-75, ["***Aguas del Tunari***"], para. 330.
[224] In this case, depending on the exclusion clause in the treaty, the tribunal may also lack jurisdiction *ratione temporis*; see *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, Doc. CA-154 ["***Pac Rim***"], para. 2.107.

- or can foresee a specific future dispute – with "very high probability and not merely as a possible controversy" as the *Pac Rim* tribunal correctly said[225].

High threshold

361. That said, the threshold for finding an abusive initiation of an investment claim is high, as has been recognized by investment arbitration case law[226], echoing the decision of the ICJ in *Equatorial Guinea vs. France*[227]:

> "[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process".

362. Do such "exceptional circumstances" exist in the present case? Respondent submits that there are four reasons which underpin its argument that Claimants have incurred in abuse of process. The Tribunal will analyze them in turn (**A.**, **B.**, **C.** and **D.**).

363. *Pro memoria*: before analyzing whether Claimants' claims constitute an abuse of process, it is important to reiterate what Claimants are requesting in the present procedure:

- Gramercy does *not* impugn pre-treaty measures or situations, such as the fact that the value of the *Bonos* had been eroded due to hyper-inflation, or that the situation remained unresolved notwithstanding the *Tribunal Constitucional*'s *Sentencia TC 2001;*

- The Impugned Measures that, in Claimants' submission, give rise to breaches of Peru's obligations under the FTA are the *Resoluciones TC 2013,* judicial orders, issued by the *Tribunal Constitucional* 12 years after the *Sentencia TC 2001*, and the *Decretos 2014* and *2017* issued by the Peruvian Government in subsequent years.

A. The investment was not made with the purpose of creating an international dispute

364. Respondent says that Gramercy incorporated GPH specifically and solely for the purpose of bond acquisitions, only five days after the signing of the Treaty, and made its investment through GPH with the unique goal of transforming a pre-existing domestic dispute into an international dispute subject to ICSID arbitration[228].

365. Gramercy counters that it purchased the *Bonos* because it had the legitimate expectation, based on the existing legal framework, that Peru would pay their current

[225] *Pac Rim*, para. 2.99.
[226] *Phillip Morris*, para. 539.
[227] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment 6 June 2018, I.C.J. Reports 2018, p. 336, para. 150.
[228] R PHB-J, para. 60; R I, para. 194.

value, or at least that Gramercy would be able to initiate Peruvian Court proceedings, as other bondholders were doing[229].

a. Discussion

366. The Tribunal agrees with Respondent's starting point. As the tribunal in *Phoenix Action* rightly said, an investment made with the sole purpose of raising a domestic dispute to the level of an international dispute is abusive, and claims deriving therefrom should be dismissed:

> "The evidence indeed shows that the Claimant made an '"investment"' not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made solely for the purpose of getting involved with international legal activity. The unique goal of the '"investment"' was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system".[230]

367. In *Phoenix Action*, the evidence showed that the investor had indeed made the investment with the sole purpose of raising an international claim, and the tribunal concluded that the claims were inadmissible.

368. In this case, there is no such showing.

369. Claimants say that the reason why they purchased the *Bonos* was because the Peruvian legal system guaranteed that the securities would be fully paid with readjustment for inflation and that bondholders could claim before the domestic Peruvian Courts. The facts of the case support Claimants' averment:

- The *Sentencia TC 2001* had clarified that, in accordance with Peruvian constitutional principles, the *Bonos* had to be paid applying the "*principio valorista*";

- Domestic bondholders indeed had the possibility of seeking redress before local Courts; between 2011 and 2013 GPH itself filed with the *Juzgados especializados en lo Civil de Lamabayeque* several proceedings requesting that the Judge revalue ("*actualice*") and order the payment in full of certain *Bonos Agrarios,* owned by GPH[231].

370. Gramercy's decision (adopted in 2012, four years after the initial purchase) to submit claims for the full payment of the *Bonos* to the domestic Peruvian Courts, belies

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[229] C PHB-J, para. 83; C I, para. 187.
[230] *Phoenix Action*, para. 142.
[231] Doc. CE-764; Doc. CE-765; Doc. CE- 766; Doc. CE-767; Doc. CE-768; Doc. CE-770; Doc. CE-771. In due course, GPH would waive these procedures, as a prerequisite to starting this arbitration.

Respondent's averment that the sole purpose of the investment was to launch an international investment procedure. The facts prove the contrary: Gramercy's first approach was to seek protection from the local Courts, under the existing municipal legal framework set forth by the *Sentencia TC 2001*; it was only after the Impugned Measures had been adopted, and when the recourse to local proceedings proved unsatisfactory or impossible, that Claimants took the decision to access international arbitration.

371. Furthermore, before initiating this international arbitration, Claimants attempted to find a negotiated solution to the payment of the outstanding *Bonos*: as Mr. Koenigsberger, Claimants' CEO, testified, Gramercy made various overtures to the Government, participated with other bondholders in discussions convened by the legislature and submitted various proposals for a bond swap[232].

b. Respondent's additional argument

372. Respondent has drawn the Tribunal's attention to the fact that GPH was incorporated shortly after the signature of the Treaty, and that the purchase of *Bonos* by GPH only started after the Treaty had been signed. In the Republic's submission, this fact would support its argument that the sole purpose of the investment was to access international justice.

373. The Tribunal does not share this reasoning.

374. It is true that Claimants incorporated GPH a few days after the signature of the Treaty and performed the acquisitions within the next two years. But during that period, the Treaty had not been ratified and, consequently, was not legally binding, and the uncertainty whether the Treaty would be ratified by the Contracting Parties persisted. Gramercy bought the *Bonos* and eventually the Treaty did come into force; but the possibility of a different outcome could not have been excluded.

375. In the Tribunal's opinion, the timing of Gramercy's investment does not support the proposition that it engaged in an abuse: bilateral investment treaties are signed with the very purpose of encouraging and increasing foreign investment – there is nothing irregular in an American investor deciding to invest in Peruvian assets, immediately after signature of an investment treaty, precisely because there is an expectation that the treaty, once it enters into force, will offer an additional layer of protection, which up to then was not available[233].

* * *

376. Summing up, the fact that GPH was incorporated five days after the signature of the FTA, but years before the Treaty was ratified by both Contracting Parties and finally entered into force in 2009, does not prove that Gramercy, when it made the investments

[232] HT(ENG), Day 2 (Koenigsberger), pp. 543, ll. 10-20; p. 561, ll. 9-15; p. 615, ll. 14-22.; C PHB-J, para. 84.
[233] *Tidewater*, para. 184; *Mobil*, para. 204.

in 2008 and 2009, was already envisioning that the investment would lead to an international dispute against Peru:

- First, as stated, at the time of the investment, the FTA remained unratified and was not in force, and there was a real chance that, for political reasons, it would never become operative;

- Second, the occurrence of one event after another does not imply that both are causally linked; the *post hoc* fallacy is a particularly tempting error; an investment made when there is a possibility, or even a motivating assumption, that a treaty may be ratified in the future, does not prove that the motivation to invest was to launch an arbitration under that treaty;

- Third, when Gramercy bought the *Bonos*, it could legitimately expect that Peru, a respected and law-abiding sovereign, would in due course comply with its payment obligations, as determined by the *Sentencia TC 2001*, without Gramercy having recourse to any judicial or international arbitration dispute.

B. The investment was not burdened with a pre-existing dispute concerning the same subject matter

377. Respondent's second argument is that Gramercy acquired *Bonos* knowing that they were already burdened by a domestic dispute, which concerned the same subject matter at issue in this Treaty proceeding, *i.e.*, their valuation and payment[234]. For its part, Gramercy says that it invested in certain assets, *i.e.*, the *Bonos* with unclipped *Cupones*, and denies the accusation of abuse[235].

Discussion

378. The question which the Tribunal must address is whether, at the time of their acquisition, the *Bonos* which Gramercy purchased were already burdened with a dispute against the Peruvian State, which concerned the same subject matter, making Claimants' investment and subsequent Treaty claims abusive.

379. Respondent's position is not precise: it submits that before the sale of the *Bonos* to Gramercy, a dispute with the State already existed in Peru, which affected the valuation and payment of the *Bonos*. But the Republic does not clearly identify the parties which were allegedly involved in such a dispute with the Republic, nor the precise subject matter of this dispute. It invokes a *totum revolutum,* in the hope of creating an appearance of abuse. But this approach is not suitable for overcoming the high threshold required to support a finding of abusive initiation of an investment claim.

[234] R II, para. 32.
[235] C PHB-J, para. 77.

380. In fact, it is possible to distinguish and analyze separately three scenarios which, in the Tribunal's understanding, might have resulted in the occurrence of a pre-acquisition dispute:

- the historic dispute between bondholders and the State in the 1980's and 1990's (**a.**);
- the litigation before the *Tribunal Constitucional* leading to the *Sentencia TC 2001* (**b.**);
- claims against the Peruvian State lodged by selling bondholders, which would have been inherited by Gramercy when it acquired the *Bonos* (**c.**).

a. The subject matter of the present dispute is different from the historic dispute by bondholders

381. Respondent seems to argue, as a first alternative, that Peru's historic failure in the 1980's and 1990's to revalue the *Cupones* of the *Bonos*, gave rise to a dispute; and that when, many years thereafter, Gramercy made the investment, the securities were burdened with such dispute, rendering the investment and the subsequent arbitration claims abusive – and depriving this Tribunal of jurisdiction.

(i) Discussion

382. The Tribunal disagrees with Respondent.

383. It is true that the Peruvian bondholders in general were unsatisfied with the measures adopted by the Republic in the 1980's and 1990's, denying application of the *"principio valorista"* to the payment of the *Cupones*. From this general perspective, there was indeed a dispute in Peru regarding the proper valuation of the *Bonos*; but this dispute was settled in 2001, when the *Tribunal Constitucional* finally established that the Peruvian Constitution required that the *Bonos* be paid revaluing their nominal amount in accordance with the *"principio valorista"*.

384. The existence of such general dispute between bondholders and the Peruvian State in the 1980's and 1990's does not make the filing of the present investment dispute abusive. The reason is that the subject matter of both disputes is markedly different – and the filing of successive disputes with different subject matters cannot be considered an abuse of the Treaty.

Criteria

385. Prior investment tribunals have developed criteria to distinguish whether two disputes concern the same subject-matter:

- The first criterion is factual: whether the facts that gave rise to the earlier dispute "continued to be central to the later dispute"[236]; "[a] pre-existing 'dispute' […] is any dispute whose intrinsic elements are invoked by the investor as the basis of the treaty claim"[237];

- The second criterion is legal: the tribunal must assess what is the "essential basis of a claim" [238] in each dispute; generally speaking, disputes are different if they are "grounded on differing legal orders, *i.e.*, the municipal and the international legal orders"[239].

386. Applying these criteria, the Tribunal finds that the subject matter of both disputes is entirely different.

387. First, there is a gap of more than two decades between the two sets of facts.

388. The historic dispute concerned the proper valuation of the *Bonos* in the 1980's and the constitutionality of *Ley 26597*, which provided that payment was to be made applying the "*principio nominalista*". The factual matrix of the present arbitration occurred in 2013-2017, when the *Tribunal Constitucional* issued the *Resolución TC Julio 2013*, which was later developed by the Government in the *Decretos 2014* and *2017.*

389. Second, the essential basis of the two disputes is also different.

390. The historic dispute concerned a purely domestic legal issue: whether under Peruvian law and the Peruvian Constitution, the debt deriving from the *Bonos* was required to be revalued applying the "*principio valorista*", or whether the State was entitled to pay off the amounts due, delivering the nominal amount of currency specified in the securities (a question which the *Sentencia TC 2001* settled).

391. In the present dispute the Tribunal is called to adjudicate a totally separate investment dispute: whether under the FTA and international law the Republic breached its international obligations and impaired the value of Claimants' investment by

- Committing a denial of justice, when the *Tribunal Constitucional* approved the *Resolución TC Julio 2013,* under undue influence of the MEF*,* without providing any reasoning and with grave procedural irregularities;

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[236] *Lucchetti*, para. 50.
[237] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017 ["***EuroGas***"], para. 441.
[238] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Decision on Annulment, 3 July 2002 ["***Vivendi I (Annulment)***"], para. 98; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, Doc. CA-18 ["***Crystallex***"], paras. 477-480.
[239] *Crystallex*, para. 480.

- Breaching the FET standard, when the MEF promulgated the *Decretos Supremos,* creating an arbitrary and unjust regime for the settlement of the *Bonos*;

- Expropriating Claimants' investment in breach of Art. 10.5 of the Treaty through the *Resolución TC 2013* and the *Decretos Supremos*;

- Breaching the Most Favored Nation provision of Art. 10.4 of the FTA, because *Resolución TC Julio 2013* and *Decretos Supremos* denied Gramercy with the "**Effective Means Clause**" of the Peru-Italy BIT of 1994;

- Breaching the National Treatment Standard ("**NTS**") of Art. 10.3, by according Gramercy less favorable treatment than the treatment granted to Peruvian bondholders, through the *Decretos Supremos*.

(ii) Counter-argument

392. The Republic makes a counter-argument: it says that the core of the dispute was always the same, the non-payment of the *Bonos.*

393. The facts simply do not bear out the Republic's thesis: neither the earlier dispute nor the current dispute has ever been about the payment or non-payment of the *Bonos*, simply because the Republic has never denied its obligation to settle the securities. What was at issue between the 1980's and 2001, was whether the face value of the *Bonos* had to be revalued to off-set the devastating effects of hyperinflation; whereas what the Tribunal has to adjudicate here is whether the *Resolución TC Julio 2013* amounts to a denial of justice, and whether the *Decretos Supremos* are so arbitrary as to constitute an international delinquency of the Peruvian Republic. The payment of the *Bonos* themselves has never been, nor is it now, under discussion.

* * *

394. Summing up, the Tribunal finds that, at the time of their acquisition by Gramercy, the *Bonos* were not burdened with a dispute against the Peruvian State regarding the same subject matter as the present dispute; Claimants' claims cannot be labelled as abusive.

b. The constitutional dispute was settled in 2001

395. *Pro memoria*: At the beginning of the 21st Century, the *Colegio de Ingenieros del Perú* filed a constitutional appeal against the Peruvian State, claiming that *Ley 26597* (a law which had sought to exclude application of the "*principio valorista*" to the *Bonos*) was incompatible with the Peruvian Constitution. The procedure opposed the *Colegio de Ingenieros* against the State, there being no evidence that any of the selling bondholders participated. In 2001, the *Tribunal Constitucional* issued its final judgement, the *Sentencia TC 2001*, which accepted the claim and declared the unconstitutionality of the impugned law.

396. When Claimants acquired the *Bonos* six years thereafter, the fact that a constitutional dispute had existed, could not and did not make their investment abusive:

- The constitutional dispute had been solved in 2001, with the *Tribunal Constitucional* having established the principle that the revaluation of the *Bonos* was subject to the "*principio valorista*";

- Not only that: none of the selling bondholders had been a party to the constitutional dispute, and the argument that the securities they sold to Gramercy were somehow burdened by that extinct dispute is difficult to follow.

397. It is true that, when Gramercy bought the Bonos, the precise economic methodology to revalue the *Bonos* had still to be defined: the *Sentencia* had affirmed the principle that the *Bonos* had to be revalued according to the "*principio valorista*", but it did not specify the methodology to apply that principle – several being admitted under Peruvian law. The Republic was required to implement the "*principio valorista*", but the manner in which it would eventually do so, was left to be defined. That situation did not amount to a new dispute and did not render Claimants' investments abusive.

398. No legal system is unaffected by uncertainties. When investors make investments, uncertainty with regard to certain aspects of the regulatory or legal regime is most usually unavoidable. The act of investing under such circumstances does not equate, however, with abuse. To understand otherwise would render virtually all investments abusive.

c. The evidence shows that there were no pre-existing claims by the selling bondholders

399. Respondent finally argues that Claimants' investment must be considered abusive, because certain selling bondholders, before the sale of the *Bonos* to Gramercy, had submitted a judicial claim against Peru for the payment of the *Bonos*.

400. The evidentiary record, however, shows otherwise: the evidence marshalled or invoked by Respondent does not prove, in the Tribunal's considered opinion, that the selling bondholders had indeed submitted claims against the Republic or that any of the *Bonos* acquired by Gramercy were the subject of such claims.

(i) Discussion

401. GPH formalized the purchase of the *Bonos* from each domestic bondholder in carefully drafted contracts with analogous drafting called a "*Contrato de Cesión de Derechos*" ("***Contrato***")[240]. In accordance with the provisions of the *Contratos*, GPH purchased from the Peruvian bondholders two types of assets ("*bienes*"):

- The *Bonos Agrarios* themselves, *i.e.*, the securities owned by the selling bondholder, endorsed in favor of GPH, by signing the endorsement on the back of the security, and

[240] Doc. R-701.

- The underlying credit rights belonging to the bondholder, consisting in the right to receive the compensation owed by the Republic for the historic expropriation of the bondholder's land under the *Ley de Reforma Agraria*.

402. In the representations and warranties text of the *Contrato* each selling bondholder specifically represented that with respect to the *Bonos* being sold

> *"*[*m*]*antiene todos los derechos de acreedor expropiado materia de indemnización por parte del Estado Peruano"*

and that the securities

> "*pueden y podrán ser opuestos y/o ejercidos plena y válidamente y sin limitación alguna* […] *frente al Estado Peruano*"[241].

403. The selling bondholders thus represented in writing to Gramercy that, before the sale, they had not filed any claim against the State in relation to the *Bonos* and that the securities were not burdened by any pre-existing litigation.

404. The uncontradicted representations by the selling bondholders are compelling proof: no evidence has been marshalled by Peru, showing that these representations were untrue. The Tribunal notes that in such a hypothetical claim, Peru would have been the respondent, making it easy for Peru to provide evidence. But Peru has failed to produce any such evidence.

405. The Tribunal consequently finds that the *Bonos* acquired by Gramercy were not burdened by any pre-existing litigation.

Subsequent litigation

406. Between 2011 and 2013 (nearly four years after the initial purchase), GPH filed with the *Juzgados especializados en lo Civil de Lamabayeque* in Peru seven proceedings requesting that the Judge revalue ("*actualice*") certain *Bonos Agrarios,* owned by GPH[242]. These documents prove that GPH filed *ex novo* actions requesting the Courts the revaluation of the *Bonos* – not that it somehow subrogated into and continued court actions originally filed by the selling bondholders seeking their revaluation[243].

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[241] Doc. R-701, Clause 3.2.
[242] Doc. CE-764; Doc. CE-765; Doc. CE-766; Doc, CE-767; Doc. CE-768; Doc. CE-770 and Doc. CE-771.
[243] Respondent submitted the entire court records of these proceedings (Doc. R-616, Doc. R-617, Doc. R-618, Doc. R-619, Doc. R-620, Doc. R-1059, Doc. R-620) some of which have the reference number of the original expropriation proceedings (*e.g.*, Doc. R-617, corresponding to case number "00195/1978"). In those cases, the historic reference number remained after a "*recomposición de expediente*", following which Gramercy sought for the first time the revaluation of certain *Bonos Agrarios*, in the terms provided by *Sentencia TC 2001*. In none of the court records presented by Respondent the original bondholders had previously filed a request for revaluation of the Bonos.

(ii) Counter-arguments

407. Peru has sought to make several counter-arguments.

408. First, Peru underlines the fact that the *Contrato* refers to the "*derechos* […] *litigiosos y/o expectaticios"* which the selling bondholders assigned to Gramercy[244].

409. The Tribunal does not share Peru's argument.

410. It is true that the *Contrato* includes the following definition of *Bonos*[245]:

> "*A los Bonos y derechos de crédito […] incluyendo los derechos accesorios, vinculados, litigiosos y/o expectaticios que pudieran corresponder a dichos Bonos, los derechos de crédito y/o aquellos que pudieran corresponder a EL CEDENTE respecto de éstos, se les denominará e identificará conjunta e indistintamente como los "BIENES*" (Capitals in the original, Emphasis added)

411. But this definition refers simply to a hypothesis: if the *Bonos* do have "*derechos accesorios, vinculados, litigiosos y/o expectaticios*", these ancillary rights form part of the definition of *Bienes,* and are transferred together with the securities. But the very words used in the clause make it clear that there is no certainty that these ancillary rights exist ("*que pudieran corresponder*").

412. The definition does not prove *quod demonstrandum erat.*

413. Second, the Republic draws the Tribunal's attention to an internal document, prepared by Gramercy, entitled "Check list of Items to Cover in our Due Diligence"[246], which refers to the "purchase [of] claims". Based on the terminology used in this internal memorandum, Peru alleges that GPH understood that it was buying pre-existing domestic disputes.

414. The Tribunal does not share Respondent's construction of the memorandum. The document adds that the purchase "will involve having a lawyer draft a purchase agreement that covers all the bases under a Peruvian law". The purchase agreement is in fact the "*Contrato de Cesión de Derechos*", and the object of this agreement are the *Bonos* and the expropriation right – not some hypothetical claims arising from pre-existing disputes. To the contrary: as noted above, under the *Contratos,* the selling bondholders expressly represent that such disputes do not exist[247].

[244] Doc. R-701, Clause 1.7.
[245] Doc. R-701, Clause 1.7.
[246] Doc. R-1095.
[247] *See* paras. 402-403 *supra*.

415. Third, Respondent draws the Tribunal's attention to a statement made by Mr. Koenigsberger during the Hearing, in which he allegedly stated that Gramercy "took over" claims already pending in Peruvian Courts[248].

416. A careful review of the Hearing Transcript disproves Respondent's argument.

417. Mr. Koenigsberger was being examined in redirect by Claimants' counsel. The questions were referring to the changes which had occurred in Peru between "2008 and 2013"[249]. Counsel put the following question to the witness:

> "Okay. Could you just describe to us what you recall about some of those observable inputs during that period"[250]

418. The answer was

> "Well, certainly in that period there were two administrations – two committees of Congress, Agrarian Commissions, that made significant process towards the advancement of a Land Bond swap […]"[251]

419. And then the following dialogue began:

> "Q: And you also mentioned, I think, in the answers you gave to Mr. Hamilton, other indications to local courts. Was that something you were also taking into account?
>
> A: Yes, it was.
>
> Q: What—do you recall whether during this period that is 2010 to '11, Gramercy also took some efforts with respect to local courts?
>
> A: I do.
>
> Q: Can you tell us about that?
>
> A: We had a subset of the position that we took over the existing litigations. Prior to those litigations, we tried to, again, come to a consensual resolution with Perú under a conciliation process, and we – without being able to get that consensual resolution, we continued to advance those in the court […][252] [Emphasis added]

420. Peru says that Mr. Koenigsberger's words: "we had a subset of the position that we took over the existing litigations" proves that certain *Bonos* purchased by Gramercy were burdened with existing litigation against the State, when Gramercy purchased these securities.

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[248] R PHB-J para. 61.
[249] HT(ENG), Day 2 (Koenigsberger), p. 634, ll. 11.
[250] HT(ENG), Day 2 (Koenigsberger), p. 634, ll. 16-18.
[251] HT(ENG), Day 2 (Koenigsberger), p. 634, ll. 19-22.
[252] HT(ENG), Day 2 (Koenigsberger), p. 635, l. 8 – p. 636, l. 2.

421. Peru has failed to provide any further information regarding this alleged "subset of the position" – something which Peru could easily have done, being the respondent in these allegedly existing litigations. Peru does not say whether the "subset" is constituted by one *Bono* or by many; it also fails to identify the names of the selling bondholders who allegedly had initiated a claim against Peru before selling the securities to Gramercy. The lack of precision deprives Peru's argument of any evidentiary value.

422. Furthermore, there are other possible interpretations, different from that advanced by Peru, for Mr. Koenigsberger's obscure phrase. The context of his statement is the period 2010-2011 and he may be referring to the seven sets of *Bonos* (which he calls a "subset") which Gramercy took to the Peruvian Courts, claiming full payment (the claims were eventually waived as a requirement for the filing of this arbitration). This interpretation is reinforced by the simultaneous Spanish translation of the Hearing Transcript. In the Spanish version, Mr. Koenigsberger says:

> "*Un subconjunto de la posición que teníamos en cuanto a las litigaciones existentes* […]"[253].

423. It is telling that in this version the expression "we took over", which is the basis of Respondent's argument, does not appear.

424. Whatever the correct interpretation of Mr. Koenigsberger's words, the Tribunal's findings remain unaffected: the Tribunal finds that the evidentiary record, weighed in its totality, proves beyond any reasonable doubt, that the selling bondholders had never submitted a claim before the municipal Courts with regard to the *Bonos* which they sold to Gramercy; and that the only claims brought before the Peruvian Courts with respect to those Bonos were filed by GPH itself, *sua sponte* and on its own behalf, in 2012 – four years after the original purchases.

C. The investment dispute was not foreseeable

425. Respondent's third argument is that, given the existence of a longstanding dispute, it was foreseeable for Gramercy that – as in fact eventually occurred – Peru would implement further measures with respect to valuation and payment of the *Bonos*, which Gramercy might then seek to challenge in a Treaty case[254].

426. Claimants argue that when they invested in 2006 they were unable to foresee that Peru would implement measures with respect to the valuation and payment of the *Bonos* in breach of the Treaty[255].

[253] HT(SPA), Día 2 (Koenigsberger), p. 612, ll. 13-14.
[254] R PHB-J, para. 62.
[255] C PHB-J, para. 94; C II, para. 212.

Discussion

427. Respondent's argument gives rise to two separate questions: what is the object which must be foreseen, and what is the degree of probability which is required?

428. As regards the first question, the tribunal in *Tidewater* rightly said[256] that

> "it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host state in this way".

429. Applying this principle to the present case, it was perfectly legitimate, and no abuse of the investment protection regime, for Gramercy to have made its investments in Peru, seeking to protect itself from the general risk of future disputes with the State. For abuse to arise, it is necessary that, at the time when the investment was made, a specific dispute was foreseeable.

430. As regards the second question, the Tribunal agrees with the decisions in *Levy and Gremcitel*[257] that abuse of process requires that the probability of the occurrence of the specific dispute be very high. In the same vein, the tribunal in *Pac Rim* said[258]:

> "In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be" (Emphasis added)

431. Summing up, for an investor to engage in abuse of the Treaty, and for its claims to be inadmissible, it is necessary that, as of the date of the investment, the specific investment dispute be foreseeable, with a high degree of probability.

Application

432. Claimants bought the *Bonos* between 2006 and 2008. The specific investment dispute which is being adjudicated in the present arbitration arose from a *Resolución* adopted by the *Tribunal Constitucional* in 2013 and from several *Decretos Supremos* promulgated by the MEF between 2014 and 2017.

433. At the time of the investment, not even the best-informed observer of the Peruvian legal and financial landscape could have predicted – with a high degree of probability – that, within five years, the *Tribunal Constitucional* would adopt the *Resolución TC Julio 2013,* establishing that the revaluation of the *Bonos Agrarios* should be made through

[256] *Tidewater*, para.184.
[257] *Levy and Gremcitel*, para. 187.
[258] *Pac Rim*, para. 2.99.

dollarization, and ordering the Government to issue the appropriate legislation – and by doing so, allegedly incurring in a denial of justice.

434. It was even less foreseeable that the Government, upon the mandate of the *Tribunal Constitucional*, would eventually issue two sets of Decrees, the *Decretos 2014* and *2017*, with a content which, in Claimants' submission, is arbitrary and discriminatory.

435. The necessary consequence is that Claimants have not engaged in an abuse of Treaty.

D. The investment was used to wield pressure against Peru

436. Finally, Respondent argues that Gramercy did not engage in any economic activity in Peru, but organized an attack campaign against the Republic, seeking to pressure it into a settlement of the preexisting dispute, while at the same time secretly acquiring still more *Bonos* in 2017. The Treaty, says the Respondent, was used as an instrument to wield pressure against Peru[259].

437. With respect to Respondent's first argument, the Tribunal has already concluded that, even if the engagement of an economic activity in the host State may – in certain circumstances – serve as a criterion to determine the existence of a protected investment, the FTA also expressly covers certain non-entrepreneurial investments, such as the acquisition of public debt[260].

438. As regards the second argument, it is true that Gramercy used highhanded techniques and lobbying efforts to secure a settlement with the Republic, in the most advantageous terms possible for the investor. As stated previously, the Tribunal has sympathy for the ill-feelings that these efforts may have at times caused to a sovereign State. It is also true that in 2017 Claimants purchased an additional quantity of *Bonos*, without informing the Republic (these additional *Bonos* do not form part of the present arbitration).

439. The Tribunal notes, however, that the Republic does not allege that any of these actions involves a breach of U.S., Peruvian or international law by Claimants, and that the Republic has failed to cite to any precedent supporting its request.

440. In the Tribunal's opinion, an allegedly excessive lobbying and public relations campaign is not a cause capable of turning otherwise admissible claims into inadmissible claims. And although Claimants' purchase of additional *Bonos*, while this procedure was ongoing, may have caused surprise or bewilderment to the Republic, as perhaps to the Tribunal, that fact cannot render Claimants' claims inadmissible.

[259] R PHB-J, paras. 60-63; R I, paras.189-194; R II, paras. 24-44.
[260] See para. 248 *supra*.

E. Conclusion

441. Abuse of process can arise when a claimant acquires an asset, which is already burdened with a domestic dispute, and thereafter files an investment arbitration against the host State, with the same dispute elevated to an international level. This is the factual situation which underlies the *leading case* in this matter, *Phoenix Action.* In that decision, the protected investor acquired the shareholding of a company in the host State, and such company was already embroiled in a dispute with the same State, and the purchaser shortly thereafter filed an investment claim based precisely on the same dispute[261].

442. The situation in the present case is markedly different.

443. In the 1980's and 1990's, there had been a general dispute between bondholders and the Republic, regarding the proper valuation of the *Bonos.* That dispute does not make Gramercy's claims in this arbitration abusive:

- First, because the subject matter of both disputes is radically different: in the 1980's and 1990's, the dispute referred to the proper valuation of the *Cupones* under Peruvian law, while, in this case, the Tribunal is called to adjudicate whether the Impugned Measure, *i.e*. the *Resoluciones TC* and the *Decretos Supremos* (which occurred decades after the *Cupones* matured) breached (or not) the FTA by being expropriatory, arbitrary or discriminatory;

- Second, when Gramercy made its investment, there was no indication whatsoever that the *Tribunal Constitucional* would eventually adopt the *Resoluciones*, and the Government issue the *Decretos* – the Impugned Measures were totally unforeseeable, further diluting any argument that Gramercy's conduct may have been abusive.

444. There had also been a second dispute, constitutional in nature, surrounding the application of the "*principio valorista*" to the *Bonos*; but that dispute had been brought by a third party, the *Colegio de Ingenieros*, without participation either of the selling bondholders or of Gramercy, and the *Tribunal Constitucional* had solved it six years before Claimants made their first investment; by then, the constitutional rule was clear: *Bonos* were subject to the "*principio valorista*".

445. Respondent's final arguments – that Claimants' lobbying and public relations campaign was excessive and that Gramercy bought an additional tranche of *Bonos* in 2017 without informing the Republic – are, even if valid, by themselves incapable of giving rise to an abuse of Treaty, or of making Claimants' claims inadmissible.

[261] *Phoenix Action*, paras. 135-142.

F. Case law

446. Respondent has invoked the precedents in *Phoenix Action* and in *Philip Morris* to support its abuse objection. However, these cases are inapposite because the underlying facts materially differ from the facts of the present case.

Phoenix Action

447. The *Phoenix Action* arbitration concerned a paradigmatical case of treaty shopping: two Czech companies owned by a Czech national had pending local proceedings for alleged tax and customs duty evasions, which had led to the seizing of the companies' assets by the Czech authorities and an order to bring Mr. Beňo into custody. Mr. Beňo not only evaded the detention order by fleeing to Israel, but he also incorporated an Israeli company – Phoenix Action Ltd. – which in turn would acquire the two Czech companies, for the sole purpose of initiating an ICSID arbitration against the Czech Republic under the Israel-Czech Republic BIT.

448. The tribunal rightly declined jurisdiction over the pre-existing dispute, *inter alia*, because the claimant had engaged in "an abuse of the system of international ICSID investment arbitration"[262].

449. The tribunal found that the timing of the alleged investment and the timing of the claim were important factors when ascertaining a possible abuse of Treaty. In this case, the Israeli company filed the notice of dispute only two months after having acquired the Czech companies[263]. The tribunal also took into consideration that the rationale of the transaction did not involve the pursue of an economic activity in the host State, but rather a maneuver to gain access to ICSID jurisdiction[264]:

> "The evidence indeed shows that the Claimant made an '"investment"' not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made solely for the purpose of getting involved with international legal activity. The unique goal of the '"investment"' was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system".

Philip Morris

450. In 2011, the Hong Kong based Philip Morris Asia Ltd. brought an investment arbitration claim against Australia on the basis of the Hong Kong-Australia BIT. The dispute concerned the Tobacco Plain Packaging measures implemented by the Australian government in 2011 and how these affected the local branch, Philip Morris

[262] *Phoenix Action*, paras. 142-144.
[263] *Phoenix Action*, para. 138.
[264] *Phoenix Action*, paras. 140-142.

Australia. In this case, some months before the crystallization of the dispute, Philip Morris Australia was transferred from Philip Morris' Swiss subsidiary to the claimant, Philip Morris Asia Ltd[265].

451. The tribunal examined whether the plain packaging dispute was foreseeable and whether Philip Morris had engaged in an abuse of the system by restructuring its investment in order to gain access to arbitration. The tribunal found conclusive evidence that, throughout 2010, several government agencies and representatives had publicly discussed the possibility of implementing plain packaging regulation and, at that time, Philip Morris' executives were already considering the restructuring in order to gain treaty protection[266]. The tribunal concluded that the dispute that crystalized months thereafter was foreseeable[267] and that the restructuring was made solely to bring a claim under the Hong Kong-Australia BIT[268].

452. The situations described above in *Phoenix Action* and *Philip Morris* are different from the facts in the present case: Gramercy invested years before Peru enacted the challenged measures that allegedly constitute a Treaty breach and these governmental decisions could not have been foreseen at the time of the investment.

[265] *Philip Morris,* para. 97.
[266] *Philip Morris,* paras. 557-565.
[267] *Philip Morris,* para. 566.
[268] *Philip Morris,* para. 584.

V.3. WHETHER CLAIMANTS MEET THE TREATY'S WAIVER REQUIREMENT (THIRD OBJECTION)

1. RESPONDENT'S POSITION

453. Peru notes that Art. 10.18.2 establishes that to submit claims under the Treaty, Gramercy must meet the formal and material requirements as to the waiver of local proceedings[269]. The very first case under the Treaty, *Renco I*, was dismissed due to the claimant's failure to provide a compliant written waiver[270].

454. Peru observes that GPH's waiver provided with its first Notice of Arbitration on 2 June 2016 (the "**First Waiver**") suffered the same flaws as that of *Renco I*: it included a reservation of rights, permitting GPH to bring the claims in another forum for resolution on the merits, if this Tribunal declined jurisdiction or admissibility (the "**Reservation of Rights**"). Peru argues that, because of the Reservation of Rights, the First Waiver was invalid.[271]

455. Peru acknowledges that, on 18 July 2016, GPH submitted an amended Notice of Arbitration, with a "**Second Waiver**", which did not include a Reservation of Rights. However, Peru adds that the Second Waiver was not formally and materially effective until 5 August 2016, the date when GPH filed certain submissions to the Peruvian Courts desisting from the local proceedings.[272]

456. According to Respondent's Post-Hearing Submission, it was on 5 August 2016 when GPH validly submitted its claims to arbitration (satisfying the waiver requirement); this is after the cut-off date of the three-year time bar established in Art. 10.18.1 of the Treaty, which is 16 July 2016 [273]. In its Rejoinder, the Republic held a different view: it submitted that the effective date of the waiver was that on which the last local Court acknowledged the withdrawal of the local proceedings – and that happened on 10 August 2016[274].

2. CLAIMANTS' POSITION

457. Claimants underline that Peru's third objection only concerns GPH – not GFM[275].

458. Claimants submit that GPH's First Waiver was valid for the following reasons:

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[269] R I, para. 170.
[270] R I, para. 172.
[271] R I, para. 173.
[272] R I, para. 173.
[273] R PHB-J, paras. 74-78; R I, paras. 170-177; R II, paras. 67-75.
[274] R II, para. 80.
[275] C PHB-J, paras. 50-51.

- The Treaty does not provide any specific text that the waiver must meet; provisions as Art. 10.18.2 of the Treaty should not be interpreted in an overly formalistic or technical manner[276];

- The purpose of the waiver is to avoid concurrent litigation and inconsistent findings in two distinct fora; GPH's reservation of rights does not create these risks, because if the Tribunal were to deny jurisdiction or admissibility over Gramercy's claims, it would not consider the challenged measures on the merits and there would be no possibility of conflicting outcomes or of double redress[277];

- Requiring that GPH irrevocably waives its ability to bring any kind of claim, even if this Tribunal were to deny jurisdiction or admissibility, would have the fundamentally unfair effect of depriving GPH of any remedy with respect to the challenged measures[278];

- The findings of the tribunal in *Renco I* are not persuasive, are not binding on the present Tribunal and have been superseded by *Renco II*[279].

459. Subsidiarily, Claimants allege that GPH's Second Waiver, dated 18 July 2016, was in any case valid, since GPH's Reservation of Rights had been eliminated[280]. They add that Peru now concedes that GPH validly submitted its Notice of Arbitration, including a correct waiver, at the latest by 5 August 2016[281].

460. Summing up, for Claimants the relevant date when GPH complied with the waiver requirement was 2 June 2016; in the alternative 18 July 2016 and, even on Peru's highest case, 5 August 2016[282].

3. THE U.S. POSITION

461. In its submission, the U.S. contends that an effective waiver is a precondition to the Parties' consent to arbitrate claims[283]. Claimant must submit an effective waiver together with its notice of arbitration. The date of such filing is the date on which the claim is deemed submitted to arbitration for purposes of the time bar provided for in Art. 10.18.1 of the Treaty[284]. Where an effective waiver is filed subsequently to the notice of arbitration, but before the constitution of the tribunal, the claim will be

[276] C II, para. 155.
[277] C II, para. 157.
[278] C II, para. 158.
[279] C PHB-J, para. 55.
[280] C PHB-J, para. 54.
[281] C PHB-J, para. 53.
[282] C PHB-J, para. 56.
[283] USS, para. 10.
[284] USS, para. 11.

considered submitted to arbitration on the date on which the effective waiver was filed (and not on the date of the notice of Arbitration)[285].

462. The waiver must meet both formal and material requirements and the arbitral tribunal is required to determine whether the investor has complied with these requirements[286]:

- The waiver must be in writing and clear, explicit and categorical; it must relinquish any right to initiate or continue any action "with respect to" measures challenged in the arbitration, excluding interim injunctive relief; the phrase "with respect to" should be interpreted broadly, with the purpose of avoiding that the respondent State has to litigate in multiple fora and to minimize the risk of double recovery and conflicting outcomes;

- Claimant must abstain from initiating or continuing proceedings in another forum, as of the date of the waiver and thereafter; if claimant breaches this undertaking, claimant has not complied with the waiver requirement and the tribunal lacks jurisdiction over the dispute.

463. The U.S. stresses that a claimant must submit an effective waiver together with its notice of arbitration. The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Art. 10.18.1[287].

4. THE TRIBUNAL'S DECISION

464. Article 10.18.2 and 3 of the Treaty provides as follows[288]:

> "2. No claim may be submitted to arbitration under this Section unless:
>
> (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) the notice of arbitration is accompanied,
>
> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
>
> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
>
> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

[285] USS, para. 17.
[286] USS, paras. 12-15.
[287] USS, para. 11.
[288] Treaty, Art. 10.18.2 and 3.

> 3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration".

465. In accordance with these provisions, a claimant must file, together with the notice of arbitration, a written statement waiving its right to initiate or continue any action or proceeding, before any forum, with respect to any measure adopted by the State which constitutes an alleged breach of the Treaty and which is the basis for the investment arbitration (with the exception of actions that seek interim injunctive relief).

466. Claimant must submit the waiver together with the notice of arbitration; if the waiver does not accompany the notice, or if the waiver is defective, the notice of arbitration is incomplete, but the claimant is entitled to cure the defect, at least until the constitution of the Tribunal.

Respondent's objection

467. In this third objection, Respondent does not challenge the Tribunal's jurisdiction to adjudicate GFM's claims: GFM's First Waiver included no Reservation of Rights, and Peru does not challenge its validity.

468. Respondent's objection only refers to GPH and is two-pronged:

- Peru says that the First Waiver was invalid, but acknowledges that the Second Waiver was correct;

- But with regard to the Second Waiver, the Republic submits that it became effective on 5 August and not 18 July 2016.

469. Claimants' position is the opposite: in GPH's submission the First Waiver was valid, and subsidiarily, the effective date of the Second Waiver was 18 July 2016.

470. The Tribunal will briefly summarize the relevant facts and then adopt a decision.

4.1 PROVEN FACTS

471. *Pro memoria*: Between 2011 and 2013, GPH filed with the *Juzgados especializados en lo Civil de Lamabayeque* in Peru seven proceedings requesting that the Judge revalue ("*actualice*") the compensation awarded for the expropriation of certain pieces of agricultural land in the *Reforma Agraria* and formalized in certain *Bonos Agrarios,*

owned by GPH. Some of these proceedings remained at the initial stage, while others progressed, although no judgement had been rendered in any of them[289].

472. Claimants filed the Notice of Arbitration on 2 June 2016[290]. Para. 233(h) of such Notice included the First Waiver, which used the wording provided by Art. 10.18.2 of the Treaty, with the exception that GPH's (but not GFM's) text included the following Reservation of Rights:

> "[…] and except that, to the extent the Tribunal declines to hear any claims asserted herein on jurisdictional or admissibility grounds, GPH reserves the right to bring such claims in another forum for resolution on the merits".

473. A few days thereafter, on 15 July 2016, the partial award on jurisdiction in *Renco I* was issued – a case between a U.S. investor and the Republic of Peru also based on the US-Peru FTA[291]. In this award, the tribunal dismissed the case for lack of jurisdiction, finding that the waiver submitted by Renco had been defective, because it included a reservation of rights identical to that submitted by GPH in the present arbitration[292].

474. Three days thereafter, on 18 July 2016, Claimants submitted an amended Notice of Arbitration, which included GPH's Second Waiver, this time without any Reservation of Rights[293]:

> i. *Finally*, GPH hereby waives "any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16." *Id.* Art. 10.18.2(b). Notwithstanding this waiver, GPH "may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of [Peru], provided that the action is brought for the sole purpose of preserving [GPH]'s rights and interests during the pendency of the arbitration." *Id.* Art. 10.18.3.

475. Some time thereafter, on 5 August 2016, GPH submitted seven "*Solicitudes de Desestimiento*" before the *Juzgados de lo Civil de Lambayeque*, withdrawing its "*pedido*[s] *de actualización y pago de Bonos de la Reforma Agraria*"[294]. On 8, 9 and

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[289] As can be induced from Docs. CE-600; Doc. CE-601; Doc. CE- 602; Doc. CE-603; Doc. CE- 604; Doc. CE-605 and Doc. CE-606.
[290] Doc. C-3, para. 233(h).
[291] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, Doc. RA-146 ["***Renco I***"].
[292] Doc. RA-146 *Renco I*, paras. 58-59, 119, 189, 193.
[293] C-4, para. 233(i).
[294] Doc. CE-600; Doc. CE-601; Doc. CE- 602; Doc. CE-603; Doc. CE- 604; and Doc. CE- 606.

10 August 2016, the *Juzgados* issued their respective *Resoluciones*, accepting the *desistimiento* by GPH in each of the seven procedures[295].

476. The Tribunal in the present arbitration was constituted on 13 February 2018.

4.2 DISCUSSION

477. The Tribunal is called upon to decide two distinct questions:

- Whether GPH's First Waiver was valid (**A.**), and, if not,

- Whether the Second Waiver was effectively made on 18 July 2016 or 5 August 2016 (**B.**).

A. GHP's First Waiver was invalid

478. The first issue which the Tribunal must adjudicate is whether a waiver under Art. 10.18.2 of the Treaty, which otherwise meets the Treaty's requirements, becomes invalid if it includes a Reservation of Rights (*i.e.*, the claimant reserves the right to submit the claims to another forum, if the investment arbitration tribunal finds that such claims are inadmissible or outside the tribunal's jurisdiction).

479. Respondent argues that the Treaty expressly requires a written waiver "of any right to initiate […] any [local] proceeding" and that this constitutes a fundamental precondition to the existence of a valid arbitration agreement and Peru's consent to arbitrate[296].

480. In its submission, the U.S. supports the same position: quoting the *Renco I* award, the U.S. states that the waiver must be "clear, explicit and categorical"[297], adding that Art. 10.18.2 is a "no U-turn" waiver provision[298], and that the claimant "must relinquish any right to initiate or continue any action with respect to measures challenged in the arbitration"[299].

481. The Tribunal accepts the joint interpretation of Peru and the U.S. of Art. 10.18.2 of the Treaty.

482. As pleaded by Peru and the US, the purpose of the waiver provision is to provide flexibility, by allowing recourse to other fora up to a point, and certainty, by prohibiting any such recourse after filing a Treaty arbitration. The rule encourages investors to investigate possible remedies within the host State's municipal legal system, before seeking to internationalize their dispute by filing a notice of arbitration under the

[295] Doc. CE-741; Doc. CE-742; Doc. CE-743; Doc. CE-744; Doc. CE-745; Doc. CE-746 and Doc. CE-747.
[296] R II, para. 71.
[297] USS, para. 12.
[298] USS, para. 11.
[299] USS, para. 12.

Treaty[300]. But once the investor has taken the decision to submit to international arbitration, the rule prevents a return to a domestic court.

483. GPH's Reservation of Rights is incompatible with this "no U-turn" structure, because it purports to reserve GPH's right to initiate subsequent proceedings in a domestic court and perform the very "U-turn" which Art. 10.18.2 is designed to prohibit[301].

484. The necessary consequence is that GPH's First Waiver was invalid.

Renco I

485. The *Renco I* tribunal was confronted with a factual situation where a U.S. investor invoked the same Treaty, which is the basis of this arbitration, and submitted a waiver that included a reservation of rights identical to the one made by GPH in the First Waiver. In an extensive decision, the *Renco I* tribunal unanimously concluded that a waiver with such a reservation of rights was invalid for the purposes of Art. 10.18.2 of the Treaty, and that this deficiency deprived the tribunal of jurisdiction[302].

B. The Second Waiver became effective on 18 July 2016

486. Having reached the conclusion that GPH's First Waiver was invalid, the Tribunal notes that Peru does not dispute that the Second Waiver met the formal and substantive requirements of the Treaty. The only outstanding issue is the date on which the Second Waiver should be deemed effective.

487. In its Rejoinder, Peru submitted that GPH "could not have concluded an effective Treaty waiver any earlier than the date of the last court order – *i.e.*, 10 August 2016"[303]; in its Post Hearing Brief, Peru's position changed; Peru now pleads that GPH[304]:

> "[…] did not submit applications to withdraw from the local proceedings until 5 August 2016. Accordingly, it could not have satisfied both written and formal requirements any earlier than then […]".

488. Claimants say that the amended Notice of Arbitration, containing the undisputedly valid Second Waiver, was submitted on 18 July 2016, and that should be considered the effective date for all legal purposes[305].

489. The Tribunal sides with Claimants.

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[300] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, Doc. RA-146 ["***Renco I***"], para. 89.
[301] *Renco I*, para. 96
[302] *Renco I*, para. 119.
[303] R II, para. 80.
[304] R PHB-J, para. 76.
[305] C PHB-J, para. 54.

a. Discussion

490. Art. 10.16.4(a) of the Treaty provides as follows:

> "4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):
>
> (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General. […]"

491. The rule under Art. 10.16.4 is straightforward: a claim is deemed submitted to arbitration when the notice of arbitration is received by ICSID.

492. Art. 10.18.2 of the Treaty adds:

> "[n]o claim may be submitted to arbitration under this Section unless […] the notice of arbitration is accompanied […] by the claimant's written waiver […] of any right to initiate or continue before any [local Court] any proceeding with respect to any measure alleged to constitute a breach […]"

493. This rule requires that the notice of arbitration include a written statement by the claimant, in which the claimant relinquishes its right to continue any existing local proceedings with respect to the allegedly wrongful measures adopted by the State, and to abstain from initiating any such proceedings in the future.

494. There is no dispute between the Parties as to the fact that the Amended Notice of Arbitration:

- Was received by ICSID on 18 July 2016;
- Included a written statement, signed on behalf of GFM and GPH in which both Claimants waived their right to continue or to initiate local proceedings, without any improper Reservation of Rights; and
- Said waiver complied with all formal requirements under the Treaty.

495. In accordance with Art. 10.16.4(a) of the Treaty, 18 July 2016 is thus the date when the Amended Notice of Arbitration must (for all legal purposes) be "deemed submitted to arbitration". This conclusion coincides with the U.S. position:

> "Where an effective waiver is filed subsequent to the Notice of Arbitration but before constitution of the tribunal, the claim will be considered submitted to arbitration on the date on which the effective waiver was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration"[306].

[306] USS, para. 16

b. Respondent's counter-arguments

496. Respondent disagrees with this conclusion, and submits that the effective date when the Amended Notice of Arbitration was filed is not 18 July 2016, but rather

- The date when GPH submitted its request for discontinuance of proceedings before the local courts (Respondent's position in the Post Hearing Brief), *i.e.*, 5 August 2016; or

- The date when the local courts acknowledged GPH's request for discontinuance of proceedings, *i.e.*, 10 August 2016 (Respondent's position in the Rejoinder).

497. Respondent's positions – be it the one advocated in the Rejoinder or the one adopted in the Post Hearing Brief – cannot be reconciled with the wording of the Treaty.

498. What Art. 10.18.2 requires is that the Notice of Arbitration be accompanied by a written waiver of any right to initiate or continue local proceedings. As the *Waste Management I* tribunal explained, such waiver consists of a written declaration of intent, executed by the claimant, committing not to continue existing local proceedings and not to file new ones, which in turn requires that the claimant subsequently adopts a conduct which is compliant with such declaration:

> "*24* […] [*E*]*l acto de renunciar conlleva una declaración de voluntad de la parte declarante que lógicamente llevará aparejado un determinado comportamiento consecuente con la manifestación emitida*"[307].

499. What would happen if a claimant, after filing the notice of arbitration, breached the commitment formalized in the waiver?

500. The U.S. has addressed this issue in its submission. The breach of the waiver, consisting in the continuation of an existing local proceedings or the initiation of a new one, would result in the tribunal being deprived of jurisdiction[308]:

> "Thus, if a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute".

501. GPH never breached the waiver commitment contained in its 18 July 2016 Amended Notice of Arbitration. GPH did not take any action in continuation or furtherance of the seven existing local proceedings before the *Juzgados de lo Civil de Lambayeque*. The only subsequent action taken by GPH was, rather, to notify the relevant *Juzgados de lo Civil* (on 5 August 2016) that the Notice of Arbitration contained a waiver and to

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[307] *Waste Management Inc. v. United Mexican States I*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, Doc. CA-227 ["***Waste Management I***"], para. 24.
[308] USS, para. 14.

request the withdrawal of these proceedings. A few days later (on 8, 9 and 10 August 2016), the *Juzgados* duly acknowledged receipt of GPH's communication.

502. GPH informed the *Juzgados* in compliance with its previous waiver commitment *vis-à-vis* the Republic. This ancillary action is simply an act of compliance with a previous waiver: on 18 July 2016, GPH had already made a valid and unconditional declaration of intent in favor of the Republic of Peru, and since that date GPH was obliged not to continue any existing local proceedings and not to initiate any new one.

503. On 18 July 2016, GPH became irrevocably bound *vis-à-vis* Respondent, and that is the date that GPH's waiver became effective.

Waste Management I

504. The same conclusion was reached by the tribunal in *Waste Management I*, which explicitly acknowledged that the date of filing of the notice of arbitration before the Secretary General of ICSID was the relevant date when the claimant's commitment become effective:

> "*En el caso que nos ocupa, y a los efectos que nos interesa, WASTE MANAGEMENT presentó la notificación de solicitud de arbitraje ante el Secretario General del CIADI el 29 de septiembre de 1998 por lo que es a partir de esta fecha cuando la Demandante, de acuerdo con la renuncia presentada, tuvo que absternerse de iniciar o continuar cualquier procedimiento ante otras instancias respecto de medidas invocadas como violatorias de disposiciones del TLCAN*"[309] (Emphasis in the original)

[309] *Waste Management I*, para. 19.

V.4. WHETHER THE *RESOLUCIÓN* CLAIMS ARE TIME BARRED (FOURTH OBJECTION)

505. Art. 10.18.1 provides as follows:

> "No claim may be submitted to arbitration under this Section 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 under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage".

506. In the present case, the discussion revolves around the issue whether Claimants' claims relating to the *Resolución TC Julio 2013* (the "***Resolución* Claims**") are or not time barred. Under Art. 10.18.1 such Claims cannot be submitted to arbitration once the three-year time bar period has tolled. This period runs between an initial and a final date:

- The "**Initial Date**" is the date when each of the Claimants acquired (or should have acquired) knowledge (i) of the issuance of the *Resolución TC Julio 2013,* and (ii) of the loss or damage caused thereby,

- While the "**Final Date**" is the date which falls three years from such Initial Date.

507. Claimants were required, in accordance with Art. 10.18.1, to file a valid notice of arbitration regarding the *Resolución* Claims before the Final Date. If they have failed to do so and have submitted their Notice of Arbitration at a later stage, the Tribunal must dismiss such Claims for lack of jurisdiction.

1. RESPONDENT'S POSITION

508. Respondent's argumentation differentiates between GFM and GPH.

509. Regarding GFM's *Resolución* Claims, Respondent acknowledges that the Notice of Arbitration was properly submitted before the Final Date[310]. According to Respondent, the Final Date was 16 July 2016 – *i.e.*, three years after the date when the *Resolución TC Julio 2013* was issued on 16 July 2013. GFM's Notice of Arbitration with a valid First Waiver was filed on 2 June 2016, more than a month before the Final Date. Consequently, GFM's claims are not time barred.

510. The situation is different as regards GPH's *Resolución* Claims; Respondent avers that these Claims are time barred under Art. 10.18.1 of the Treaty:

[310] HT(ENG), Day 1, p. 308, l. 8 – p. 309, l. 1.

- The Initial Date of the time bar should be 16 July 2013, because the *Resolución TC Julio 2013* was issued on that date. In Respondent's submission, on that same day, GPH acquired knowledge of its existence and of the loss or damage that it caused to its investment; the time bar clause does not require full or precise knowledge of the loss and damage, and it is triggered by the first appreciation that loss or damage has been or will be incurred;

- The Final Date would have fallen three years thereafter, *i.e.*, on 16 July 2016; by that date GPH had not filed a valid Notice of Arbitration; the valid Notice of Arbitration, with a correct Second Waiver, was filed on 18 July 2016 – three years and two days after the Initial Date, and consequently outside the three-year limitation period provided for in Art. 10.18.1.

  [In its submission, Respondent argues that the Amended Notice of Arbitration should be deemed submitted either on 5 August 2016 or on 10 August 2016; the Tribunal has already decided that, in accordance with Art. 10.16.4(a) of the Treaty, 18 July 2016 is the date when the Amended Notice of Arbitration must, for all legal purposes, be "deemed submitted to arbitration"".]

511. The Republic says that the necessary consequence of the time bar is that the Tribunal is deprived of jurisdiction to adjudicate GPH's *Resolución* Claims.

512. But the Republic goes one step further: since GPH is allegedly claiming that Peru's breach of multiple Treaty provisions arises from a continuing course of conduct, beginning with the *Resolución TC Julio 2013*, GPH cannot evade the Treaty's limitations period by separating out and selectively emphasizing only the later measures[311]. Peru and the U.S. agree that this is impermissible[312].

513. Respondent invokes *Berkowitz* in support of its position[313].

2. CLAIMANTS' POSITION

514. As a preliminary argument, Claimants invoke the *Renco II* doctrine that a defective waiver still suspends the three-year time bar[314].

515. Claimants' second argument stresses that this fourth objection:

- Only affects claims submitted by GPH, not those of GFM; and

- Among GPH's multiple claims, it only affects one single claim, that the *Resolución TC Julio 2013* constituted an expropriation; it does not affect other claims relating to that *Resolución,* (including the way the MEF obtained the decision and the way

[311] R II, para. 65.
[312] R PHB-J, para. 73.
[313] R II, para. 62.
[314] C PHB-J, para. 55.

it was adopted by the *Tribunal Constitucional*), nor claims deriving from other *Resoluciones TC* or from the *Decretos 2014* and *2017*[315].

516. Claimant's third argument is that, even with respect to GPH's single claim for expropriation, Peru's objection still fails, because from the mere issuance of the *Resolución TC Julio 2013*, GPH could not and did not have the requisite knowledge that it had suffered a substantial deprivation of value[316]. As the Hearing illustrated, the *Resolución TC Julio 2013* was susceptible of multiple interpretations, several of which implied significant value for GPH. The MEF itself was so confused that it petitioned the *Tribunal Constitucional* for a clarification, and the *Tribunal Constitucional* issued two further *Resoluciones*[317]. GPH first obtained knowledge of the actual loss caused to its investment only when the *Decretos 2014* were promulgated. Thus, the Initial Date of the time bar should fall on the date of promulgation of the *Decretos* in 2014 (not on the date of issuance of the *Resolución TC Julio 2013*), with the consequence that the time period between that Initial Date and the Amended Notice of Arbitration (incorporating a correct Second Waiver) was less than three years. The result is that the *Resolución* Claims included in such Amended Notice of Arbitration were not time barred.

517. As a last defense, GPH argues that, even if the Tribunal were to accept Peru's time bar objection regarding the *Resolución* Claims, such finding would not affect other claims based on other illicit measures adopted by the Republic, like the *Resolución TC Agosto 2013* and the *Decretos 2014* and *2017*.

3. THE U.S. POSITION

518. The U.S. says that all claimants must prove the necessary and relevant facts to establish that each of their claims falls within the three-year limitation period established in Art. 10.18.1[318]. This period is a clear and rigid requirement that is not subject to any suspension or prolongation. An investor first acquires knowledge of an alleged breach and loss as of a particular date – not on multiple dates. Quoting the *Grand River* decision, the U.S. adds that subsequent transgressions arising from a continuing breach do not renew the limitation period once an investor knows or should have known of the alleged breach and loss or damage incurred thereby[319].

519. A claimant has actual or constructive knowledge of an alleged breach once it has knowledge of all elements required to make a claim under the article in question. In other words, the operative date is the date on which the claimant first acquired actual or constructive notice of the facts sufficient to state a claim under the article[320]. With regard to knowledge of incurred loss or damage, a claimant may have knowledge of

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[315] C III, para. 157; C PHB-J, para. 57.
[316] C III, para. 157.
[317] C PHB-J, para. 62.
[318] USS, para. 5.
[319] USS, para. 6.
[320] USS, para. 7.

loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date[321].

4. THE TRIBUNAL'S DECISION

520. This jurisdictional objection concerns only GPH's *Resolución* claims – not GFM's claims, and not to GPH's claims based on the *Decretos Supremos.*

521. Art. 10.18.1 of the Treaty (the full text is in para. 505 *supra*) requires that claims be submitted to arbitration

- before the Final Date,

- which falls three years after the Initial Date.

And the Initial Date is defined as the date when claimant first acquired, or should have first acquired, knowledge of the alleged breach and of the loss or damage.

522. The *Resolución TS Julio 2013* was issued on 16 July 2013. GPH has submitted three *Resolución* Claims, *i.e.*, claims based on this decision:

- The "**Denial of Justice Claim**", which alleges that the *Resolución TC Julio 2013* constituted a denial of justice and breached the Minimum Standard of Treatment of aliens, guaranteed by Art. 10.5 of the FTA[322];

- The "**Expropriation Claim**", which argues that the *Decretos 2014*, issued as mandated by the *Resolución TC Julio 2013*, resulted in the expropriation of GPH's investment[323]; and

- the "**Denial of Effective Means Claim**", based on the argument that the Peruvian legal system deprived the investor of its right to appeal to the Peruvian Courts[324].

523. The Tribunal will first determine the proper Initial Date (**4.1.**) and Final Date (**4.2.**) of the time bar, and finally decide whether GPH's *Resolución* Claims are time-barred (**4.3.**). It is important to note that, on the merits, the Tribunal will, in any case, dismiss the three *Resolución* Claims (see section **XI.1.3.** *infra*).

4.1 THE INITIAL DATE OF THE TIME BAR

524. Under Art. 10.18.1 of the Treaty, the Initial Date of the time bar is the date when a claimant, in this case GPH, first acquired actual or constructive knowledge of two cumulative facts:

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[321] USS, para. 8, quoting *Mondev,* para. 87
[322] C I, para. 197.
[323] C I, para. 150.
[324] C I, para. 233.

- The breach allegedly committed by the host State, and

- the existence of loss or damage caused by such breach.

525. The determinative factor is thus not the occurrence of the breach, but a claimant's actual or constructive knowledge of both the breach and the fact that it had incurred loss or damage resulting from it.

526. This conclusion has been accepted in *Mobil Investments,* (a decision applying NAFTA, a treaty with identical language to that of the FTA)[325]:

> "[T]he limitation period starts to run only when the investor or enterprise has not only acquired (or ought to have acquired) knowledge of the alleged breach but also has acquired (or ought to have acquired) knowledge that it has incurred loss or damage as a result. The date on which an investor or enterprise first acquires (or ought to have acquired) knowledge that it has suffered loss or damage may not be the same as the date on which it first acquires (or ought to have acquired) knowledge of the alleged breach which causes that damage".

527. What level of knowledge is required?

528. In accordance with established case law, what is required is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear[326]. More recent case law emphasizes that it is not enough that the claimant suspects that it might suffer a loss. As the *Mobil Investments* tribunal explained[327]:

> "To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty. While the Tribunal agrees with Canada that it is not necessary that the quantum of loss or damage be known, it is clear that there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained".

529. In the *Mobil Investments* and *Resolute Forest Products* cases the tribunals accepted that the investor, although it knew of the complained-of measures when they were promulgated, did not until a later date acquire the requisite knowledge that it would incur loss or damage as a result of the breach[328].

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[325] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, Doc. CA-142 ["***Mobil Investments***"], para. 153.
[326] *Mondev*, para. 87; USS, para. 29; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, Doc. RA-136, ["***Bilcon***"], para. 275; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, Doc. RA-147 ["***Rusoro***"], para. 217.
[327] *Mobil Investments,* para. 155.
[328] *Mobil Investments,* para.155; *Resolute Forest Products v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction, 30 January 2018, Doc. CA-170 ["***Resolute Forest Products***"], para. 178.

530. The U.S., in its submission, has summarized the *status quaestionis* in a short phrase, quoting as support the conclusions of the tribunal in *Resolute Forest Products*: for the time bar to start tolling, the claimant must have acquired actual or constructive notice of facts sufficient to state a claim for the relevant breach[329].

531. The Tribunal concurs with this interpretation of the rule. To properly apply it to the facts, it is necessary to differentiate between the three *Resolución* Claims:

A. The Initial Date of the Denial of Justice Claim is 25 January 2015

532. The Denial of Justice Claim is premised on the allegation that the MEF improperly interfered with the *Tribunal Constitucional* in obtaining the *Resolución TC Julio 2013* and thus caused a denial of justice.

533. What is the date when GPH acquired knowledge that the MEF had allegedly interfered with the *Tribunal Constitucional* and had improperly influenced the Tribunal in issuing the *Resolución TC Julio 2013*?

534. The relevant facts were not apparent in July 2013 – the published text of the *Resolución* did not manifest any irregularities. The facts became public knowledge, at the earliest, on 25 January 2015, when the story of the forged dissent broke in the press[330].

535. The Initial Date for the Denial of Justice Claim is consequently 25 January 2015. Since GPH's Notice of Arbitration was filed by 18 July 2016, it is not time barred.

B. The Initial Date of the Expropriation Claim is 17 January 2014

536. Claimants do not argue that the impact of the *Resolución TC Julio 2013* was to expropriate Gramercy's *Bonos*. It was only on 17 January 2014, when Peru issued the first *Decreto 2014,* that Claimants acquired knowledge of the dollarization methodology, which – according to Claimants – made the *Bonos* worthless.

537. For the time bar to start tolling, the claimant must have acquired actual or constructive notice of facts sufficient to state a claim for the relevant breach[331]. In the present case, this only happened on 17 January 2014, when Peru issued the first *Decreto 2014*. It was only then when GPH could realize that the loss amounted to an expropriation. Thus, it was also then, in January 2014, that the three-year time bar for the Expropriation Claim began to run. Since GPH's Expropriation Claim was filed on 18 July 2016, it is not time barred.

[329] USS, para. 7.
[330] C I, para. 92.
[331] USS, para. 7.

C. The Initial Date of the Denial of Effective Means Claim is also 17 January 2014

538. For reasons analogous to those set forth in the preceding section, the Initial Date of the Denial of Effective Means Claim should also be set at 17 January 2014 – it was the promulgation of the first *Decreto 2014* which provided Claimants with the relevant information to submit this Claim.

4.2 THE FINAL DATE

539. The Final Date is the date which falls three years from the Initial Date.

4.3 CONCLUSION

540. Summing up, Respondent acknowledges that the three-year time bar of Art. 10.18.1 is not applicable

- to any of GFM's claims nor
- to GPH's claims other than the *Resolución* Claims.

541. As regards Respondent's argument that GPH's *Resolución* Claims are time-barred, a careful analysis shows that GPH's *Resolución* Claims include three categories:

- For GPH's Denial of Justice Claim, the Initial Date is 25 January 2015;
- For GPH's Expropriation Claim and for GPH's Denial of Effective Means Claim the Initial Date for the tolling of the time bar is 17 January 2014, the date when the first *Decreto 2014* was issued;

542. The Final Date falls three years after the Initial Date, *i.e.*, in January 2017 for the Expropriation Claim and in January 2018 for the Denial of Justice and Denial of Effective Means Claims. GPH filed its valid Notice of Arbitration, with a correct Second Waiver, on 18 July 2016 (as established in Section **V.3.4.2.B.** *supra*), well before the time bars expired.

543. The Tribunal thus concludes that none of the claims submitted with the Notice of Arbitration by GFM or GPH (including GPH's Expropriation Claim and GPH's Denial of Justine and Denial of Effective Means Claims) was time-barred under Art. 10.18.1 of the Treaty.

> [Even accepting *arguendo* Respondent's position that the relevant date for effectiveness of the Notice of Arbitration was 10 August 2016, the day when the last *Juzgado* acknowledged GPH's waiver (and not 18 July 2016), GPH's *Resolución* Claims would still not have been time-barred].

4.4 PERU'S FINAL ARGUMENT

544. As a final argument, Peru says that, in accordance with Gramercy's own submission, Peru's breach of multiple Treaty provisions arises from a continuing course of conduct – beginning with the *Resolución TC Julio 2013*, being the initial alleged breach on which all subsequent breaches are founded. Gramercy cannot evade the Treaty's limitation period by separating out and selectively emphasizing only the later measures[332].

545. The allegation mischaracterizes Claimants' claims and, in any case, is baseless, because the Tribunal has already concluded that the *Resolución* Claims, based on the *Resolución TC Julio 2013*, are not affected by the three-year time bar.

[332] R II, para. 65.

V.5. WHETHER GRAMERCY IS AN INVESTOR (SIXTH OBJECTION)

1. RESPONDENT'S POSITION

546. Peru contends that Gramercy fails to meet its jurisdictional burden of proving that it meets the requirements to be an investor[333].

547. First, Peru argues that the Treaty requires that an investor actively "make" an investment, which, as a number of tribunals have held, requires that the investor "must itself have made a contribution", "at its own risk" – and not have benefited from a contribution made by someone else, who is the ultimate beneficial owner[334].

548. Respondent submits that Gramercy's own documents and executives' representations confirm that neither GPH nor GFM "made" any investment involving a contribution of its own, at its own risk[335]:

- GPH acquired the *Bonos* with money raised entirely from third-party beneficiaries;
- GFM was later substituted into the Gramercy structure to manage GPH, not to acquire or hold the *Bonos*; and
- any proceeds with respect to the *Bonos* will ultimately pass on to the third-party beneficial owners who funded the *Bonos* purchases.

549. It is Peru's position that both the Treaty and the general principles of international investment law only allow Gramercy to submit a claim for its own alleged losses, and not for losses suffered by third parties[336].

550. Second, Respondent argues that the beneficial owner of the *Bonos* is not GPH, but rather third parties, including non-U.S. nationals[337]. GPH acquired title to the *Bonos* by purchasing them with funds raised from its third-party clients, and these are the true beneficial owners. Any profits or losses in respect of the *Bonos* are to be distributed to third parties:

- First, from GPH to its sole owner Peruvian Agrarian Reform Bond Company, Ltd ("**PARB**").

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[333] R PHB-J, para. 103.
[334] R PHB-J, para. 102. Peru relies on *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, Doc. RA-317 ["***KT Asia***"], paras. 192, 219; *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, Doc. RA-318 ["***Alapli***"], paras. 350, 384, 386; (R PHB-J, footnote 226).
[335] R PHB-J, para. 103.
[336] R PHB-J, para. 110.
[337] R PHB-J, paras. 109, 111.

- Then, from PARB to its owners [redacted] according to their respective beneficial ownership interests in the *Bonos*, and

- from there to the thousands of beneficial owners who invested in those three entities.

551. In Respondent's opinion, the beneficial owners of the *Bonos* are the direct and indirect investors in GPH, and GPH is not authorized to submit claims on behalf of third parties (except in one scenario, which is not present here)[338].

552. Third, GFM does not exercise control over GPH, [redacted][339].

553. In sum, Respondent submits that under the Treaty and well-established principles of international investment law,

- GPH has no standing to claim for [redacted]% of the *Bonos* presented in this arbitration, as it only holds a mere nominal and *de minimis* beneficial ownership,

- while GFM only holds a [redacted]% beneficial ownership[340].

554. Respondent invokes the precedents in *KT Asia Investment* and *Alapli*[341] and submits that *Mera* is inapposite[342].

2. CLAIMANTS' POSITION

555. Claimants rely on the plain terms of the Treaty and aver that either title or control independently satisfies personal jurisdiction. Claimants meet both conditions and nothing more is required by the Treaty[343].

556. First, Claimants say that both GFM and GPH are U.S. entities organized under the laws of the State of Delaware, and that this suffices for them to be considered as investors under the Treaty[344].

557. Second, Claimants say that the requirement to "make an investment" simply requires Gramercy to cause or to give rise to its ownership or control, direct or indirect, of a

[338] R II, para. 107.
[339] R PHB-J, para. 111.
[340] R PHB-J, paras.111-112.
[341] R II, para. 91.
[342] R II, para. 92.
[343] C PHB-J, para. 37.
[344] C I, para. 142; C III, para. 13.

qualifying asset[345]. GPH itself actively sought out, negotiated, and ultimately acquired the *Bonos* directly from Peruvian individual bondholders in arm's-length transactions in Peru[346]. GFM satisfies the requirement of active contribution through its commitment of know-how, contacts, expertise and time[347].

558. Third, Claimants submit that GPH actually owns the *Bonos*.

559. The *Bonos* are nominative debt instruments, which were delivered to GPH, and GPH is in possession of them; the endorsement on the rear of each title demonstrates that title has validly passed to GPH under Peruvian law. Claimants have produced into the record an audited inventory and images of all of its *Bonos*[348] and of the notarized purchase contracts[349]. There is no question that GPH owns the *Bonos* under Peruvian law, as confirmed by Claimant' law expert Prof. Bullard[350].

560. Fourth, even though the *Bonos* were acquired with money raised from third-party investors, ownership belongs to GPH and the financing came from GPH's capitalization: Gramercy's clients subscribed to equity stakes in other Gramercy funds with interests in GPH, and these funds then equitized through capital contributions to GPH, which purchased the *Bonos* and has exclusively owned them ever since[351].

561. Claimants stress that the origin of capital is not relevant unless the applicable treaty says otherwise[352].

562. Any monetization of the *Bonos* will flow exclusively to GPH and distribution of proceeds from GPH to upstream investors is not automatic. The fact that GPH has upstream investors does not mean that it does not own the *Bonos*. Gramercy acts like any other investment manager, selling equity interest in funds that, in turn, hold a portfolio of assets. The purchases by Gramercy's clients of these interests do not affect GPH's exclusive legal title to 100% of the *Bonos*. Gramercy's clients do not have a stake in the *Bonos* themselves; they are shareholders of the funds that are invested, directly or indirectly, in GPH, and their contributions were capitalized in GPH[353].The investors do not hold title over the *Bonos* and do not manage them; all they receive is the proceeds from their investment after the deduction of Gramercy's expenses and profit margin[354].

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[345] C III, paras. 16-18.
[346] C III, para. 32.
[347] C III, para. 32.
[348] Doc. CE-224A.
[349] Doc. CE-339.
[350] C II, para. 16 by reference to CER-10, Bullard, para. 48.
[351] C PHB-J, para. 41.
[352] C III, para. 37.
[353] C PHB-J, paras.43, 45.
[354] C PHB-J, paras. 40, and 43.

563. GPH has at all times owned 100% of the *Bonos*, it maintains nominal and economic as well as legal and beneficial interest in the securities and GPH is the entity to whom any payment on the *Bonos* will flow[355].

564. Fifth, GFM controls the *Bonos* through its control of GPH. Control may be achieved through indirect majority ownership as well as other arrangements that constitute legal or *de facto* control. Either legal or factual control suffices for jurisdictional purposes[356].

565. Claimants say that, since 2011, GFM controls GPH both in fact and in law. Under GPH's Operating Agreement, GFM is the "Sole Manager" of GPH, and GFM is vested with exclusive power to act on behalf of GPH and manage its affairs and entitles it, among others, to exercise all rights of the assets held by GPH and to designate GPH's officers[357].

566. GFM also acts as the investment manager and makes all investment decision for PARB, the entity which in turn holds a 100% membership interest in GPH[358].

3. THE TRIBUNAL'S DECISION

567. In this sixth objection, Respondent submits that the Treaty requires that an investor actively "make" an investment, with its own contribution and at its own risk[359]. The Republic adds that GPH acquired title to the *Bonos* by purchasing them with funds raised from its third-party investors who are the true beneficial owners of the Bonos[360]. GFM has simply a [redacted]% holding in [redacted], through which it holds a mere [redacted]% indirect beneficial interest in the *Bonos*[361].

568. Claimants' position is totally different. In its submission, GPH is the owner of the *Bonos*, which it acquired with its own funds, provided as equity by its shareholders. Claimants aver that GFM is the investment manager of GHP and, as such, controls GPH, and through GPH it indirectly controls the *Bonos*.

569. The Tribunal will first establish the applicable Treaty provisions (**3.1.**), it will then summarize the proven facts, (**3.2.**) and then will apply the law to the facts (**3.3.**).

3.1 TREATY PROVISIONS

570. The scope of protection granted by the Treaty is established in Art. 10.1.1:

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[355] C PHB-J, para. 45; C III, para. 47.
[356] C II, para. 20.
[357] Doc. CE-165; C II, para. 23.
[358] Doc. CE-524.
[359] R PHB-J, para. 102. Peru relies on *KT Asia*, paras. 192, 219; *Alapli*, paras. 350, 384, 386; (R PHB-J, footnote 226).
[360] R PHB-J, paras. 109, and 111.
[361] R PHB-J, paras. 111,

> "This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) covered investments; […]". (Emphasis added)

571. The Treaty includes in its Art. 10.28 the following definition of investor of a Party:

> "**investor of a Party** means […] 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". (Emphasis in the original)

572. Enterprise of a Party in its turn is defined as follows:

> "**enterprise of a Party** means an enterprise constituted or organized under the laws of a Party […]". (Emphasis in the original)

573. The Treaty also provides a general definition of enterprise in Art. 1.3:

> "**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and weather privately-owned or governmentally- owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association". (Emphasis in the original)

574. Applying these definitions to the present case, to have standing as investors, Claimants must meet three separate requirements:

- First, GPH and GFM must each be constituted or organized under U.S. law,
- Second, GPH and GFM must have "made an investment",
- Third, the investment must have been made in the territory of Peru.

575. The first requirement is not disputed: GPH and GFM are U.S. limited liability corporations, organized under the laws of the State of Delaware[362]; GPH was incorporated on 17 April 2006[363], and GFM on 23 June 2009[364], as proven by their certificates of incorporation.

576. The third requirement is also not disputed with regard to GPH: the purchase price for the *Bonos* was paid by GPH directly into Peru to Peruvian citizens, negotiations for the acquisition of the *Bonos* took place in Peru, and the physical *Bonos* themselves are maintained in Peru – GPH's investment was thus made in the territory of Peru[365].

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[362] Doc. CE-165; CE-493.
[363] Doc. CE-455.
[364] Doc. CE-493.
[365] CWS-3, Koenigsberger I, paras. 38-41.

577. The discussion is centered on the second requirement: whether GPH and GFM have made an investment.

3.2 PROVEN FACTS

A. GPH's Sole Manager

578. GPH was incorporated on 17 April 2006. Under its Operating Agreement, of that same date, Gramercy Investment Advisors LLC ("**GIA**"), also a Delaware company, was designated as "Sole Manager", with extensive exclusive powers to manage the affairs of the company and to bind the company with respect to third parties[366]. The Operating Agreement adds that

> "The Sole Manager shall have the exclusive authority and discretion to approve or disapprove any elections required or permitted to be made by the Company under any provision of the Code or any other revenue law"[367].

579. The Operating Agreement designates the owners or shareholders of the company as "Members". At the time of incorporation, the only "Member" of GPH was a Cayman Islands corporation called Gramercy Emerging Markets Fund Ltd. ("**Gramercy Emerging Markets**")[368].

580. A year later, on 26 November 2007, the sole membership in GPH was transferred to another Cayman Islands company, Peru Agrarian Reform Bond Company, Ltd,. ("**Agrarian Bond Company**"), a corporation also managed or advised by the Gramercy group, which continues to be the only member of GPH[369].

581. Between 2006 and 2008, while GIA was its Sole Manager, GPH purchased 9,656 *Bonos Agrarios* from their legitimate holders – local Peruvian individuals[370]. GPH transferred into Peru and paid to the sellers approximately USD 33.2 million[371]. The *Bonos* were endorsed in favor of GPH and a notarized sales contract ("***Contrato de Cesión de Derechos***") was executed between GPH and each bondholder[372].

582. GPH used its own funds to pay for the bonds; those funds had been received by GPH, as an equity contribution, from its only shareholder, Gramercy Emerging Markets.

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[366] Doc. CE-454, p. Arts. 1.1, 3.1.
[367] Doc. CE-454, Art. 3.1.
[368] Doc. CE-703, para. 2 (confidential).
[369] Doc. CE-703, para. 20 (confidential).
[370] C I, paras. 5, 137.
[371] See Doc. CE-711; CWS-5, Lanava, para. 12; and CWS-6, Joannou, para. 7; RER-5, Quantum I, para. 124; R PHB-M, para. 104; RER-11, Quantum II, paras. 35, and 72.
[372] Doc. R-701, Clause 2.

B. Change in the Sole Manager

583. A few years later, and for reasons which have not been explained, Gramercy decided to change the company acting as GPH's Sole Manager: on 31 December 2011 GIA (the U.S. corporation which was the previous Sole Manager) assigned to GFM (the U.S. corporation which is acting as Claimant in this arbitration) its position as Sole Manager of GPH, and the transaction was formalized in an "Assignment and Assumption Agreement"[373]; there is no evidence that GFM paid any contribution to GIA in consideration of the assignment of the role as Sole Manager. On that same date, an "Amended and Restated Limited Liability Company Operating Agreement"[374] was entered into, which reiterated the extensive powers granted to the Sole Manager.

584. [redacted][376].

585. This implies that GFM, in addition to being the Sole Manager of GPH, is a minority indirect shareholder in GPH, holding a participation equivalent to [redacted]% of its share capital[377].

3.3 APPLICATION

586. The Tribunal has already established that the *Bonos Agrarios* qualify as protected investments under the Treaty. The question which the Tribunal must now answer is whether GPH and GFM, two U.S. corporations who act as Claimants in this arbitration, can be considered as investors (**A.** and **B.**). The tribunal will address the situation of each corporation separately. It will then analyze in depth the meaning of "control" under the FTA (**C.**).

A. GPH is a U.S. corporation which acquired the *Bonos* with its own funds

587. Respondent acknowledges that GPH acquired the *Bonos*, but submits that it did so, not with its own funds, but rather with funds raised from its third-party investors, who are the true beneficial owners of the securities. Claimants holds the contrary: it says that

[373] Doc. CE- 521.
[374] Doc. CE-165.
[375] By reference to the table in Doc. CE-686 (confidential).
[376] HT(ENG), Day 2 (Lanava), p. 756, ll. 10-20 l. 2 – p. 757, l. 2.
[377] Confirmed by Mr. Lanava, HT(ENG), Day 2 (Lanava), p. 756, ll. 6-9; acknowledged by Respondent R PHB-J, para. 111.

GPH is the owner of the *Bonos*, which it acquired with its own funds, provided by its shareholders as equity.

588. The facts support Claimants' case.

589. GPH is a company incorporated in Delaware in 2007, with separate legal personality. Between 2006 and 2008, this U.S. corporation purchased 9,656 *Bonos Agrarios* from Peruvian sellers, against payment of the agreed purchase price. The transactions were documented in two ways:

- The *Bonos* themselves were endorsed in favor of GPH, and
- a notarized sales contract ("***Contrato de Cesión de Derechos***") was executed between GPH and each bondholder[378].

590. Ownership over the *Bonos Agrarios* is regulated by Peruvian law – the law under which the securities were issued. Prof. Bullard, Claimants' legal expert on Peruvian law, has analyzed the legal requirements for the valid transfer of ownership of *Bonos Agrarios* under Peruvian law. Since *Bonos* are nominative securities, their valid transfer only requires a written contract of assignment of rights, executed between the legitimate owner and the new purchaser. The consent of the issuer of the security is not required[379]. His conclusion is that:

> "*La transferencia de valores nominativos, como los Bonos Agrarios, se realiza a través de cesiones de derechos. Para que una cesión sea válida, el único requisito formal es un contrato por escrito con el nombre del cedente y el cesionario. No se necesita cumplir ningún otro requisito bajo la ley peruana para la cesión de bonos*"[380].

591. Respondent's expert, Prof. Hundskopf, avers that an additional requirement for the valid transfer of the *Bonos* is that the transaction is lodged in the registry of the *Banco de Fomento Agropecuario del Perú*[381].

592. The Tribunal is not convinced for the following reasons:

593. First, the *Banco de Fomento Agropecuario del Perú* was extinguished in 1992, and accordingly, as Respondent expert Mr. Norbert Wühler acknowledges, from that point onwards, there was no longer an official registry with the information of the bondholders[382].

594. Second, Art. 144 of the Peruvian Civil Code establishes that "Cuando la ley impone una forma y no sanciona con nulidad su inobservancia, constituye solo un medio de

[378] Doc. R-701, Clause 2.
[379] CER-10, Bullard, paras. 45-46.
[380] CER-10, Bullard, para. 49.
[381] RER-2, Hundskopf I, para. 27.
[382] RER-3, Wühler, para. 79.

prueba de la existencia del acto". In this case, Art. 31 of the Ley de Títulos Valores, that governs the registry of transfer of securities, does not establish that the registry is a requirement for the validity of the transaction[383]. The registry only operates as additional means to prove the existence of the transaction of securities.

595. The only requirement imposed by the *Ley de Títulos Valores* for the transaction to operate with respect to the issuer is that the issuer is informed of the transaction: Art. 29.2 of the *Ley de Títulos Valores* sets forth that "*Para que la transferencia del título valor nominativo surta efecto frente a terceros y frente al emisor, la cesión debe ser comunicada a éste* [the issuer] *para su anotación en la respectiva matricula* […]"[384]. In this case, Gramercy informed the Peruvian Government regarding the acquisition of the *Bonos Agrarios* through notarized letters[385].

596. Third, the *Decretos Supremos* also acknowledge that the registry is not required to prove the legitimate ownership of the *Bonos* in order to request a revaluation. The only requirement is that[386]:

> "*En el caso que el solicitante sea un adjudicatario o cesionario, presenta copia legalizada del contrato o instrumento legal que acredite válidamente la adjudicación o cesión del Bono de la Deuda Agraria*".

597. Based on Prof. Bullard's opinion[387], the Tribunal accepts that, as regards those *Bonos Agrarios* for which a written *Contrato de Cesión de Derechos* has been executed, GPH is the legitimate owner under Peruvian law. The Tribunal has already established that the *Bonos Agrarios* are protected investments under the Treaty, and the necessary consequence is that, by validly purchasing ownership over the *Bonos Agrarios*, GPH has made an investment, and must be considered as an "investor of a Party".

Respondent's counter-arguments

598. Respondent's only counter-argument is that GPH did not itself make a contribution, that it does not own the *Bonos* at its own risk, and that the money was raised by Gramercy's ultimate investors, who are the ultimate beneficiaries of the investment and the beneficial owners of the securities.

599. The facts do not support Respondent's argument.

600. GPH is a U.S. corporation, with separate legal personality, which purchased and now owns *Bonos*, and which paid the acquisition with its own funds. It had received the

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[383] CER-10, Bullard, paras. 53-54; Doc. CE-391, Art. 31: "*Registro de las transferencias. El emisor o, en su caso, la Institución de Compensación y Liquidación de Valores deberá anotar la transferencia en la respectiva matrícula o registro, en mérito al documento en el que conste la transferencia, con la firma del cedente y demás informaciones y formalidades señaladas en el Artículo 30*".
[384] Doc. CE-391, Art. 29.2.
[385] Doc. CE-340.
[386] See *e.g.*, Doc. CE-275, Art. 7.
[387] CER-10, Bullard, para. 49.

moneys from its only shareholder or member (initially Gramercy Emerging Markets Fund and, after 2007, Agrarian Bond Company), by way of successive capital contributions.

601. It is true that these two shareholder companies are incorporated in the Cayman Islands, but the Treaty does not exclude from its ambit a U.S. investor that is owned by a non-US shareholder, nor does it prohibit funding provided to the investor by its non-US shareholder as equity contributions (Peru does not argue otherwise). It is also true that these Cayman Islands companies are owned by a complex and frequently changing web of companies, used by Gramercy's clients to channel their investment into financial instruments managed by Gramercy, including *Bonos Agrarios*. But again, the Treaty does not prohibit such a structure (and again, Peru does not argue otherwise).

602. All that is relevant is that the U.S. investor purchased the *Bonos* with its own funds derived from an equity injection by its shareholder. If, at the end of the day, GPH suffers a loss or makes a profit or has to be liquidated, any corresponding funds or debt will be delivered or accrue to its shareholder (and that shareholder will do likewise to the benefit or detriment of its own shareholders). The existence of an upstream shareholder is a universal phenomenon in corporate structures; but it does not detract from the fact that the subsidiary with its own legal personality (in this case GPH), acts and invests on its own behalf, with its own funds, acquiring the legal and beneficial ownership of the *Bonos.* And since GPH owns the *Bonos,* it qualifies as a protected investor under the Treaty.

Case law

603. Respondent has invoked several investment awards concerning cases of claimant companies nominally holding assets for a third-party beneficiary that did not have the nationality requirement of the applicable treaty.

604. In *KT Asia,* the claimant was a Dutch shell company, set up by a national of the host State, with the sole purpose of nominally holding his shares in one of the most important banks in Kazakhstan[388]. More importantly, the shell company never paid an arm's length price for the transaction; in fact, it never even paid the nominal price for the shares it supposedly owned[389]. In light of this, the tribunal concluded that KT Asia had made no contribution, and thus, it held no protected investment[390].

605. Similarly, the *Alapli* case concerned the construction and operation of a combined cycle power plant in Turkey. The project was sponsored by two Turkish nationals and American financiers. The concession was awarded to a Turkish entity and the financial contribution and know-how came from the American investors. It was only after certain legislative changes in Turkey that allegedly affected the project, that the two Turkish nationals and the American investors established a Dutch company and introduced it in

[388] *KT Asia*, paras. 176-178.
[389] *KT Asia*, paras. 183-186.
[390] *KT Asia*, para. 206.

the corporate chain. The tribunal concluded that the Dutch entity had made no contribution to the investment, and despite fulfilling the nationality requirement under the ECT and the Netherlands-Turkey BIT, it could not be granted protection[391]. Arbitrator Stern considered that the claimant had not made a *bona fide* investment, taking into account the timing of the Dutch company's involvement in the project, which took place when the dispute had already arisen[392].

606. These cases are inapposite; they refer to corporate restructurings where shell corporations acquire the investment for a nominal price, from a national of the host State or a third-party investor who does not benefit from the treaty. In this case, GPH, a company which at all times satisfied the nationality requirement of the FTA, purchased the *Bonos* with its own funds, acting on its own behalf, and thus became the legal and beneficial owner of the *Bonos*, five years before the breaches of the Treaty were allegedly committed by Peru.

B. GFM is a U.S. corporation which is a minority indirect shareholder and Sole Manager of GPH

607. The situation of GFM is more complex. It is also a corporation with separate legal personality incorporated under the laws of Delaware. But it does not directly own any of the *Bonos Agrarios*. Claimants say that its standing derives from two different situations:

- First, it is indirect owner of a small participation in GPH and, through GPH, in the *Bonos* (**a.**),
- Second, it is GPH's Sole Manager and investment manager, and as such it is alleged to control GPH (**b.**).

a. GFM is a minority indirect shareholder of GPH

608. GFM is indeed a minority shareholder of GPH: [redacted]. The end result is that GPH is a minority indirect shareholder in GPH, with a participation of [redacted]%. And GPH is the U.S. entity which owns the *Bonos*.

609. The definition of investment in Art. 10.28 of the Treaty includes "every asset that an investor owns […], directly or indirectly". The Treaty also contains no exclusion of minority participations. GFM owns indirectly [redacted] a [redacted]% participation in the *Bonos Agrarios* located in Peru. This asset qualifies as a protected investment

[391] *Alapli*, para. 347.
[392] *Alapli*, para. 315.

and gives GFM standing as an "investor of a Party" who "has made an investment in the territory of another Party".

> [GPH is direct owner of 100% of the *Bonos Agrarios* while GFM indirectly owns [redacted]% of the securities; the fact that GFM and GPH act together in the present arbitration as Claimants cannot result in double recovery, as will be further analyzed in the *quantum* section of the Award].

b. GFM does not have separate standing as Sole Manager of GPH

610. GFM also claims that it has standing in this arbitration as Sole Manager of GPH.

611. GFM assumed this position in 2011 under the "Amended and Restated Limited Liability Company Operating Agreement" signed between GFM (as the new Sole Manager) and Agrarian Bond Company (as the only shareholder of GPH or "Member") and with the consent of GIA (the former Sole Manager)[393]. This agreement describes the two corporate organs of GPH:

- The "Meeting of the Members", an annual event in which the owners of the company participate and adopt decisions[394], and
- The "Sole Manager", the administrative organ of the corporation, with exclusive powers to manage its affairs and to designate its officers[395].

612. Claimants invokes the definition of investment, which includes "every asset that an investor owns or controls, directly or indirectly". Based on this definition, Claimants aver that GFM, by acting as "Sole Manager", exercises control directly over GPH and indirectly over its assets, and that consequently the *Bonos Agrarios* are an asset "indirectly controlled" by GFM, with the result that GFM becomes an investor with regard to these protected investments.

613. The Tribunal disagrees, for two reasons.

(i) GFM did not make an investment in the territory of Peru

614. GFM only became Sole Manager of GPH as of 31 December 2011, two years after GPH's last investment in *Bonos Agrarios*. When GPH purchased the *Bonos*, GPH's Sole Manager was GIA – not GFM.

615. Claimants have failed to prove that GFM, by assuming the role of Sole Manager of GPH, made any investment in the territory of Peru. There is no evidence (and not even an allegation) that GFM made any contribution (in favor of GIA or otherwise) to

[393] Doc. CE-165.
[394] Doc. CE-165, Art. 4.1.
[395] Doc. CE-165, Arts. 3.1-3.2.

become Sole Manager of GPH[396]. What seems to have happened is that Gramercy decided – for internal organizational reasons – to substitute GIA (the initial Sole Manager) by GFM (another Delaware company belonging to the Gramercy group), and that this was accomplished by signing an Assignment and Assumption Agreement on 31 December 2011[397], but without any contribution being made by the assignee.

Claimants' counter-argument

616. Claimants say that GFM satisfies the requirement of active contribution through its commitment of know-how, contacts, expertise and time[398].

617. The Tribunal sees the matter differently.

618. Since 2011, GFM has carried out the type of activities that are typical for the manager of a company whose only asset is a portfolio of bonds. This does not require special know-how, contacts, expertise or time. It simply is the normal management activity which a diligent manager of a portfolio company is expected to carry out in the interest of the company and of its owners. But it does not have any of the characteristics (commitment of capital, expectation of gain or profit or assumption of risk) which constitute intrinsic characteristics of an investment.

(ii) GFM did not control GPH

619. There is a second reason.

620. Claimants aver that GFM, by acting as "Sole Manager", exercised "control" directly over GPH and indirectly over its assets, and that consequently the *Bonos Agrarios* are an asset "indirectly controlled" by GFM.

C. Meaning of control

621. Claimants' argument raises the difficult question of the meaning of "control", as used in the FTA.

622. The Definition of investment in Art. 10.28 includes every asset that an investor owns or controls, directly or indirectly:

> "**investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment […]".

396 [redacted]

397 Doc. CE-521.

398 C III, para. 32.

623. But this is not the only occasion when the verb "to control" or the equivalent expression "to exercise control" is used in the Treaty. The term appears three times in Chapter 10 of the Treaty, in relation to the investor[399]:

- Art. 10.10.2 restricts the requirements which a host State may impose on the members of the board of directors of a company[400] created by the investor in the host State; these requirements cannot impair the investor's control over such company:

  "A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment". (Emphasis added)

- Art. 10.12 allows a Party to deny the benefits of the Treaty to an investor of another Party

  "[…] that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party

  (a) does not maintain diplomatic relations with the non-Party; or

  (b) adopts or maintains measures with respect to the non-Party […]" (Emphasis added).

- Art. 10.16.1 (b) permits that a protected investor presents a claim on behalf of a company incorporated in the host State, provided that the investor owns or controls, directly or indirectly, such company:

  "the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim […]". (Emphasis added)

624. Art. 31.1 of the VCLT establish the general rule of interpretation of treaties:

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[399] Art. 10.20.8 of the Treaty, includes the term control referring to the scope of interim measure, including "an order to preserve evidence in the possession or control of a disputing party" (Emphasis added). And Art. 10.28, includes the definition of "investment agreement" between the investor and the host State, including those "with respect to natural resources that a national authority controls […]".

[400] The Treaty refers to enterprise, a wide concept which includes corporations – see Treaty Chapter 1, Art. 1.3: "**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association". Since in the present case GPH is a corporation, the Tribunal will simply refer to corporations.

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

625. The ordinary meanings of the verb control, according to Black's Law Dictionary, are "to exercise power of influence over" something, and "to have a controlling interest in" a company (and Black's provides the following example: "the five shareholders controlled the company")[401].

626. These ordinary meanings must (under Art. 31.1 of the VCLT) be read "in their context"; this implies that the term control, as used in Art. 10.28, must take into consideration its meaning in the other provisions of the Treaty.

627. Art. 10.28 defines investment in an asset that an investor owns or controls:

- Ownership can be predicated with regard to any asset;

- But control can only apply to enterprises (including companies).

628. Art. 10.10.2, 10.12 and 10.16.1 show that, when the Treaty uses the term "control", it is referring to the investor exercising control over an enterprise in the form of a corporation – not over other type of assets. An investor can own any type of asset (including a corporation). But control can only be exercised with regard to a corporation in which the investor already has an ownership interest: a corporation is controlled by an investor when the investor (through his majority or minority ownership interest and/or by other means) is able to determine the corporate decisions.

629. Control is especially relevant with regard to corporations incorporated in the host State; in such case:

- The investor may claim against the host State on behalf of the local corporation, as authorized by Art. 10.16.1 (b); and

- The host State cannot impair the investor's control by a requirement that a majority of the board of directors be of a particular nationality or residency, as provided for in Art. 10.10.

630. But control can also apply to corporations incorporated in the investor's home State or in third countries. There is no prohibition in the Treaty restricting the investor's right to hold the investment through one or more controlled corporations, incorporated in the investor's home State or in a third State – to the contrary, Art. 10.28 specifically foresees that an investment may be owned or controlled directly or indirectly.

[401] Garner, B. A., & Black, H. C. (2009), *Black's Law Dictionary*, 9th ed. St. Paul (2009), MN: West, p. 378.

a. Discussion

631. How does an investor exercise control over an enterprise or corporation, be it in the home State or in the host State?

632. Corporations are organized at two levels – that of the owners and that of the administrators (*e.g.*, in a joint stock corporation, the general shareholders meeting and the board of directors). Each level constitutes a separate organ, but cross-participation is frequently permitted (*e.g.*, in joint stock companies shareholders may act as members of the board of directors).

633. Owners (be they known as partners, shareholders or members) are those who contribute the funds required for the corporation's development, stand to benefit or suffer from the entity's activities, and receive the remaining funds upon the corporation's liquidation.

634. The administrative organ (be it a sole manager, a general partner or a board) manages the affairs of the corporation and designates its officers; administrators and officers are both the corporation's servants, authorized by the owners or the founding documents to adopt decisions on the corporation's behalf and in its interest. Administrators and officers normally receive a remuneration for their services (which may or not be linked to the company's profits) and may or may not be subject to dismissal by the owners; what separates owners and administrators/officers is the business risk; that ultimate risk is always borne by the owners.

635. Control of a corporation can only be exercised at the level of its owners – not at that of its administrators or officers. The owners, and not the administrators or officers, have an ownership interest in the company, and the owners are those who suffer the loss. The Treaty grants protection to assets owned or directly or indirectly controlled by an investor, reinforcing the conclusion that control of the corporation must be exercised at ownership level.

Application to the present case

636. GPH is a U.S. company with separate legal personality (not an investment fund without legal personality). Its only shareholder is [redacted]. It is this company which participates in the Meeting of Members, and which, by adopting decisions in this Meeting, controls GPH. The "Amended and Restated Limited Liability Company Operating Agreement", which purported to assign the position as Sole Manager to GFM, required the consent of the sole shareholder[402].

637. Control of GPH (for the purposes of the definition of investment contained in Art. 10.28 of the Treaty) is thus exercised by [redacted] – and not by its Sole Manager, GFM. The powers attributed to GFM may be wide and cover the totality of

[402] Doc. CE-165.

the day-to-day operations of GPH; its remuneration may be partially linked to the company's success; but in legal terms, GFM's role as the company's administrative organ is by nature subordinate: profit and loss and eventually liquidation proceeds will flow to [redacted] and not to GFM.

638. It is [redacted], as the entity having a controlling interest in GPH, which in principle would have standing as investor under the Treaty – if it were not for the fact that [redacted] and not in the U.S. and thus lacks the necessary nationality.

b. Claimants' counter-argument

639. Claimants say that control may be achieved through indirect majority ownership as well as other arrangements that constitute legal or *de facto* control[403].

640. But – contrary to Claimants' underlying assertion – control can only be exercised at the ownership level, not at the level of administration. Managers, directors and administrators do not control the company – their role is to adopt decisions and make declarations of intent on the company's behalf.

c. Case law

641. The Parties have referred to case law to support their positions.

642. The majority of cases are inapposite, because they discuss the existence or inexistence of control at the level of the corporate organ which represents the owners of the corporation – and not whether the administrative organ of a company by itself can be deemed to exercise control over the corporation[404].

B-Mex

643. In one of these cases, *B-Mex*, the U.S. claimants had invested in Mexico's gaming sector though seven local Mexican subsidiaries: five of them owned casinos and related assets, one held the gaming permits and the last one – *Operadora Pesa* – provided

[403] C II, para. 20

[404] The majority of investment awards addressing the issue of control do so (i) when interpreting Article 25(2)(b) ICSID Convention, to assess the standing of a locally incorporated company controlled by the foreign investor, or (ii) under Article 1117 NAFTA, to assess whether the foreign investor may claim "on behalf" of the locally incorporated company that it owns or controls. In these cases, the foreign investor owns less than 100% of the shares in the local entity and the discussion is always centred on the extent of control derived from the ownership rights. See, for instance, *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports, 16 ["***Klöckner***"], *SOABI v. Senegal*, ICISD Case No. ARB/82/1, Decision on Jurisdiction, 1 August 1984 ["***SOABI***"], paras. 38–41, *LETCO v. Liberia, Decision on Jurisdiction*, 24 October 1984, 2 ICSID Reports ["***LETCO***"], paras. 349, 351; *Aguas del Tunari*, paras. 227, and 264; *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994 ["***Vacuum Salt***"], para. 43; *Bernhard* Von Pezold *and others* v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, 28 July 2015, Doc. CA-197 ["***Von Pezold***"], paras. 317, 324-326; International Thunderbird Gaming Corp. v. United Mexican States, UNCITRAL, Award, 26 January 2006, Doc. RA-77 ["***Thunderbird***"], paras. 105-108.

management and administrative services for the five casinos under a service agreement[405]. The U.S. claimants were shareholders of these local companies, except for *Operadora Pesa*, which was not owned by any of the claimants[406].

644. The U.S. investors made a claim for their own losses under NAFTA Article 1116 and also a claim under Article 1117 "on behalf" of their local subsidiaries. With respect to the second claim, the respondent contended that the U.S. nationals did not own or control the local enterprises[407].

645. The tribunal addressed the objection of ownership and control examining the share percentage that the U.S. nationals held in each of the companies[408]; first concluding that absent ownership of 100% of the shares, an investor could not be deemed to "own" the enterprises in the sense of Art. 1117 NAFTA[409]; however, the tribunal concluded that the U.S. nationals did "control" the casino companies, because they had a sufficient number of shares that conferred upon them the legal capacity to control the organ of administration (what the tribunal referred to as the "legal control"); and with respect to the company that held the gaming permits, even if they did not own sufficient shares to have the "legal control", the U.S. nationals were able to exert "*de facto*" control through alliances with other shareholders[410].

646. With respect to *Operadora Pesa*, it was undisputed that the U.S. nationals had no ownership interest. The tribunal concluded that, since the U.S. nationals had no ownership, the question of whether they controlled the subsidiary was irrelevant, since they had no right to claim on behalf of that company. The tribunal made a clear distinction between "*de facto*" control derived from agreements between minority shareholders and a distinct "*de facto*" control exerted by the managers of the company. This latter control, without ownership is not sufficient to grant protection under the treaty[411]:

> "Article 1117 cannot be read as allowing the nationals of one NAFTA Party to pursue Treaty claims on behalf of an enterprise of another NAFTA Party if they cannot show to have an investment in that enterprise. If the Claimants were right, it might be possible, for example, for a Mexican company to appoint a US national as its sole director and for that director then to pursue claims under the Treaty on behalf of the Mexican company against Mexico, claiming that she need not be an "investor" herself to pursue such Treaty claim if she exercises *de facto* control. That proposition runs counter not only to the terms of Chapter 11, but also to its fundamental object

[405] *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019 ["***B-Mex***"], para. 31.
[406] *B-Mex*, paras. 33, 197.
[407] *B-Mex*, para. 41(c).
[408] *B-Mex*, paras. 173-197.
[409] *B-Mex*, paras. 205-207.
[410] *B-Mex*, paras. 228-241.
[411] *B-Mex*, para. 246.

> and purpose, which is the protection of investments by investors of another NAFTA Party". (Emphasis added)

647. *B-Mex* supports this Tribunal's conclusion that managerial control is not sufficient for an investor to acquire standing under the FTA.

Renta 4

648. Arguably the leading case discussing control by an investment manager is *Renta 4*[412]. In this decision the tribunal was confronted with two types of claimants:

- Investment funds without legal personality, created in Spain ("*fondos de inversion*"), and

- Investment companies with separate legal personality, also incorporated in Spain ("**SICAVs**").

649. Both types of investment vehicles were managed by a Spanish investment advisor, and both had invested in Yukos shares[413].

650. The tribunal concluded that the investment funds – which lacked legal personality – did not have standing to claim on their own. The person entitled to sue on their behalf would have been their investment manager, a Spanish corporation with separate legal personality, which by law acted as their manager. But the investment manager had failed to appear as claimant in the arbitration, and the tribunal dismissed the claims filed directly by the investment funds and their depositary[414].

651. The SICAV investment companies also had the same investment manager, who did not participate in the arbitration. But these companies had legal personality and were claiming on their own behalf, and the tribunal admitted their claims.

652. The factual situation in the present arbitration is similar to that of the SICAV investment companies: GPH also is an investment company with separate legal personality. And the decision in both arbitrations is analogous: investment companies which have the appropriate nationality and have invested their own funds are entitled to claim under the relevant treaty.

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[412] *Renta 4 S.V.S.A, et al, v. The Russian Federation, SCC No. 24/2007*, *Award on Preliminary Objections*, 20 March 2009 ["***Renta 4***"].
[413] *Renta 4*, paras. 125, 132.
[414] *Renta 4*, paras. 127-133.

Mason

653. The facts in *Mason* bear some similarity with the present arbitration, but there are also significant differences[415].

654. The investment vehicle in *Mason* was a Cayman Islands fund without legal personality, which had invested in Samsung shares, and whose general partner was a U.S. corporation, the claimant in the arbitration[416].

655. The *Mason* tribunal found that – since the Cayman Islands fund lacked legal personality – the U.S. general partner was the owner of the securities, and thus, was entitled to bring the claim. The fact that the U.S. general partner had made no capital contribution to the Cayman Islands fund – which was contributed by another Cayman Islands fund – was not a bar for the claim, since the general partner was entitled to an incentive allocation for its management of the funds[417].

656. For the tribunal, the incentive allocation met the characteristics of an investment and the active contribution requirement, because[418]

> "the General Partner's investment decision-making, management and expertise constitutes a commitment of 'other resources" in the sense of Article 11.28 of the [US-Korea] FTA"

657. Finally, the tribunal decided that the General partner controlled the Samsung shares both *de iure* and *de facto*, because the investment fund, not having legal personality, could only exercise its rights through the general partner[419].

658. *Mason* can be distinguished from the present case in two aspects:

- First, in *Mason* the investment vehicle is a Cayman Islands fund without legal personality, while in the present case the investment vehicle is a U.S. corporation with legal personality; as discussed in *Renta 4*, the role of an investment manager is legally different, depending on whether the investment vehicle has or not legal personality;

- Second, in *Mason* the general partner took the decision to invest and carried out the investment operation, while in the present case the Sole Manager did not participate in the decision which led to the purchase of the *Bonos* and was incorporated into the structure several years after the making of the investment.

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[415] *Mason Capital LP and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Preliminary Objections, 22 December 2019 ["***Mason***"].
[416] *Mason*, paras. 156-163.
[417] *Mason*, para. 180.
[418] *Mason*, para. 207.
[419] *Mason*, paras. 194-196.

D. Conclusion

659. Summing up, to meet the requirements established in the definition of an "investor of a Party" under Art. 10.28 of the FTA, a U.S. corporation must prove that it has made an investment in the territory of Peru:

- GPH, a Delaware corporation, has proven that between 2006 and 2008 it purchased 9,656 *Bonos Agrarios* from Peruvian sellers, against payment with its own funds of the agreed purchase price and that, under Peruvian law, it is the owner of such securities; GPH is thus a protected investor, who directly owns 9,656 *Bonos*;

- GFM, also a Delaware corporation, made a qualifying investment when it indirectly (through its participation in two Cayman Islands corporations and in GPH) acquired a [redacted]% participation in the *Bonos Agrarios* owned by GPH; GFM is thus a protected investor, who indirectly owns a [redacted]% participation in the 9,656 *Bonos Agrarios* directly owned by GPH;

- GFM however has failed to prove that it made a further protected investment, when in 2011 it accepted the assignment of the role as Sole Manager of GPH. Moreover, GFM does not "control" GPH by reason of being GPH's Sole Manager, with the consequence that GFM does not have standing to claim in this arbitration as GPH's Sole Manager.

V.6. WHETHER PERU CAN DENY THE BENEFITS OF THE TREATY (SEVENTH OBJECTION)

1. RESPONDENT'S POSITION

660. Respondent notes that Art. 10.12.2 of the Treaty contains the possibility for Peru to deny benefits to investors if[420]:

- The enterprise has no substantial business activities in the territory of any Party other than the denying Party, and

- Persons of a non-Party, or of the denying Party, own or control the enterprise.

661. Peru submits that the documentary and testimonial evidence confirms that Peru is entitled to deny benefits to Claimants, for two reasons:

662. First, GPH has no substantial business activities in the United States, given that it was created as a mere vehicle to buy and hold *Bonos* in Peru. The other alleged activities – contracts with Peruvian lawyers and with the local custodian of the *Bonos* – also concern the *Bonos* and, in any event, all take place in the territory of Peru, the "denying Party" under Art. 10.12.2 of the Treaty[421].

663. Second, GPH has at all times been owned by "persons of a non-Party". When GPH was first incorporated and began acquiring *Bonos*, [redacted]. Through subsequent evolutions in the structure of the company, GPH became entirely owned by [redacted][422].

2. CLAIMANTS' POSITION

664. Claimants aver that Peru's denial of benefits objection has not only been waived but is also meritless.

665. First, Claimants submit that Peru waived this objection by raising it untimely, *i.e.*, later than the Statement of Defense, which is the deadline established in UNCITRAL Rule 23(2) and Procedural Order No. 1 for raising jurisdictional objections. Claimants thus argue that to admit this objection would be fatal to Gramercy's elementary due process rights, since Gramercy would have lost the right to be heard regarding this objection[423].

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[420] R PHB-J, para. 104; Doc. RA-1.
[421] R PHB-J, paras. 105-106.
[422] R PHB-J, para. 107.
[423] C PHB-J, para. 48.

666. In any event, Claimants argue that the denial of benefits clause cannot apply to GPH because, despite Peru's mischaracterization of the evidence, neither of the two cumulative requirements of Art. 10.12.2 of the Treaty has been established[424]:

- First, GPH makes investment decisions and raises capital from its Connecticut headquarters, in the U.S., where all its employees are based; the activities conducted there exceed the threshold required to overcome the denial of benefits objection.

- Second, the fact that Gramercy's fund structure includes Cayman Islands companies does not alter the reality that GPH is a company incorporated in the U.S., controlled by U.S. persons – as the U.S entity GFM controls GPH –, and whose ultimate beneficial owners are U.S. persons – 93% as of March 2019.

3. THE TRIBUNAL'S DECISION

667. Respondent submits that this Tribunal does not have jurisdiction to decide Gramercy's claims since Peru is entitled to invoke the denial of benefits clause to deprive Claimants of the protections contained in the Treaty. Claimants, on the other hand, aver that Respondent's objection is time-barred and that, in any event, the requirements to deny benefits are not met.

668. Art. 10.12.2 of the Treaty, which contains the denial of benefits clause, reads as follows[425]:

> "A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise".

669. If this provision were applicable to the present case, the Tribunal would be deprived of jurisdiction[426]. Yet, before examining whether the requirements of Art. 10.12.2 are met, the Tribunal must determine whether Respondent's jurisdictional objection is time-barred.

Time bar

670. The Tribunal notes that under the UNCITRAL Rules, applicable to this proceeding, the deadline to file a jurisdictional objection is the statement of defense[427], as per Article 23(2)[428]:

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[424] C PHB-J, para. 49.
[425] Treaty, Art. 10.12.2.
[426] *Guaracachi America, Inc. and Rurelec PLC e tal. v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, Doc. CA-232, ["***Guaracachi***"], para. 381.
[427] See also *Guaracachi*, Doc. CA-231, paras. 381-382.
[428] Doc. CE-174.

> "2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence […]".

671. Additionally, Procedural Order No. 1, which contains the rules applicable to the procedure and the procedural timetable as discussed and agreed by the Parties and the Tribunal, establishes that:

> "10. Respondent shall present its Statement of Defense on December 14, 2018. The Statement of Defense shall set forth the facts, the legal arguments, any jurisdictional objection or counterclaim (if applicable) and the relief sought […]" (Emphasis added).

672. Pursuant to the above provisions, Respondent was required to raise any jurisdictional objections no later than in its Statement of Defense.

673. However, Respondent first raised a jurisdictional objection based on the denial of benefits clause long after its Statement of Defense. In fact, Respondent presented this objection at the last possible moment: when filing its Post-Hearing Brief on Jurisdiction on 1 July 2020.

674. Respondent's objection is time-barred, in application of Article 23(2) of the UNCITRAL Arbitration Rules and para. 10 of Procedural Order No. 1. Finding otherwise would deprive Claimants of a fundamental opportunity to defend themselves.

675. In sum, the Tribunal concludes that Respondent's objection to jurisdiction is untimely and must be dismissed.

Merits

676. *Ad cautelam*, the Tribunal also notes that Respondent's objection has no merit.

677. The denial of benefits requires (as the first of two cumulative conditions) that

> "the enterprise has no substantial business activities in the territory of any Party, other than the denying Party".

678. GPH is a Delaware corporation, which is managed by GFM, another Delaware corporation, and both belong to the Gramercy group, a U.S. investment management firm which is headquartered in Connecticut. All business activities are performed in the U.S. – not in the Cayman Islands nor in Peru. The only connection to the Cayman Islands is that GPH's controlling shareholder is a Cayman Islands corporation – but this does not prove that any business activities are being performed there. As regards Peru, the only connection is that GPH made and still owns a portfolio of *Bonos* in that jurisdiction; there is no evidence that GPH has a branch or performs business activities in Peru.

679. The first requirement for the application of the denials of benefit rule is thus not met, and therefore, the Tribunal does not need to analyze the second requirement.

V.7. LACK OF AUTHENTICATION (EIGHTH OBJECTION)

680. Respondent submits that Claimants have failed to prove the authenticity of the *Bonos* – around 9,600 pieces of decades-old paper – upon which they base their claims. Peru claims that this failure to authenticate shows Gramercy's disregard for the Treaty, fundamental due process and procedural integrity, by seeking to have the Tribunal render a multi-billion-dollar award based solely on Gramercy's unilateral review of the *Bonos*[429].

681. Claimants disagree and, in any event, submit that any objection to the authenticity of a particular *Bono* or *Cupón* would bear on *quantum*, not the Tribunal's subject-matter jurisdiction [430].

682. The Tribunal finds that the issue of the lack of authentication of the *Bonos* does not go to its jurisdiction, nor to the admissibility of the claims, but rather to *quantum*. Accordingly, the Tribunal will address this issue when it addresses the *quantum* of the claim (see Section **XII.3.4.** *infra*).

[429] R PHB-J, para. 101.
[430] C PHB-J, paras. 32-34.

VI. MERITS: GENERAL OVERWIEW

683. Claimants' "**Main Claim**" is the allegation that the *Decretos Supremos* constitute arbitrary measures in violation of the Minimum Standard of Treatment ("**MST**") of aliens enshrined in Art. 10.5 of the Treaty.

684. Claimants also submit a number of "**Ancillary Claims**":

- That the *Resolución TC Julio 2013* constitutes a denial of justice, in breach of Art. 10.5 of the Treaty;

- That the *Resoluciones TC 2013* and the *Decretos Supremos* (already referred to as the "**Impugned Measures**") gave rise to expropriatory measures, in breach of Art. 10.7 of the Treaty;

- That the Impugned Measures contravened the Most Favored Nation ("**MFN**") provision of Art. 10.4 of the FTA, because they denied Gramercy the protection afforded by the "**Effective Means Clause**" of the Peru-Italy BIT of 1994.

- That the *Decretos Supremos* breached the National Treatment Standard ("**NTS**") of Art. 10.3, by according Gramercy less favorable treatment than the treatment granted to Peruvian bondholders.

685. To adjudicate both sets of Claims, the Tribunal will proceed as follows:

- It will first summarize the Parties' positions (VII. and VIII.);

- Then it will review the Non-Disputing Party's submission on the interpretation of the standards of protection of the Treaty (**IX.**);

- Thereafter the Tribunal will adjudicate Claimants' Main Claim: that the *Decretos Supremos* by being arbitrary breach the MST of aliens provided for in Art. 10.5 of the Treaty (**X.**); the Tribunal will find for Claimants and conclude that the Republic has indeed incurred in a breach of its international obligations under Art. 10.5 of the FTA;

- This finding regarding the Main Claim renders Claimants' remaining Ancillary Claims moot, at least from a financial point of view: the amount of compensation due to Claimants (which will be established in section **XII.**) derives from the breach of Art. 10.5 of the FTA and will not be affected by the Tribunal's decision as regards the Ancillary Claims;

- Claimants are, however, requesting declaratory relief with regard to the Ancillary Claims ("Declare that Peru breached Articles 10.3, 10.4, 10.5, and 10.7 of the

Treaty"[431]); to avoid incurring in *infra petita,* the Tribunal is bound to adjudicate each of the Ancillary Claims; it will do so in Section **XI.**, in which the Tribunal will dismiss these Ancillary Claims in their totality.

- Finally, Section **XIII.** will be devoted to costs of the arbitration.

[431] C PHB-M, para. 149(a).

VII. CLAIMANTS' POSITION

1. MINIMUM STANDARD OF TREATMENT

686. Claimants allege that the Republic breached the MST under Art. 10.5 of the Treaty

- by evading payment through arbitrary and unjust conduct (**1.1.**);
- incurring in a denial of justice (**1.2.**), and
- taking actions inconsistent with Gramercy's legitimate expectations (**1.3.**)[432].

1.1 ARBITRARY MEASURES

687. Claimants argue that, through the *Decretos Supremos*, the Republic implemented an arbitrary process, in contravention of Peruvian law and the transparency standards of sovereign debt claims, that rendered an unjust outcome[433].

Arbitrariness

688. Gramercy argues that the *Decretos Supremos* were arbitrary for the following reasons[434]:

689. First, the *Decreto 2014* implemented an illogical formula that failed to achieve the stated purpose of reducing the effects of severe inflation and yielded an arbitrarily low valuation of the *Bonos*[435]:

- The parity exchange rate can be broken down to an impossible mathematical equation under which Soles Oro/USD = (Soles Oro/USD)2; this is a nonsensical construction that produces an unreasonable economic result[436];
- Interest accrued at an arbitrary low rate (short term U.S. Treasury rate)[437] only until 2013, and not thereafter, without any economic justifications[438];
- The exchange rate to convert USD into Soles was amongst the lowest in recent history[439].

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[432] C I, paras. 173, 180.
[433] C I, para. 194.
[434] C I, paras. 198-199; C PHB-M, para. 59.
[435] C I, para. 198; C II, para. 344; C PHB-M, para. 60.
[436] CER-4, Edwards I, paras. 205-211.
[437] C II, para. 334.
[438] CER-4, Edwards I, para. 182.
[439] CER-4, Edwards I, para. 217.

690. The *Decreto Febrero 2017* purported to rectify these errors, but to the contrary, it introduced more confusion:

- It failed to provide the full revised mathematical formula for calculating the value of the Bonds and appeared to deliver a wide range of possible values[440];

- It refrained from providing an explanation for the underlying methodology or reasons for changing the *Decreto 2014* formula[441].

691. The *Decreto Agosto 2017* implemented yet another arbitrary methodology[442] which yielded an unreasonable economic result by revaluating Gramercy's Bonos at USD 33.57 million[443], by:

- Continuing to apply dollarization instead of CPI;

- Using an inappropriate base period (the month of January 1969[444]) for the parity exchange rate, that is applied as of the date of the last clipped coupon, instead of the date of issuance;

- Appling the parity exchange rate only when converting Soles into USD; however, to convert back from USD to Nuevos Soles, it applies the current exchange rate[445].

- Continuing to apply a lower interest rate than the real rate of return and evade accrual of compensatory interest[446].

Lack of transparency and contravention of Peruvian Law

692. Gramercy also alleges that the Republic denied the bondholders the right of meaningful participation or consultation in defining the process to resolve the outstanding debt of the *Reforma Agraria*[447].

693. The Impugned Measures do not accord with the international best practices for sovereign debt claims mechanism because they purported to resolve the issue of the agrarian debt without engaging in consultations with the affected bondholders[448].

694. The procedure by which the *Decretos Supremos* were passed also failed to comply with Peruvian law[449], because they did not provide the reasons that justify the normative proposals formulated; the MEF failed to pre-publish the draft regulations to grant

[440] C I, para. 199; C PHB-M, para. 60; CER-4, Edwards I, para. 235.
[441] C I, para. 199; C PHB-M, para. 60.
[442] C I, para. 204; CER-4, Edwards I, para. 203.
[443] C I, para. 203.
[444] C PHB-M, para. 60.
[445] C PHB-M, para. 61.
[446] C PHB-M, para. 62.
[447] C II, para. 388.
[448] C II, paras. 364-366.
[449] C II, para. 377.

stakeholders the opportunity to voice their concerns; and refrained from having the legal office of the MEF undertake a review of the draft regulation to ensure compliance with the mandatory framework or to present to the Multisectoral Commission a Regulatory Quality Analysis Report[450].

Unjust outcome

695. In any event, the bondholder process implemented thorough the *Decretos Supremos* is simply unjust, because its sole objective was to eliminate the outstanding debt[451]. Not surprisingly it lacked widespread creditor engagement (typically above 90% in successful sovereign debt restructurings). The administrative process implemented by MEF only attracted less than 10% of the outstanding value of the Bonos Agrarios[452]; and to this date Peru has paid only 1% of the outstanding principal submitted for payment[453].

1.2 DENIAL OF JUSTICE

696. Claimants also contend that the Republic breached the MST by incurring in a denial of justice through the *Resolución TC Julio 2013*, that was the product of a highly irregular procedure[454].

697. First, Gramercy sustains that the MEF improperly caused the Justices of the Tribunal Constitucional to issue the *Resolución TC Julio 2013* as it finally came to be adopted. Some days before its issuance, on 9 July 2013, the Rapporteur of the Tribunal Constitucional, Justice Eto Cruz, had drafted a decision – endorsed by the rest of the Justices of the Tribunal Constitucional – ordering the update the Bonds using CPI from the issuance date, plus interest at the stated coupon rate. However, Claimants aver, that decision never came to light, and it was only attached as a forged dissenting opinion. When the MEF learned of the potential inconvenient outcome, some of its representatives arranged *ex parte* meetings with some of the Justices and pressured them to issue the *Resolución TC Julio 2013* ordering the update of the Bonos using the dollarization method, alleging that with the original decision the Republic's budget would be severely impaired[455].

698. Second, the *Resolución TC Julio 2013* was adopted in clear violation of the *Tribunal Constitucional* rules[456]:

[450] C II, para. 379.
[451] C II, para. 389.
[452] C II, para. 368.
[453] C PHB-M, para. 87.
[454] C I, para. 210.
[455] C PHB-M, paras. 47-50.
[456] C I, paras. 210-213; C II, para. 418.

- The Tribunal Constitucional lacked jurisdiction to rule the way it did, reverting the conclusions of the Sentencia TC 2001 though an executive resolution, violating the principle of *res judicata*.

- The substance of the decision (the dollarization method) was based on the premise that the Government could not afford to pay the value calculated under the CPI method. This justification was never briefed by the parties or supported by any other evidence, and thus, the decision lacked the required reasoning or basis.

- It was critically depended on a forged dissent, which supposedly triggered a tie of votes, that would then allow the President of the *Tribunal Constitucional* to issue a casting vote.

- It was issued after Chief Justice Urviola denied one of the other Justices the minimum period that the TC's own rules stipulate to issue a dissent.

699. Third, through *Resolución TC August 2013*, that declared that MEF procedure would be exclusive, without the possibility of access to courts, Peru denied Gramercy access to justice[457].

700. Claimants disagree with Respondent's proposition that a denial of justice claim may only be initiated by the person who participated in the local proceedings and was directly prevented from accessing justice. In Claimant's view, *Arif* and *ELSI* confirm that the standard of denial of justice in international law covers a broad range of claimants affected by the conduct of the courts of the State[458]. In this case, the *Resolución TC Julio 2013* undoubtedly affected Gramercy, and thus, even if Claimants were not named parties of the local proceeding their denial of justice claim is admissible[459].

701. Finally, with respect to Respondent's objection on exhaustion of local remedies, Claimants say that this requirement is met, because there was no available recourse against the *Resolución TC Julio 2013*, a decision of the highest Court of the land[460].

1.3 LEGITIMATE EXPECTATIONS

702. Subsidiarily, Gramercy sustains that, through the adoption of the *Decretos Supremos*, the Republic contravened Claimants' legitimate expectations, based on specific assurances made to Gramercy and Peru's general representations regarding its intent to provide foreign investors with a stable legal framework.

[457] C II, paras. 445-449.
[458] C II, paras. 447-451.
[459] C II, para. 453.
[460] C II, paras. 454-455.

Legitimate expectation to payment of the *Bonos*

703. Claimant says that when it decided to acquire the *Bonos* it had the legitimate expectations that it would receive payment of their CPI-updated current value, with interest, and that it would be able to enforce such payment before the Peruvian Courts[461]. Gramercy acknowledges that, at the time of its investment, some ancillary issues concerning the payment had still to be defined; however, the basic element of CPI valuation plus interest had already been established[462].

704. Gramercy's legitimate expectations were based on the *Sentencias TC 2001* and *2004* that reaffirmed Peru's commitment to paying the *Bonos* at current value[463], the *Proyecto de Ley 2006* that foresaw the use of CPI method[464], the judgements of Peruvian courts, confirming the revaluation of the *Bonos* using the CPI method plus interest[465], and the Government's consistent practice of using CPI to make inflation adjustments when revaluating taxable bases or pensions[466].

705. In Claimants' view, the Impugned Measures reversed the legal framework on which Gramercy relied to make its investment in breach of the MST[467]: first, through the *Resoluciones TC 2013*, that adopted a flawed dollarization method compulsory to all bondholders[468]; then, through the *Decretos Supremos* which established an administrative procedure and valuation method that offered a very small fraction of the value that Gramercy would have obtained under the CPI method[469].

Legitimate expectations based on Peru's general representations

706. Claimants aver that they relied on the Republic's publicly known commitment towards fiscal responsibility and the promotion of foreign investment before acquiring the *Bonos*[470]: Peru gained access to the global markets to place its sovereign debt, executed dozens of trade and bilateral investment agreements, and established constitutional guarantees of non-discrimination[471].

707. Gramercy reasonably trusted that the Republic was committed to honoring its obligations and paying the *Bonos*, in a manner consistent with the rule of law and with the established jurisprudence of the country's highest Court[472].

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[461] C II, paras. 282, 290, 298; C PHB-M, paras. 10, 33.
[462] C II, para. 295.
[463] C I, paras. 183-184.
[464] C II, para. 300.
[465] C II, para. 299.
[466] C II, para. 303.
[467] C II, para. 328; C II, paras. 332-336.
[468] C II, paras. 329-330.
[469] C II, para. 331.
[470] C II, paras. 304-305.
[471] C I, para. 186.
[472] C II, para. 306.

2. MEASURES EQUIVALENT TO EXPROPRIATION

708. Claimants aver that Peru indirectly expropriated the *Bonos* through the *Resoluciones TC 2013* and the *Decretos Supremos*[473], in breach of Art. 10.7 of the Treaty. Claimants substantiate their allegation in four arguments:

709. First, the Impugned Measures had a devastating impact on the *Bonos*, reducing their value by 98%: Claimants say that, but for the Impugned Measures, the current value of their investment is USD 1.8 billion; applying the valuation methods of *Decreto 2014* and *Decreto 2017*, the value of the *Bonos* is reduced to USD 0.86 million[474] and USD 33.57 million[475], respectively[476].

710. Second, Gramercy purchased the *Bonos* between 2006 and 2008 based on the legal framework governing their valuation, which included rulings from the *Tribunal Constitucional*, *Tribunal Supremo* and other lower courts, and which made clear that the Government was required to pay the *Bonos* at current value, using the CPI method[477]. In 2012, in line with the established framework, the former Minister of Finance reported that the total estimated worth of the *Bonos Agrarios* was USD 4.5 billion[478].

711. In Claimants' view, the Impugned Measures drastically modified the legal framework in force, implementing a deeply flawed dollarization method[479]; by doing so, Peru interfered with Gramercy's "distinct, reasonable investment-backed expectations", breaching the assurances against indirect expropriation under Annex 10-B of the Treaty[480].

712. Third, the Impugned Measures were not adopted to achieve any legitimate purpose, but expressly aimed at reducing the value of the *Bonos*. The *Resolución TC Julio 2013* changed the valuation method from CPI to dollarization allegedly because applying the former "would generate severe impacts on the Budget of the Republic"[481]. The *Resolución TC Agosto 2013* and *Resolución TC Noviembre 2013* echoed this purported reason to justify amending the valuation methodology[482]. However, there was no evidence or analysis supporting such a conclusion; to the contrary, many experts have opined that Peru is able to meet its debt obligations, even revaluating the *Bonos* using the CPI method[483].

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[473] C I, para. 149.
[474] C II, para. 247.
[475] C II, para. 259.
[476] C I, paras. 150, 152.
[477] C I, paras. 156-157; C II, paras. 226-232.
[478] C II, para. 243.
[479] C I, para. 158.
[480] C I, para. 155.
[481] C I, para. 161; C II, para. 244, citing to Doc. CE-17, Whereas, Section 25.
[482] C I, para. 161, citing to Doc. CE-180, Whereas, Section 15 and Doc. CE-183, Whereas, Section 7-8.
[483] C I, paras. 163-164; C II, paras. 264-265.

713. Fourth, the *Decretos 2014* and *2017* targeted Gramercy in a discriminatory fashion by establishing that bondholders that had purchased the Bonos "with speculative ends" should be paid last[484].

714. In conclusion, Claimants say that Peru caused an unlawful indirect expropriation of the *Bonos* in breach of Art. 10.7 of the Treaty[485].

3. NATIONAL TREATMENT STANDARD

715. Gramercy alleges that the Republic breached its obligations to accord no less favorable treatment than to local investors under Art. 10.3 of the Treaty, when the Government established through the *Decretos Supremos* that "speculative investors" are to be paid after all other bondholders[486].

716. Claimants say that a case for breach of the NTS requires establishing two elements[487]:

- That the State accords the foreign investor less favorable treatment than that accorded to local investors;

- That the foreign investor is in "like circumstances" to an investor of the host State.

717. In the present case, Gramercy sustains it suffered disparate and unfavorable treatment because through the *Resolución TC Julio 2013* authorized the Government to consider different categories of bondholders; and then the *Decretos Supremos* stipulated an order of priority for payment, placing last in line "legal entities who are not original bondholders and acquired the debt for speculative purposes"[488]. In Claimants' view, this provision only applies to Gramercy[489].

718. Claimants also submit that, while proof of the State's intention to discriminate against the foreign investor is not a requirement to find a breach of the NTS, it may serve as the basis to conclude that less favorable treatment has occurred. In this case, Claimants point to a letter of the President of the Audit Commission of Congress to the MEF, that records the State's explicit intent to discriminate against Gramercy, and altogether deny Claimants the right to seek payment[490].

719. Regarding the second requirement, Claimants sustain they were in "like circumstances" with the Peruvian bondholders, because they had the same rights under the Bonds and the Peruvian legal framework. The *Ley de Reforma Agraria* made no distinction

[484] C II, para. 273.
[485] C II, paras. 272-277.
[486] C I, para. 215; C II, para. 498.
[487] C I, para. 218.
[488] C I, para. 219, 221; C II, paras. 498-500.
[489] C I, para. 222.
[490] C I, para. 233.

between bondholders and the Ley 22749 provided for the free transferability of the Bonos, and thus, there was no legal basis to treat bondholders differently.

4. MFN AND EFFECTIVE MEANS CLAUSE

720. Claimants invokes the MFN clause set forth in Art. 10.4 of the Treaty, that requires the Republic to grant treatment to U.S. investor no less favorable than that accorded to other foreign investors. Through the Impugned Measures, Peru failed to provide Gramercy with effective means to bring claims and enforce its rights ("**Effective Means Clause**"), a protection guaranteed to Italian investors under the Peru-Italy BIT of 1994[491].

721. First, Gramercy says that it is well-established that, through the MFN clause, investors may incorporate substantive protections provided in other investment treaties entered into by the State. For instance, in *White Industries Australia Ltd. v. India*, the tribunal acknowledged the possibility that the investor had, through the MFN of the applicable treaty, to invoke the effective means of a third-party treaty[492].

722. Second, Claimants aver that the Republic breached the Effective Means Clause:

- Gramercy had no possibility to challenge the *Resolución TC Julio 2013* or the *Decretos Supremos*, despite their manifest substantial and procedural irregularities. The *Tribunal Constitucional* summarily dismissed ABDA's attempt to reverse the revised updating procedure, holding that the bondholder association had no standing to challenge either the *Resolución TC Julio 2013* nor the *Decretos Supremos*[493].

- The *Decretos Supremos* remove Gramercy's right to secure the current value of the Bonds through the Peruvian Courts. The *Resolución TC Agosto 2013* provided that the process established by the MEF would be mandatory and the *Decretos Supremos* established that the new administrative proceeding for the revaluation was incompatible with any attempt to seek the updating through new proceedings before the Courts; and for those judicial proceedings pending, the formula of the *Decretos Supremos* should apply. These provisions effectively closed off Gramercy's access to the Peruvian courts as a means of redress[494].

- The *Decretos Supremos* failed to provide Gramercy with an effective means of enforcing its rights under the Bonds: it established a burdensome process, even for bondholders who had been litigating for years before the Peruvian Courts and

[491] C I, para. 225; C II, para. 460; Doc. CA-45.
[492] C I, para. 227.
[493] C I, paras. 233-234.
[494] C I, para. 235; C II, paras. 484-485, 488.

granted unilateral discretion to the Government to determine the final amount due and form of payment, including non-financial forms of property[495].

[495] C I, para. 236.

VIII. RESPONDENT'S POSITION

1. MINIMUM STANDARD OF TREATMENT

723. The Republic says that Gramercy's claim for breach of MST under Art. 10.5 of the Treaty must be dismissed because

- Peru's measures were non-arbitrary, just and in accordance with due process, fixing a transparent and carefully regulated procedure for the update and payment of the Bonos (**1.1.**);
- the Republic did not incur in a denial of justice through the *Resoluciones TC 2013* (**1.2.**) and, lastly
- Peru had no legitimate expectations when it made its speculative investment at a time of longstanding legal uncertainty regarding the valuation of the *Bonos* (**1.3.**)[496].

1.1 ARBITRARY MEASURES

724. Respondent says that the MST of Art. 10.5 establishes a high threshold that Gramercy's claim for unjust and arbitrary treatment fails to meet[497].

725. First, the valuation formulas of the *Decretos Supremos* are economically viable and reasonable. The Republic sustains that it is Gramercy's proposed valuation that is fundamentally flawed because it essentially rewrites the terms of the *Bonos*[498].

726. Second, the *Decretos Supremos* were adopted as part of an administrative proceeding in conformity with Peruvian law, including the evaluation and recommendations of the DGETP (the MEF agency responsible for the bondholder process), the legal evaluation by the MEF's Office of the General Counsel, the relevant ministerial and presidential reviews and authorizations, and the publicity and transparency required under Peruvian Law[499].

727. Third, the bondholder process conforms with Peruvian law and the international best practices[500]:

- One of the common features of contemporary mass claims mechanisms is exclusivity: the requirement set in the *Decretos Supremos*, that a bondholder with claims pending in Peruvian courts, with no decision yet rendered, withdraw those claims in order to be paid through the Bondholder Process accords to this standard.

[496] R I, paras. 249-251; R II, para. 346.
[497] R I, paras. 270-271; R II, paras. 374-375; R PHB-M, paras. 60, 88-89.
[498] R I, para. 273.
[499] R I, para. 274.
[500] R I, para. 278

Peru emphasizes that this is without prejudice to the judicial and administrative recourses that the bondholder has throughout the process;

- The bondholder process offers the choice of four kinds of payment (sovereign bonds, land, cash or investment in State sectors), a distinct advantage for the beneficiaries, not present in other mass claims mechanisms;

- The bondholder process implements a reasonable payment order consistent with constitutional principles that prioritizes original bondholders and elderly, natural persons over juridical entities, and non-speculative investors over speculative investors. Many mass claims programs have in the past created categories of beneficiaries that are to receive priority treatment.

1.2 DENIAL OF JUSTICE

728. The Republic recalls that the standard of denial of justice under international law is extremely high and requires an exceptionally egregious and discreditable failure of the State's judicial system as a whole[501]. In this case, all of Gramercy's factual allegations to support its denial of justice claim are wrong[502]:

- As Peru's legal expert Dr. Hundskopf explains in his report, the *Tribunal Constitucional* did have competence to issue the *Resolución TC Julio 2013* in the terms it did, and its content and validity were confirmed by the subsequent *Resoluciones TC August* and *November 2013*[503].

- Gramercy's theory of supposed visits by government officials that supposedly influenced the decision of the *Tribunal Constitucional* is also baseless. Minister Castilla confirmed no such meetings took place; in fact, after the *Resolución TC Julio 2013*, many of the Ministers criticized the content of the *Resolución* and the Justices confirmed that they had received no external pressure that would have influenced their decisions, undermining any unfounded claim that the Government was in league with the *Tribunal Constitucional*[504].

729. In any case, Peru alleges that Gramercy's denial of justice claims is not admissible for two reasons:

730. First, Claimants have no standing to bring such a claim, because they were not a party to the judicial proceeding that resulted in the *Resoluciones TC 2013*. The denial of justice protection of Art. 10.5 of the Treaty does not create a broad right for unrelated third parties – in this case Gramercy – to bring claims based on local proceedings on which they did not participate[505]. The U.S. confirmed that for a successful denial of

[501] R I, paras. 261-262, 265.
[502] R II, paras. 365-366; R PHB-M, paras. 91-92.
[503] R I, para. 266.
[504] R I, para. 267; R II, paras. 365-366.
[505] R II, para. 360.

justice claim the investor must prove that it "was prohibited from becoming a party to adjudicatory proceedings"[506].

731. The Republic emphasizes that in this case it is undisputed that, if any, the aggrieved party by any failure in Peru's judicial system would have been the *Colegio de Ingenieros del Perú*, who initiate such proceedings, not Gramercy[507].

732. Second, Gramercy failed to exhaust local remedies, precisely because it was not a party to the local proceedings, and therefore not eligible to challenge the *Resoluciones TC 2013*, and in turn, it could not have complied with this requirement[508].

1.3 LEGITIMATE EXPECTATIONS

733. The Republic alleges that legitimate expectations are not an element of the customary international law MST set forth in Art. 10.15 of the Treaty; accordingly, even if Claimants could establish that Peru frustrated any purported expectations with respect to the Bonos, this could not form the basis for a violation of Art. 10.15 of the Treaty[509].

734. In any case, Respondent says that Claimants have failed to establish the source of their alleged legitimate expectations: first, Peru made no specific commitments to pay the *Bonos* at current value using the CPI method; and second, the Republic's general representations regarding its legal framework to encourage foreign investment could not give rise to Gramercy's speculative expectations.

Legitimate expectation to payment of the *Bonos*

735. The Republic says that, at the time that Gramercy acquired the *Bonos*, there was no legal framework that established the manner in which the *Bonos* should be updated and paid. The legislative, executive and judicial efforts to resolve the longstanding issue of the *Bonos* was ongoing, but no clear solution had been materialized. Peru certainly never made a commitment to the holders of *Bonos Agrarios* that payment would be made at current value using CPI method, that could give rise to legitimate expectations[510].

736. Respondent adds that Gramercy was well aware of the legal uncertainty:

- In its 2006 internal memorandum, it acknowledged that the different authorities involved had "discrepancies" regarding the possible applicable valuation methods and there was not even a consensus on the procedure to implement the payment of the *Bonos*[511];

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[506] R II, para. 360, citing to USS, para. 43.
[507] R I, para. 263.
[508] R I, para. 264.
[509] R PHB-M, paras. 86-87.
[510] R I, para. 259; R II, para. 352.
[511] R I, para. 258; R II, para. 352.

- Gramercy's lobbying efforts to influence the executive and legislative branches to adopt its preferred approach for the valuation of the Bonos reveals the lack of a specific legal framework[512];

- Gramercy acquired the Bonos at a deep discount and acknowledged in the purchasing contracts that is was taking the "risk" of an "expectative right" as to "the possibility of actual collection" [513];

- Gramercy's financial statements cautioned that the valuation of the Bonos "do not necessarily represent amounts that might be realized" and that "ultimate realization of such amounts depends on future events and circumstances" [514].

Legitimate expectations regarding the legal framework

737. The Republic says that Peru's efforts to attract foreign investment, including through the ratification of treaties and the current placement of sovereign debt in the international markets have nothing to do with the *Bonos Agrarios* and cannot be the source of the legitimate expectations that Gramercy purports to establish.

738. The *Bonos Agrarios* are the result of the *Reforma Agraria* implemented in the 1970s as compensation for land redistribution in Peru; they were not marketed or issued in the international capital markets, are denominated in Peruvian currency, are governed by Peruvian law and subject to the sole jurisdiction of Peruvian courts[515]. The Contracting Parties to the Treaty considered that contemporary sovereign bonds issued on the international markets could be covered by the scope of protection; however, the application of the Treaty to the Agrarian Bonds was never discussed[516].

2. MEASURES EQUIVALENT TO EXPROPRIATION

739. The Republic rejects Gramercy's claim that Peru adopted measures equivalent to expropriation because[517]:

- the Impugned Measures established the current value of the *Bonos* and a payment procedure of an asset that would have otherwise remained worthless;

- Claimants had no "reasonable expectation" that the *Bonos* would be updated using CPI, and where plainly conscious of making a speculative investment fraught with legal uncertainty;

[512] R II, para. 352.
[513] R II, para. 352.
[514] R II, para. 352.
[515] R I, paras. 256-257.
[516] R II, para. 354.
[517] R I, paras. 219-221; R II, para. 314.

- the Impugned Measures served a legitimate purpose of resolving the longstanding issue of the *Bonos* in adherence with the general welfare and consistent with fiscal security; and

- there are no "rare circumstances" that would justify deeming a legitimate regulatory action such as the *Decretos Supremos* as an indirect expropriation.

There was no substantial deprivation

740. Respondent says that, absent the Impugned Measures, the *Bonos* were worthless on their face value, and Gramercy was well aware of this when it made its speculative investment[518]. The effect of Peru's measures was to impart value to the *Bonos*: Gramercy acquired the *Bonos* from the original bondholders for USD 33.2 million and, applying the formula of the *Decreto Supremo 2017,* Gramercy would receive USD 33.57 million as payment[519].

741. Accordingly, the Republic says that Gramercy has suffered no deprivation in the value of its investment. Gramercy's allegation that it was entitled to a 5600% return on its investment – through the CPI method applied by its expert – is simply not a valid basis for an expropriation claim. Prior investment tribunal have dismissed expropriation claims for loss profits that could have materialized absent the challenged measures[520]. The U.S. coincides with Peru in that a claim for indirect expropriation must establish that the measures at issue "destroyed all, or virtually all, of the economic value of [the] investment"[521].

742. The Republic says that the *Decreto 2014* cannot be the basis of Gramercy's claims, because it was later revised by *Decreto 2017*, that refined the formula to update the value of the *Bonos*; the tribunal should take into consideration the fact that Peru indeed revised any inconsistencies in the formula that *Decreto 2017* resolved[522], and the fact that despite these corrections being made, Gramercy refused to participate in the bondholder process[523].

No legitimate expectation

743. The Republic emphasizes the treaty language in Annex 10-B which requires that, when assessing whether an indirect expropriation has occurred, the tribunal is to consider the investor's "reasonable investment-backed expectations". In this case, Respondent says that Gramercy had no reasonable expectation that the Bonds would be updated and paid using the CPI method as of the date of issuance[524].

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[518] R II, para. 321; R PHB-M, para. 76.
[519] R I, para. 225; R II, para. 327; R PHB-M, para. 76.
[520] R I, paras. 226-227.
[521] R II, paras. 318-319, citing to USS, para. 24.
[522] R II, para. 330.
[523] R II, para. 331.
[524] R I, para. 228.

744. Respondent says that the legal status relating to the valuation of the *Bonos* had been uncertain for decades; the only thing that the *Sentencia TC 2001* did was to rule that their valuation according to nominal value was unconstitutional, but it did not propose or order an alternative method for calculating the value or the payment procedure. Further, the *Sentencia TC 2004* upheld dollarization as a valid method for the update. In Congress, from 2001 to 2011, at least nine different bills were introduced proposing a variety of valuation methods; only two of these bills passed but were vetoed and never became law[525].

745. Gramercy was perfectly aware of this uncertainty, as shown in its Due Diligence Memorandum of 2006, which recorded the complexity of the issue and the discrepancy concerning the possible valuation methods; according to Gramercy's own calculations, the potential value of all *Bonos Agrarios* could range in between USD 650 million to USD 3 billion[526].

746. Respondent also points out that Gramercy acquired the *Bonos* from the original bondholders at a significant discount, in the range of 20% of their current value[527]. If the pre-July 2013 legal framework and valuation of the Bonds were anywhere as certain as Gramercy suggests, it is unlikely such transactions would have taken place[528].

Peru's measures serve a legitimate purpose

747. The Republic says that, in any event, the Impugned Measures cannot constitute an indirect expropriation because they were adopted to serve a legitimate public welfare purpose: resolving the longstanding issue concerning the valuation of the *Bonos Agrarios* and establishing a payment procedure for the legitimate owners[529]; and these measures were implemented in a manner consistent with other relevant constitutional principles, including the State's obligation to promote general welfare to its citizens[530] and the principles of budgetary balance and substantiality[531].

748. The Republic says that States are entitled to a high degree of deference on how to regulate their internal matters. In this case, the Tribunal must not assess whether the *Tribunal Constitucional* or the MEF should have adopted another valuation method or proposed another solution for the bondholder process; the question is whether there is clear and compelling evidence that the public interest invoked by Peru was pretextual and that the Impugned Measure were improper[532].

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[525] R I, para. 229.
[526] R I, paras. 231-232; R II, para. 335; R PHB-M, para. 83.
[527] R II, paras. 324-325.
[528] R I, para. 234.
[529] R I, para. 240.
[530] Peruvian Constitution, Art. 44.
[531] Peruvian Constitution, Arts. 77-78.
[532] R I, para. 244.

No rare circumstance to overcome the presumption against indirect expropriation

749. Finally, Peru highlights that Annex 10-B of the Treaty specify that "except in rare circumstances […] regulatory actions by a Party […] do not constitute indirect expropriations"[533].

750. In this case, Respondent avers, Gramercy has failed to establish any "rare circumstances" that would justify a finding of indirect expropriation. Peru implemented a bondholder process to resolve the longstanding issue of the *Bonos Agrarios*, in the manner more consistent with all relevant constitutional principles at stake[534]. Gramercy offers no response to this legitimate purpose underlying the regulatory measures that it challenges, and simply avers without evidentiary support that the measures were aimed exclusively at discriminating Gramercy and reducing the speculative value they assign to the *Bonos* through the CPI method[535].

751. In sum, this case does not present the "rare circumstances" in which regulatory action aimed at protecting the public welfare constitute an indirect expropriation[536].

3. NATIONAL TREATMENT STANDARD

752. The Republic alleges that Gramercy's national treatment claim is without merit and must be dismissed because[537]:

753. First, Gramercy is not in like circumstances with the Peruvian bondholders. The *Decretos Supremos* – as many sovereign debt claims procedures have done in the past – differentiate between types of bondholders, according to distinct categories, to structure the order of cash payments[538]. The differentiation is not based on nationality, but rather it reflects a legitimate policy decision to protect vulnerable citizens, for instance, distinguishing between elderly and young bondholders, physical persons and legal entities, and in general, prioritizing payment of those bondholders that require special protection[539].

754. Second, Peru did not accord Gramercy less favorable treatment, because the *Decretos Supremos* do not establish a *de jure* discrimination based on nationality. Gramercy simply alleges that it has been accorded less favorable treatment because other bondholders would have priority in payment under the *Decretos Supremos*; however, this alleged adverse effect is only hypothetical because Gramercy has refused to

[533] R II, para. 338.
[534] R II, para. 341.
[535] R II, para. 342.
[536] R II, para. 345; R II, para. 81.
[537] R I, para. 280; R II, para. 379; R PHB-M, paras. 96-98.
[538] R I, para. 286.
[539] R I, para. 288; R II, para. 384.

participate in the bondholder process, and therefore, any lack of payment is solely attributable to Gramercy's own conduct[540].

4. MFN AND EFFECTIVE MEANS CLAUSE

755. Respondent says that Gramercy's claim on the breach of the MFN clause, thorough a violation of the no effective means provision of the Peru-Italy BIT, is unfounded and must be dismissed for four reasons[541]:

756. First, the MFN clause of Art. 10.4 also requires that the investor that is claiming the treatment accorded to another investor under a different treaty "be in like circumstances" with the former. The interpretation of these terms is that the importation of substantive protections granted to investors protected under third-party treaties is prohibited because those protections are granted exclusively to those investors. The U.S. has confirmed the limitations of the MFN clause, in the sense that it cannot be meant for expanding the protection to include the guarantees offered in other investment treaties[542].

757. Second, the effective means provision of the Peru-Italy BIT that Gramercy invokes significantly overlaps with the protection granted to U.S investors under Art. 10.5.2 of the Treaty, regarding denial of justice[543].

758. Third, even if the effective means provision of the Peru-Italy BIT was applicable, the standard refers to the judicial system as a whole – which Gramercy never tested internally, because it chose to withdraw from the court proceedings where it was seeking the update of the value of its *Bonos*. Gramercy's attempt to challenge the outcome of the *Resolución TC Julio 2013* through this effective means provision is impermissible for the same reasons the denial of justice claim is inadmissible: Gramercy was not a party to the local proceedings, and therefore, cannot challenge them under the Treaty provisions[544].

759. Fourth, Peru has granted Claimants with effective means to enforce their rights, through the bondholder process established pursuant to the *Resoluciones TC 2013* and the *Decretos Supremos*. These measures establish a method for updating the value of the *Bonos*, a payment procedure, and avenues for both judicial and administrative appeals in certain circumstances to challenge the result of the process. Gramercy's own choice not to participate in the bondholder process cannot be equated to Peru's breach of the effective means standard[545].

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[540] R I, paras. 290-292; R II, para. 386.
[541] R I, para. 294; R II, para. 387; R PHB-M, para. 95.
[542] R I, para. 295.
[543] R I, para. 296; R II, para. 391.
[544] R I, para. 297; R II, para. 394.
[545] R I, para. 298; R II, para. 395.

IX. THE U.S. POSITION

760. In its Art. 10.20.2 Non-Disputing Party Submission, the U.S. provided its views on the interpretation of the protection standards of the Treaty discussed by the Parties – without taking a position on their application to the facts of this case.

761. In this Section, the Tribunal will summarize the content of the U.S.'s position.

1. MINIMUM STANDARD OF TREATMENT

762. The U.S. highlights that Art. 10.5 of the Treaty and Annex 10-A contain the express intent of the Contracting Parties to establish the customary international law minimum standard of treatment – evidenced in actual practice and *opinio juris* of States[546] – as the applicable threshold of treatment of investors protected by the scope of the Treaty[547].

763. The U.S. further adds that it is on the claimant to establish:

- the existence of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*, for it to become binding on the Contracting Parties[548]. The U.S. recalls that decisions of international courts and arbitral tribunals interpreting components of the MST, such as the fair and equitable treatment, are not themselves instances of "State practice" for the purpose of evidencing customary international law[549].

- that the disputing Contracting Party has engaged in conduct that breaches the relevant rule. Such assessment, the U.S. contends, must be made taking into account the high deference that international law grants States to regulate matters within their borders; and under the general rule that failure to satisfy the requirements of domestic law does not *per se* entail a violation of international law[550].

Concepts included into the MST

764. The U.S. says that, to this date, customary international law has crystalized to establish a MST only in the following areas, that are also regulated in the Treaty:

- The State's obligation to provide fair and equitable treatment – included in Art. 10.5.2(a) of the Treaty – which encompasses "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the

[546] USS, para. 33.
[547] USS, paras. 31 and 32.
[548] USS, para. 34.
[549] USS, para. 41.
[550] USS, para. 35.

principle of due process embodied in the principal legal systems of the world", *i.e.*, the law principle prohibiting denial of justice[551].

- The obligation to provide full protection and security, as stated in Art. 10.5.2(b), that requires the State to "provide the level police protection required under customary international law"[552].

Concepts not included into the MST

765. The MST does not include:

- Legitimate expectations: in the U.S.'s view, the obligation to provide fair and equitable treatment does not entail a separate obligation not to frustrate the investor's legitimate expectations. There is no general and consistent State practice and *opinio juris* establishing such an international obligation. The U.S. says that the mere fact that the State adopts an action inconsistent with the investor's expectations does not amount to a breach of the MST, even if the conduct results in loss or damage to the covered investment[553];

- Prohibition of discrimination: there is no general rule on non-discrimination, and the State may treat differently national and foreign investors, and also accord differential treatment to foreign investors from different States. The U.S. says that, even if it is understood that non-discrimination is incorporated into the MST, it is only applied within the context of other established customary international rules – also included in the Treaty – such as the prohibition of discriminatory expropriations, equal treatment regarding access to judicial remedies, or the State's obligation to provide full protection and security to national and foreigners on an equal basis[554].

- The concept of transparency is not a component of the MST giving rise to an independent State obligation[555].

Claims based on judicial measures

766. The U.S. says that Art. 10.5 includes claims for denial of justice under customary international law, including for instance[556]:

- being prohibited from becoming a party to adjudicatory proceedings;

[551] USS, para. 36.
[552] USS, para. 37, citing to Treaty, Art. 10.5.2.(b).
[553] USS, para. 38.
[554] USS, para. 39.
[555] USS, para. 40.
[556] USS, para. 45.

- failure to provide procedural guarantees indispensable for the proper administration of justice;

- manifestly unjust judgments that amount to a travesty of justice or are grotesquely unjust;

- evidence of corruption in judicial proceedings;

- discriminatory judicial treatment against aliens; or

- executive or legislative interference with the freedom or impartiality of the judicial process.

767. The customary international law standard establishes a high threshold[557] by prohibiting only final acts of the State's judiciary system that are "notoriously unjust"[558] or amount to an "egregious" administration of justice "which offends a sense of judicial propriety"[559]. A mere erroneous domestic court decision, resulting from the misapplication or misinterpretation of domestic law does not constitute on itself a denial of justice[560]. This is because, under international law, domestic judicial rulings are accorded even greater presumption of legality than legislative or executive acts[561].

768. Inherent to the standard of denial of justice is the exhaustion of local remedies rule, which may only be excluded when remedies against non-final judicial acts are futile or manifestly ineffective[562].

2. MEASURES EQUIVALENT TO EXPROPRIATION

769. The U.S. says that the Treaty provides for the prohibition of direct expropriation, except when the State does so for a public purpose, in a non-discriminatory manner, on payment of prompt adequate and effective compensation and in accordance with the due process of law[563].

770. Regarding the types of State measures that the standard purports to address, the U.S. submits that Art. 10.7 was envisaged for acts of the legislative and executive branches of the State. The U.S. makes clear that judicial measures may give rise to a claim for denial of justice under Art. 10.5 of the Treaty, but not to a claim for expropriation under Art.10.7[564].

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[557] USS, para. 46.
[558] USS, para. 44, citing to J. Paulsson, "Denial of Justice in International Law", Cambridge University Press (2005), Doc. RA-72/CA-156 ["**Paulsson**"], p. 44.
[559] USS, para. 44, citing to *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, Doc. RA-66 ["***Loewen***"], para. 132 and *Mondev*, para. 127.
[560] USS, para. 45.
[561] USS, para. 46.
[562] USS, para. 47.
[563] USS, para. 20.
[564] USS, paras. 28-29.

771. With respect to indirect expropriation, the U.S. says that the Treaty incorporates the prevailing principle under international law that *bona fide* and non-discriminatory regulation will not ordinarily constitute an indirect expropriation[565]. In line with this principle, Annex 10-B of the Treaty provides guidance to determine whether State conduct amounts to an indirect expropriation, by requiring a "case-by-case, fact-based inquiry" that considers, among others, the following factors:

772. First, "the economic impact of the government action" [566], which, according to Annex 10-B, "standing alone, does not establish that an indirect expropriation has occurred"[567]. The U.S. says that, under international law and arbitral practice, this requirement entails:

- the destruction of all, or virtually all, of the economic value of the investment; or an interference of such an extent to support the conclusion that the State has taken the investment at issue[568];

- the economic impact must be assessed by comparing the economic value of the investment immediately before the alleged expropriatory measure, based on the circumstances known to exist at that time; and the economic value of the investment immediately after the expropriatory measure. The U.S. emphasizes that assessing the value of the investment in both scenarios must be done with reasonable certainty, avoiding speculative determinations contingent on unforeseen or uncertain events[569].

773. Second, the extent to which the impugned conduct "interferes with distinct, reasonable investment-backed expectations"[570]. In the U.S.'s submission, this requires an assessment of the claimant's expectations, which may depend on the regulatory framework existing at the time of the investment[571].

774. Third, "the character of the government action" [572]. According to the U.S., the nature of the State's conduct must be considered when assessing an indirect expropriation claim, *i.e.*, whether the impugned measure consists of non-discriminatory regulation implemented for a *bona fide* public purpose, or on the contrary, it consists of an unjustified physical taking of property by the government[573].

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[565] USS, para. 22.
[566] Treaty, Annex 10-B, para. 3(a)(i).
[567] Treaty, Annex 10-B, para. 3(a)(i).
[568] USS, para. 24.
[569] USS, para. 25.
[570] Treaty, Annex 10-B, para. 3(a)(ii).
[571] USS, para. 27.
[572] Treaty, Annex 10-B, para. 3(a)(iii).
[573] USS, para. 27.

3. NATIONAL TREATMENT STANDARD

775. The U.S. says that the NTS of Art. 10.3 is intended to prevent discrimination on the basis of nationality between domestic and foreign investors[574]. In order to establish a breach of the NTS the claimant must prove that[575]:

- Was accorded a treatment "less favorable",
- than the treatment accorded to domestic investors in "like circumstances".

776. The U.S. says that a proper assessment of this condition requires identifying the appropriate comparator, *i.e.*, domestic investors alike the foreign investor in all relevant respects but for nationality. In the U.S.'s view, a "like circumstances" analysis requires consideration of more than just the business or economic sectors, but also the regulatory framework and policy objectives, including the assessment of justifiable differential treatment based on legitimate public welfare purposes[576].

777. The prohibition of discriminatory treatment in like circumstances is with respect to de jure or *de facto* conduct by the State; and a claim for breach of this standard does not require proof of intent by the State[577].

4. MFN AND EFFECTIVE MEANS CLAUSE

778. The U.S. submits that the requirements to find a breach of the MFN standard under Art. 10.4 are identical to those of NTS of Art. 10.3, except that:

- the applicable comparators are other foreign investors of non-Parties[578];
- the assessment of the "less favorable" treatment requires to look into whether the impugned measures are not subject to the reservations contained in Annex II of the Treaty, were the Contracting Parties reserved "the right to adopt or maintain any measure that accord differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement"[579].

779. Lastly, in the U.S.'s view, the MFN standard cannot be used to alter the substantive content of other treaty provisions, such as the MTS, precisely because the latter does not require treatment in addition or beyond that which is required by customary international law[580].

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[574] USS, para. 48.
[575] USS, para. 49.
[576] USS, paras. 51-52.
[577] USS, para. 50.
[578] USS, para. 55.
[579] USS, para. 56, citing to Treaty, Annex II.
[580] USS, para. 57.

Effective means provision

780. The U.S. says that the prohibition of denial of justice contained in Art. 10.5 of the Treaty includes the same guarantees as the "effective means of asserting claims and enforcing rights", found in earlier U.S. treaty practice. The effective means provision was removed from the U.S. investment treaties to avoid unnecessary duplicity with the denial of justice standard[581].

[581] USS, para. 36.

X. MAIN CLAIM: WHETHER THE *DECRETOS SUPREMOS* ARE ARBITRARY

781. Claimants' main argument is that the *Decretos Supremos*, issued by the MEF, were arbitrary, and consequently constitute a breach of Article 10.5 of the FTA – a position rejected by the Republic. To adjudicate this Main Claim the Tribunal will first establish the proven facts (**1.**), then analyze the Minimum Standard of Treatment under Article 10.5 (**2.**) and finally adopt a decision (**3.**).

1. PROVEN FACTS

1.1 THE SUCCESSIVE *RESOLUCIONES TC*

782. *Pro memoria*: In 2001, the *Tribunal Constitucional* issued the *Sentencia TC 2001*, which settled the constitutional dispute submitted by the *Colegio de Ingenieros* and declared the payment regime for the *Bonos* under Art. 2 of *Ley 26597* unconstitutional [582]. The *Sentencia TC 2001* did not say whether the readjustment of the *Bonos* was to be carried out by dollarization, by applying the CPI or by some other financially appropriate methodology. The judgment simply provided the general principle, but it lacked any details as to how the revaluation should be calculated[583].

783. By 2013 the uncertainty created by the *Sentencia TC 2001* still persisted. After two years deliberating, the *Tribunal Constitucional* issued an enforcement order, the *Resolución TC Julio 2013*, on 16 July 2013 – a decision which the Tribunal analyzes in a later section of the present award.

784. The general thrust of this *Resolución* was that the *Bonos Agrarios* should be revalued, and that the correct methodology for such revaluation was the dollarization of the historic debt using the parity exchange rate[584]. The *Tribunal Constitucional* additionally ordered the MEF to issue within six months a *Decreto Supremo*, regulating the procedure for the registry, revaluation and payment of the *Bonos*[585]. The *Tribunal Constitucional* specifically ordered that the *Decreto Supremo* comply with the following rules:

- The *Decreto Supremo* should include a procedure for the identification and registry of the holders of the bonds, who could be either the expropriated owners, their heirs or their assignees; identification and registry should be made within a period of five years[586];

[582] The *Sentencia TC 2001* also declares the unconstitutionality of Art. 1 of Ley 26597, but this declaration is irrelevant for the present dispute.
[583] RER-2, Hundskopf I, para. 79.
[584] Doc. CE-17, para. 25.
[585] Doc. CE-17, para. 26.
[586] Doc. CE-17, para. 27.

- The *Decreto Supremo* should also include a procedure to quantify the present debt owed to each bondholder, in accordance with the methodology established in the *Resolución*, including interest; quantification should be finalized within two years[587];

- The *Decreto Supremo* should also determine the payment formula, which could consist in the Republic paying the outstanding amount in partial instalments, with a maximum deferment of eight years; alternatively, the *Resolución* permitted that payment be effected by delivery of freely transferable interest-bearing Government bonds, similar to those presently being issued by the Republic[588];

- Finally, the *Resolución* provided that the *Decreto Supremo* may prioritize payments to natural person before juridical person, and within natural persons priority may be given to original holders of the *Bonos* and their heirs, and within this category to holders older than 65[589].

The *Resolución TC Agosto 2013*

785. Both the MEF and the Congress of the Republic filed an appeal (*recurso de reposición*) against the *Resolución TC Julio 2013*, and various private individuals requested clarifications. A month later, on 8 August 2013, the *Tribunal Constitucional* issued the *Resolución TC Agosto 2013*[590] , in which it

- Dismissed the appeals of the MEF, averring that due process had been respected in the issuance of the *Resolución TC Julio 2013*[591];

- Dismissed the appeal of the Congress, arguing that the principle of *res iudicata* had not been breached and that the *Resolución TC Julio 2013* had been properly approved, because the tie between three Justices defending different opinions had been undone through the casting vote of the President[592];

- Clarified that the revaluation established in the *Resolución TC Julio 2013* ("*valorización basad[a] en dólares americanos y con la tasa de interés de los bonos del tesoro americano*" "*que permita el pago de la deuda en ocho años*") had to be applied in all pending judicial procedures[593];

- Finally, clarified that the procedure for registration, quantification and payment of the *Bonos*, to be organized by the MEF through the *Decreto Supremo*, as set forth in the *Resolución TC Julio 2013*, was mandatory:

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[587] Doc. CE-17, para. 28.
[588] Doc. CE-17, para. 29.
[589] Doc. CE-17, para. 29.
[590] Doc. CE-180.
[591] Doc. CE-180, para. 3.
[592] Doc. CE-180, paras. 5-7.
[593] Doc. CE-180, paras. 10, 15.

> "[E]*n adelante la pretensión de cobro de dicha deuda solo puede efectuarse ante el referido procedimiento y no ante uno judicial, lo que no obsta a que los acreedores de la deuda recurran a un proceso judicial en caso de producirse una arbitrariedad en el curso de dicho procedimiento ante el Poder Ejecutivo*".

The *Resolución TC Noviembre 2013*

786. The *Resolución TC Agosto 2013* in turn received a number of requests for annulment and for clarification, so that, on 4 November 2013, the *Tribunal Constitucional* was forced to issue a third order, the *Resolución TC Noviembre 2013*[594]. In this final *Resolución,* the *Tribunal Constitucional*:

- Clarified, at the request of the MEF, how the different terms set forth in the *Resolución TC Julio 2013* related to each other[595]:

- once the *Decreto Supremo* had been published, bondholders would have a five-year term to submit their *Bonos* to the procedure;

- the MEF would have a term of two years, to be counted from the date when each bondholder submits its *Bonos* to the MEF, in which to identify, register and quantify such securities;

- the maximum term for payment of the outstanding debt is eight budgetary years, starting with the next annual budget after the decision of the MEF quantifying the debt;

- Clarified, at the request of ABDA (the bondholders' association) that the precise methodology to be applied for the revaluation of the *Bonos* had to be established by the MEF in the *Decreto Supremo*, but that the practical application of that methodology could never result in a non-revaluation of the outstanding debt (*i.e.*, in "*la aplicación práctica de un criterio nominalista*"); if that were to occur, the *Tribunal Constitucional* expressly reserved its jurisdiction to review the methodology[596];

- Clarified, again at the request of ABDA, that the criteria for priority of payment foreseen in the *Resolución TC Julio 2013* should only be applied to payments in cash – not to alternative forms of payments, like delivery of public debt or of public lands, an alternative which must be freely accepted by the relevant bondholder[597].

1.2 THE SEMINARIO REPORT

787. In April 2011 (*i.e.*, more than two years before the first *Resolución* of the *Tribunal Constitucional*) the MEF had signed a Consulting Contract with Prof. Luis Bruno

[594] Doc. CE-183.
[595] Doc. CE-183, para. 4.
[596] Doc. CE-183, para. 8; the principle is reiterated in paras. 10, 12, 14.
[597] Doc. CE-183, para. 8.

Seminario, with the request that the expert analyze alternatives for updating the debt deriving from the *Reforma Agraria*, applying the principles established in the *Sentencia TC 2001* (which at that time was still pending enforcement)[598].

788. Prof. Seminario delivered his report to the MEF in May 2011 (the "**Seminario Report**")[599]. The Report comes to the following conclusions:

- Prof. Seminario acknowledges that there are no statistics showing the outstanding principal of the agrarian debt; he consequently assumes that the total amount of debt issued, Soles Oro 15 billion, is still outstanding[600];

- He provides the following table, showing that the assumed outstanding debt of Soles Oro 15 billion, converted into USD at the official exchange rate, applicable as of the date of issuance of the securities, would have amounted to USD 374 million:

Año de Emisión	En millones de S/. Oro	Tipo de cambio (S/. Oro x US$)	En millones de US$
1969	3 500	38.70	90.44
1970	4 000	38.70	103.36
1971	3 101	38.70	80.13
1972	852	38.70	22.02
1973	2 500	38.70	64.60
1975	500	40.37	12.39
1982	547	710.96	0.77

Fuente: DGCP-MEF
BCRP

- In Prof. Seminario's opinion, the official exchange rate when the *Bonos* were issued did not reflect the true market rate between the Soles Oro and the USD, due to the existence of exchange control measures; to correct these distortions he recommends that the parity exchange rate (and not the official exchange rate) be used[601];

- He then proposes a methodology, which he describes as "simple", for calculating the parity exchange rate, based on the 1950 market rate, multiplied by a factor of his own definition[602];

- The next step in Prof. Seminario's analysis is to convert the Soles Oro 15 billion to USD, using the parity exchange rate calculated in accordance with his own formula; the result is shown in the following table:

[598] Doc. R-509.
[599] Doc. R-297.
[600] Doc. R-297, p. 3.
[601] Doc. R-297, p. 3.
[602] Doc. R-297, p. 4.

Año de Emisión	En millones de S/. Oro	Tipo de cambio de paridad (S/. Oro x US$)	En millones de US$
1969	3 500	40.42	86.60
1970	4 000	40.46	98.86
1971	3 101	42.15	73.57
1972	852	42.52	20.04
1973	2 500	44.46	56.24
1975	500	54.70	9.14
1982	547	828.91	0.66

Fuente: DGCP-MEF
BCRP

- A comparison between the two tables shows that, using the parity instead of the official exchange rate, causes the total outstanding value of the securities to drop from USD 374 million to USD 345 million, (*i.e.*, a reduction of 7.65%);

- Additionally, Prof. Seminario recommends that the debt, once expressed in USD, accrue interest either at the rate of the U.S. Treasury Bills, or of LIBOR[603].

789. Prof. Seminario concludes his Report with a formula, based on the elements he proposes: the conversion of the Soles Oro into USD using the parity exchange rate (calculated in accordance with the Seminario formula), with the addition of interest at the rate for one year U.S. Treasury Bills[604].

790. The Seminario Report is indeed a seminal document. It is the first document which uses two concepts, which eventually would be accepted by the *Tribunal Constitucional* and incorporated into the *Resolución TC Julio 2013*:

- The conversion of the outstanding principal using the parity exchange rate (and not the official exchange rate);

- The accrual of interest on the outstanding principal in USD, at the rate of one year U.S. Treasury Bills.

1.3 THE DS 17/2014 AND DS 19/2014

791. The *Resolución TC Julio 2013* required the Government of the Republic to issue a *Decreto Supremo* setting forth the procedure for identification and registry of bondholders, for the quantification of the outstanding debt, and the methodology for payment.

792. The MEF complied with this mandate by issuing, within six months of this Resolución, DS 17/2014 (dated 17 January 2014), which approved a "*Reglamento*" developing the "*procedimientos conducentes al registro, actualización y pago*" of the *Bonos* (the "***Reglamento General***"). The *Reglamento General* contained 19 articles, plus an

[603] Doc. R-297, p. 5.
[604] Doc. R-297, p. 11.

Annex, which established a formula describing the methodology for revaluing the securities, and which did not differentiate between securities with or without *Cupones*[605].

793. Interestingly, the formula in the Annex of DS 17/2014 was directly copied from the Seminario Report. But the MEF must have promptly noticed that this formula was inappropriate, and only four days thereafter, on 21 January 2014, the Government published a second *Decreto Supremo* (the "**DS 19/2014"**), which differed from the original Annex, and replaced it with a new Annex, establishing two different formulas, one for *Bonos* where all *Cupones* were still outstanding, and a separate one for securities where certain *Cupones* had been paid[606].

794. The new formulas, although based on the same philosophy, showed significant differences to that used in DS 17/2014. The Republic has not provided any information explaining the reasons for the change. There is also no information in the file regarding the authorship of the new formulas.

1.4 CLAIMANTS' NOTICE OF INTENT

795. Two years thereafter, on 1 February 2016, Claimants filed their Notice of Intent under the Treaty, which gave rise to the present arbitration, in which Claimants submit that DS 17/2014 and DS 19/2014 were arbitrary and discriminatory, and amounted to a breach of the Treaty.

1.5 THE LAPUERTA REPORT

796. Upon receipt of the Notice of Intent, the Republic contacted Prof. Seminario, requesting that he review his original Report. Prof. Seminario reacted on 2 June 2016, confirming "*la vigencia y validez*" of his Report[607], but acknowledging that, upon review, he found that two "precisions" had to be made to his work:

- In the definition of parity exchange rate, the factor "IPC EEUU/hoy" must be expressed in Soles Oro;

- In the definition of the real exchange rate, the factor "TC t" "c*orresponde a un Índice de Tipo de Cambio (TC_t/ TC_0), tal como se verifica en el desarrollo del Anexo 2 del Informe*";

797. Prof. Seminario's acknowledgement that there were errors in his Report prompted the Republic to request a second opinion.

798. It decided to approach an international financial expert, Dr. Lapuerta, who issued his report on 21 August 2016 (the "**Lapuerta Report**")[608]. In it, Dr. Lapuerta reviewed the

[605] Doc. CE-37.
[606] Doc. CE-38.
[607] Doc. R-354.
[608] Doc. R-355.

Seminario Report and confirmed that the Seminario Report contained a "typographical error" in one of the formulas used, as had been acknowledged by Prof. Seminario in his letter of 2 June 2016 (the error was that, in the definition of parity exchange rate, the factor "IPC EEUU/hoy" must be expressed in Soles Oro)[609]. This error, said Dr. Lapuerta, had also found its way into the formulas in the Annex of DS 19/2014, which were wrong for the same reason[610].

1.6 DS 34/2017

799. The Republic reacted six months after receiving the Lapuerta Report, by promulgating on 27 February 2017 the *Decreto Supremo* 34/2017 (the "**DS 34/2017**"), which modified the existing regulation in two aspects[611]:

- First, it corrected the mistakes in the Annex to DS 19/2016, as had been acknowledged by Prof. Seminario (and confirmed by Dr. Lapuerta):

- the factor "IPC EEUU/hoy" must be expressed in Soles Oro;

- the factor "TC_t" corresponds to an Index of Exchange Rate (TC_t/ TC_0)

- Second, DS 34/2017 approved a "*Reglamento Complementario*" a regulation which gave additional guidance regarding the actual payment of the outstanding Bonos by the Republic and complemented the *Reglamento General* approved by DS 17/2004.

1.7 DS 242/2017 AND THE *TEXTO ÚNICO*

800. But this was not the end of the story: six months thereafter, on 19 August 2017, the Republic published a fourth *Decreto Supremo* (the "**DS 242/2017**"), which again amended the regulation[612]:

- First, DS 242/2017 derogated the three preceding *Decretos Supremos*, including the *Reglamento General* and the *Reglamento Complementario* and the Annex to the *Reglamento General* (which had contained the revaluation formulas);

- Second, DS 242/2017 approved a new *Reglamento* (known as the "***Texto Único***"), which consolidated and amended existing legislation governing the registration, revaluation and payment of the *Bonos*;

- Third, DS 242/2017 included a new Annex, which provided new formulas for the calculation of the revaluation, again differentiating between *Bonos* with the totality of *Cupones* and *Bonos* where certain *Cupones* had been paid[613].

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[609] Doc. R-355. p. 8.
[610] Doc. R-355. p. 2.
[611] Doc. CE-269.
[612] Doc. CE-275.
[613] Doc. CE-276.

801. *Pro memoria*, this was the fourth iteration of the formulas:

- the original formula had been that contained in DS 17/2014,
- which had been substituted by new formulas in DS 19/2014,
- the errors in DS 19/2014 had been amended by DS 34/2017, and
- DS 242/2017 decreed a completely new set of formulas.

802. There is no documentation in the file explaining the amendments to the formulas introduced by the Republic through DS 242/2017. The two internal memoranda which Peru has produced[614] do not provide any justification. And the Republic's Quantum Expert, Mr. Kaczmarek, in his first expert report simply says, without adding any further reasoning, that[615]

> "[…] during 2017, the MEF thought prudent to further define some of the terms and variables in the formulas to avoid different interpretations".

1.8 THE BONDHOLDER PROCESS

803. The *Texto Único* provided a detailed regulation of the complex procedures which bondholders had to follow to obtain payment of their outstanding *Bonos*:

804. The first step in the procedure required bondholders to deposit the physical *Bonos* with the Peruvian Central Bank, which by law acted as custodian of the securities. Thereafter, the authenticity of the *Bonos* had to be confirmed by expert forensic handwriting analysis[616]. To this end, the MEF had established a laboratory with specialized optical equipment for authenticating the securities[617].

805. If the *Bonos* were found to be authentic, the second step was the registration of the bondholder in a specific public registry created by the MEF. To achieve registration, the bondholder was required to submit documentation, proving legitimate ownership of the securities, which had to be validated by the MEF[618]. The MEF's decision to deny registration could be impugned first at the administrative level through a *recurso de reconsideración* and an additional *recurso de apelación*[619]; and subsequently through a *recurso contencioso-administrativo* before the Courts[620].

806. The third step in the procedure was the revaluation of the *Bonos*, to be performed by the MEF. This step could only be requested by bondholders who had been duly

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[614] Doc. R-392; Doc. R-436.
[615] RER-5, Quantum I, para. 66.
[616] Doc. CE-275, Art. 7.
[617] R I, 120.
[618] Doc. CE-275, Arts. 7.5, 8, 10.
[619] Doc. CE-275, Art. 9.2; Doc. RA-282, Arts. 208-209.
[620] RER-8, García-Godos, para. 107; Doc. RA-282, Art. 218.

registered at the administrative registry. In such case, the MEF would calculate the current value of their Bonos[621]. The purpose of this exercise was to calculate the present value of the *Bonos*, in compliance with the *Resoluciones TC Julio, Agosto and Noviembre 2013*[622]:

> "*Dicho valor actualizado es determinado de acuerdo con la metodología enunciada por el Tribunal Constitucional en* [*las Resoluciones*]".

807. The revaluation had to be established by the MEF applying the formula contained in the Annex of the *Texto Único*[623],

> "*conforme a la cual se efectúa la indexación del principal adeudado a su equivalente en dólares americanos, basándose en el tipo de cambio paridad, y se le aplica la tasa de rendimiento de los bonos del tesoro americano*".

808. The MEF's decision regarding the revaluation was also subject to a *recurso de reconsideración* and a *recurso de apelación*[624]; and, furthermore, a judicial remedy was available through a *recurso contencioso-administrativo* before the Peruvian Courts[625].

809. In the fourth step of the procedure, the bondholder had to choose between three payment options to receive the revalued principal plus the interest of the *Bonos*[626]:

- The first option consisted in payment with Peruvian public debt; the *Texto Único* adds, rather cryptically, that if the bondholder chooses this option, "*el menú*" of the public debt to be delivered will be defined by the MEF;

- Payment with land or investments in certain sectors owned by the Peruvian State;

- Payment in cash, but subject to an important limitation: the cash to be paid cannot exceed Soles 100,000 per bondholder (less than USD 30,000).

810. Bondholders were authorized to combine the various options, and in such case, the cash portion can reach 20% of the total (even if the cash amount exceeds Soles 100,000)[627].

811. The cash payment (whether limited to Soles 100,000 or to 20% of the total) is subject to two additional restrictions:

- The Republic is entitled to pay this cash portion in up to eight years[628], and additionally

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[621] Doc. CE-275, Arts. 11-13.
[622] Doc. CE-275, Art. 11.1.
[623] Doc. CE-275, Art. 13.
[624] Doc. CE-275, Art. 14.2; Doc. RA-282, Arts. 208-209.
[625] RER-8, García-Godos, para. 107; Doc. RA-282, Art. 218.
[626] Doc. CE-275, Art. 16.
[627] Doc. CE-275, Art. 16 *in fine*.
[628] Doc. CE-275, Art. 18 *in fine*.

- There is a system of priority in payment, with seven categories of bondholders[629]; the first category is composed of natural persons or their heirs, who are 65 or older; the last category in priority of payment is defined as

  "[p]*ersonas jurídicas que sean tenedores no originales de los bonos de la deuda agraria, que fueron adquiridos con fines especulativos*".

  The *Texto Único* does not provide any further indication when the acquisition of Bonos by a bondholder must be deemed "*con fines especulativos*".

812. The fifth and last step in the procedure entails the acceptance of the bondholder's option by the MEF. If the MEF disagrees with the bondholder's proposal, it can react with a counterproposal, that in turn must be accepted by the bondholder. If no agreement is reached, the decision on how the *Bonos* are to be paid is taken unilaterally by the MEF[630]:

> "*De no haber acuerdo entre las partes, la Dirección de Créditos, o la que haga sus veces, de la DGETP del MEF, emite la resolución directoral debidamente sustentada que defina la opción de pago y suscribe los documentos complementarios correspondientes, en un plazo máximo de treinta (30) días hábiles, contados a partir del vencimiento del plazo adicional otorgado para llegar a una propuesta consensuada.*" (Emphasis added)

813. Against this decision, the bondholder is entitled to file a *recurso de reconsideración* and a *recurso de apelación*[631]; and eventually a *recurso contencioso-administrativo* before the Peruvian Courts[632].

2. THE PROHIBITION OF ARBITRARY MEASURES IN THE FTA

814. Art. 10.5 of the Treaty contains the Republic's assurance to provide U.S. investors with the Minimum Standard of Treatment ("**MST**") of aliens required by customary international law, including Fair and Equitable Treatment ("**FET**"):

> **Article 10.5: Minimum Standard of Treatment**
>
> 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

[629] Doc. CE-275, Art. 18.
[630] Doc. CE-275, Art. 17.5.
[631] Doc. CE-275, Art. 17.7; Doc. RA-282, Arts. 208-209.
[632] RER-8, García-Godos, para. 107; Doc. RA-282, Art. 218.

> to or beyond that which is required by that standard, and do not create additional substantive rights […]". (Emphasis added)

815. In Annex 10-A of the Treaty the Contracting Parties offer additional guidance for the interpretation of Art. 10.5:

> "**Annex 10-A**
>
> **Customary International Law**
>
> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens".

* * *

The Parties' positions

816. Claimants say that a State breaches the MST, including the FET standard, when its conduct is arbitrary, grossly unfair or unjust[633]. Claimants add that, in the present case, Peru's actions in establishing and implementing the bondholder process, as formalized in the *Decretos Supremos*, were the very essence of arbitrary and unjust. Peru's conduct falls below the MST that the Treaty and international law require, on any articulation of those standards[634].

817. Peru does not dispute that a government act that is arbitrary or irrational falls below the Treaty's MST. But the Republic adds that, to amount to a breach of the MST, the measures must be manifestly unfair or unreasonable, such as would shock or at least surprise a sense of juridical propriety, and that the threshold is a high one. In the present case, the Republic denies that the bondholder process was arbitrary or unjust[635].

The U.S. position

818. In its submission, the U.S. says that the MST is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law. The standard establishes a minimum floor below which treatment of foreign investors must not fall.

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[633] C I, para. 177, citing to *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, RA-69 ["***Waste Management II***"], para. 98.
[634] C II, para. 339, citing to *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, CA-29 ["***Lemire (Jurisdiction)***"], para. 262; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, CA-40 ["***Tza Yup Shun***"], paras. 187-188; *Waste Management II*, para. 98.
[635] R I, para. 271; R II, para. 374, citing to *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, RA-108, ["***AES***"], para. 9.3.40; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, RA-93 ["***Biwater Gauff***"], paras. 597-599.

In accordance with Annex 10-A, customary international law requires a two-element approach: State practice and *opinio iuris*[636].

819. The U.S. adds that that the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio iuris*[637]. Decisions of international courts and arbitral tribunals interpreting the FET as a concept of customary international law are not in themselves instances of State practice, although such decisions may be relevant for determining State practice when they include an examination of such practice[638].

820. Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule, in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders. A departure from domestic law does not in-and-of -itself sustain a violation of Art. 10.5 of the Treaty[639].

821. Currently – says the U.S. – customary international law has crystallized to establish a Minimum Standard in only a few areas, one such area being the FET standard. The U.S. does not refer to specific measures adopted by the host State, which would breach the FET standard[640].

Discussion

822. Claimants argue that the *Decretos Supremos*, regulations of general application issued by the MEF, were arbitrary and unjust, and that Peru failed to accord FET to Claimants' investment, as required by the MST enshrined in customary international law, thus breaching Art. 10.5.1 of the FTA. The Republic acknowledges the principle that a host State that adopts arbitrary measures incurs in conduct that falls below the MST but underlines that the threshold for a finding of the Tribunal in this respect is high, and that in the present case no breach of its obligations under Art. 10.5.1 of the FTA occurred.

823. A classic debate in investment arbitration law is whether the FET standard established by bilateral or multilateral investment treaties coincides with or differs from the MST for aliens required by customary international law[641]. There is no single answer to this question because there is diversity in the way the FET standard is formulated in investment treaties: certain agreements do not make any reference to the MST and customary international law, while others do.

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[636] USS, para. 31.
[637] USS, para. 34.
[638] USS, para. 41.
[639] USS, para. 35.
[640] USS, para. 38
[641] *Lemire (Jurisdiction)*, para. 247.

824. The U.S.-Peru FTA belongs to the second category; it provides clear rules incardinating the FET standard under the Treaty within customary international law and the MST.

825. The text of Art. 10.5.1 shows that the intention of the Contracting Parties was to ensure that "all customary international law principles that protect the economic rights and interests of aliens" are applicable, including the FET and the FPS standards. At the same time, "[f]or greater certainty", the rule affirms that these standards do not require treatment additional to that required by the MST. The Treaty Parties affirm their obligation to accord FET to protected investments, but without extending the treatment beyond the MST enshrined in "customary international law", which in turn must result "from a general and consistent practice of States that they follow from a sense of legal obligation".

826. In the present case, the specific breach of the MST of aliens required by customary international law, including the FET standard, which allegedly has occurred, consists in the adoption by the Republic of certain measures – the *Decretos Supremos* – said by Claimants to be arbitrary and unjust.

2.1 THE CONCEPT OF ARBITRARINESS

827. What does "arbitrary" or "unjust" mean?

828. As a first point, the Tribunal notes that there is no uniform use of these concepts. Certain treaties refer to "arbitrary" conduct, others qualify the conduct as "unjust" or "unreasonable". The terms are often used interchangeably. As Schreuer says[642]:

> "There does not appear to be a relevant distinction between the terms "arbitrary", "unjustified", and "unreasonable" in this context".

829. Claimants submit that the Republic's conduct was "arbitrary" and "unjust"[643]. Since the term "unjust" does not seem to add any qualification to the term "arbitrary", the Tribunal will focus its analysis on whether the Republic's conduct, when it issued the *Decretos Supremos*, could be considered as arbitrary.

830. Arbitrariness has been described as "founded on prejudice or preference rather than on reason or fact"[644]; "not so much something opposed to a rule of law, as something opposed to the rule of law"[645]; "willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety"[646]; or conduct which

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[642] C. Schreuer: "Protection against Arbitrary or Discriminatory Measures". In C. Rogers and R. Alford (Eds.) *The Future of Investment Arbitration*, OUP (2009), p. 183.
[643] C I, para. 172.
[644] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, Doc. RA-70 ["***Occidental***"], para. 162; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 ["***Lauder***"], para. 221.
[645] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J. Reports 1989, p. 15, Judgment, 20 July 1989, Doc. CA-107 ["***ELSI***"], para. 128.
[646] *ELSI*, para. 128; *Loewen*, para. 131.

"manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination"[647]; "measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process"[648].

831. In *EDF,* Professor Schreuer, appearing as an expert, defined as "arbitrary",

> "a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
>
> b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
>
> c. a measure taken for reasons that are different from those put forward by the decision maker;
>
> d. a measure taken in willful disregard of due process and proper procedure".

And the *EDF* tribunal accepted such definition when it analyzed and ultimately rejected the claimant's claim that Romania had taken unreasonable or discriminatory measures[649].

832. Summing up, the underlying notion of arbitrariness is that prejudice, preference, bias and lack of reason is substituted for the rule of law and proper procedure[650].

2.2 ARBITRARY CONDUCT IS A BREACH OF THE MST OF ALIENS

833. The MST which an alien can expect includes that the State will abstain from arbitrariness and that the rule of law will not be undermined by prejudice, preference, bias, lack of reason or absence of proper procedure. If an investment has been subject to arbitrary or unreasonable treatment by the host State, the necessary consequence is that the MST under customary international law, including FET, have been violated[651]. As the tribunal in *Pawlowski* said[652]:

> "Any unreasonable or discriminatory measure may, by definition, also be said to be unfair and inequitable".

834. There are a number of arbitral decisions, where tribunals have considered arbitrary conduct of the host State as a breach of the FET standard. This tendency is particularly

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[647] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Doc. RA-79 ["***Saluka***"], para. 307.
[648] *LG&E Energy Corp., LG&E Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, Doc. RA-81, ["***LG&E***"], para. 158.
[649] *EDF Services Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, Doc. RA-103 ["***EDF***"], para. 303.
[650] *Lemire (Jurisdiction)*, paras. 262-263.
[651] C. Schreuer: "Protection against Arbitrary or Discriminatory Measures". In C. Rogers and R. Alford (Eds.) *The Future of Investment Arbitration*, OUP (2009), p. 189.
[652] *Pawlowski AG and Projekt Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 ["***Pawlowski***"], para. 295.

pronounced with tribunals applying treaties (like NAFTA or the FTA), which do not contain a separate provision prohibiting arbitrary treatment. In *S.D. Myers,* the tribunal used the concept of "arbitrary" as a definitional element of the FET standard in Art. 1105.1 NAFTA. The tribunal said that it[653]

> "considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective".

835. And in *Waste Management II* (a decision cited approvingly by Respondent[654]), the tribunal explained that[655]

> "Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety […]". (Emphasis added)

High threshold

836. Respondent insists that the threshold for proving that a conduct is unreasonable should be a high one. The U.S. adds that determining a breach of the MST must be made in the light of the high measures of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders[656].

837. The Tribunal tends to agree.

838. Investment arbitration tribunals are not called to adjudicate appeals against measures adopted by States or their agencies. Their task is to establish whether the State's conduct *vis-à-vis* protected foreign investors is tainted by prejudice, preference or bias or is so incompatible with or lacking in reason that it constitutes an international wrong.

3. THE TRIBUNAL'S DECISION

839. Claimants say that the *Decretos Supremos* incurred in arbitrariness for three reasons – which the Republic denies:

- First, the formulas used are arbitrary and irrational and lead to the application of an unreasonable parity exchange rate (**3.2.**);

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[653] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000, Doc. RA-57, ["***S.D. Myers***"], para. 263.
[654] See R I, para. 271.
[655] *Waste Management II*, para. 98.
[656] USS, para. 35, citing to *S.D. Myers*, para. 263; *Thunderbird*, para. 127 and *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016 ["***Mesa***"], para. 505

- Second, the bondholder process is arbitrary in design and a complete failure in execution (**3.3.**); and

- Finally, the *Decretos Supremos* violate basic Peruvian law requirements of legality and reasonableness – and this is symptomatic of arbitrary conduct (**3.4.**).

840. Respondent denies that the *Decretos Supremos* are arbitrary and aver that they provide for a reasonable bondholder process[657].

841. Before analyzing these arguments, the Tribunal will summarize the mandate given by the *Tribunal Constitucional* to the Government and formalized in the successive *Resoluciones* – because if the Government adopted measures which did not abide by the mandate received from the Republic's Highest Court, this may constitute an indication that the Government's conduct is arbitrary (**3.1.**).

3.1 THE MANDATE GIVEN BY THE *TRIBUNAL CONSTITUCIONAL*

842. In the three *Resoluciones,* the *Tribunal Constitucional* mandated the Government to issue a *Decreto Supremo* setting forth the methodology for the revaluation and payment of the *Bonos,* but also required that the rule complies with the following requirements:

- The principal of the *Bonos* must be revalued by converting the outstanding amount in Soles into USD ("*a través de la conversión del principal impago en dólares americanos*")[658];

- Such revaluation must be done as of the date of the earliest unpaid Cupón ("*desde la fecha de la primera vez en que se dejó de atender el pago de los cupones de dicho bono*")[659];

- The conversion of the outstanding principal must be done using the parity exchange rate between the Peruvian currency and the USD ("*basándose en el tipo de cambio de paridad*")[660];

- The principal, thus converted into USD, must accrue interest at the rate applicable to U.S. Treasury Bonds ("*más la tasa de interés de los bonos del Tesoro americano*")[661];

- the outstanding principal and interest must be paid in partial instalments, with a maximum deferment of eight years; the cash payment can be substituted by delivery of freely transferable interest-bearing Government bonds, similar to those presently

[657] R I, para. 273.
[658] Doc. CE-17, para. 25.
[659] Doc. CE-17, para. 25.
[660] Doc. CE-17, para. 24.
[661] Doc. CE-17, para. 25.

being issued by the Republic[662], but this option must be accepted by the bondholder ("*libremente acordada*")[663];

- Payments in cash to natural persons may be prioritized, and within natural persons, priority may be given to original holders of the *Bonos* and their heirs, and within this category, to holders older than 65 years of age[664].

843. The *Tribunal Constitucional* repeatedly averred that the MEF was entrusted with developing the methodology for the revaluation of the *Bonos*, but insisted that the mandate must result in the outstanding debt being properly revalued and paid in accordance with the principio valorista ("*En ningún caso, la operación de actualización de la deuda puede conllevar a un resultado que suponga la aplicación práctica de un criterio nominalista*"); if that were to occur, the *Tribunal Constitucional* expressly reserved its jurisdiction to review the chosen methodology[665].

844. The admonition of the *Tribunal Constitucional* was prescient.

3.2 THE METHODOLOGY DEVELOPED BY THE MEF IS ARBITRARY

845. Claimants' first argument is that the methodology defined in the *Decretos Supremos* to revalue the outstanding *Bonos* is arbitrary and irrational:

- The methodology contains elementary mathematical blunders and violates basic rules of economics[666];

- Peru is unable to justify or explain the formulas and, as such, they constitute the very definition of arbitrariness[667];

- Additionally, the formulas do not include any compensatory interest[668];

- And, as a result of these gross failures, the methodology yields trivial amounts and destroys value so substantially as to be confiscatory[669]; the MEF complied with the mandate received from the *Tribunal Constitucional* in bad faith, with the aim of reducing the amounts owed to bondholders to nil[670].

846. The Republic sees matters differently[671]: it avers that it implemented the mandate of the *Tribunal Constitucional* in good faith, that the formulas were adopted as part of an

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[662] Doc. CE-17, para. 29.
[663] Doc. CE-183, para. 8 *in fine*.
[664] Doc. CE-17, para. 29 *in fine*.
[665] Doc. CE-183, para. 8 *in fine*. The principle is reiterated in paras. 10, 12, 14.
[666] C PHB-M, para. 60.
[667] C PHB-M, para. 72.
[668] C PHB-M, para. 62.
[669] C PHB-M, para. 63.
[670] C PHB-M, para. 74.
[671] R PHB-M, para. 89.

administrative procedure adopted in accordance with Peruvian law,[672]and that the updating methodology provided reasonable compensation.

847. To adjudicate the matter, the Tribunal will analyze the methodology developed by the Republic in the *Decretos Supremos*, with the aim of establishing whether any of its elements can be labelled as arbitrary. The Tribunal will address in turn the parity exchange rate (**A.**), the date of revaluation (**B.**), and the applicable interest rate (**C.**).

A. <u>The parity exchange rate established by the Government is arbitrary</u>

848. In its *Resolucion TC Julio 2013*, the *Tribunal Constitucional* ordered that the revaluation of the *Bonos* be carried out applying the parity exchange rate between Soles and USD – and not the official exchange rate; the reasoning of the Tribunal is as follows[673]:

> "*Esta fórmula asume la obligación como el valor actualizado al dólar norteamericano de la deuda (principal) basándose en el tipo de cambio de paridad, dado que la cotización oficial del dólar no expresaba la cotización del mercado*".

849. The *Tribunal Constitucional* did not provide any further guidance on the calculation and application of the parity exchange rate and delegated this matter for determination by the Government in a *Decreto Supremo.* The Government provided successively three starkly different methodologies for the calculation of the parity exchange rate, in

- the DS 17/2014 (**b.**),
- the DS 19/2014 (**c.**), and
- the DS 242/2017 (**d.**),

which the Tribunal will analyze in turn. Before that, the Tribunal will provide a general overview of the definition of parity exchange rate, as developed by economic science (**a.**).

a. General definition of parity exchange rate

850. In his expert reports, Prof. Edwards, who is a specialist in this matter, and who has published a book on the subject[674], provides a definition of parity exchange rate between two currencies and an overview of the proper methodology for its calculation. Parity exchange rate, "an old concept"[675] in economics, is that rate of exchange between two currencies which makes their purchasing power substantially equal. If a basket of

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[672] R I, para. 273.
[673] Doc. CE-17, para. 24.
[674] S. Edwards: "Real Exchange Rates, Devaluation and Adjustment: Exchange Rate Policy in Developing Countries", MIT Press (1989), Doc. CE-61. See CER-4, Edwards I, Appendix A; HT(ENG), Day 5 (Edwards), p. 1622, ll., 1-14.
[675] HT(ENG), Day 5 (Edwards), p. 1615, ll., 13-19.

goods and services in Peru can be purchased for 10 Soles, and the same basket in the U.S. costs 5 USD, the parity exchange rate between both currencies is two (even if the market exchange rate is different, say three).

851. In open, developed economies, purchasing power parity between currencies is normally reflected in the market exchange rate. In emerging markets, especially if subject to exchange control, it frequently happens that official exchange rates are out of line with equilibrium and do not properly reflect purchasing power parity. The concept of parity exchange rate is closely related to relative inflation: an exchange rate is in equilibrium and reflects parity when it moves only because of changes in relative inflation rates between the two countries[676].

852. Professor Edwards estimates the parity exchange rates between the Peruvian currency and the U.S. dollar for every month between 1970 and 2018[677].

- The first step is determining an appropriate base period (the "**Base Period**"); Prof. Edwards explains the characteristics that this Base Period must meet for the exchange rate to properly reflect parity between both economies:

  > "The selected period should correspond to relatively "normal" years during which the two countries experienced fairly low and stable inflation, did not undergo any major economic or political changes, and when their external accounts exhibited sustainable balances"[678].

  In his calculation, Prof. Edwards used January 1999 through May 2018 as his Base Period because, in his opinion, Peru's economy in this period was stable and relatively liberalized, with a floating exchange rate, low levels of inflation and few economic controls[679];

- The second step requires estimating the parity exchange rate for every month between 1970 and 2018. To calculate, for instance, the November 1972 parity exchange rate, he divides the official exchange rate on the first month of the Base Period, *i.e.*, January 1999, by the ratio of the change in the Peru CPI and the U.S. CPI from November 1972 to January 1999. This provides one estimate[680]. He makes the same operation with all the months of the Base Period, resulting in 233 estimates for the parity exchange rate of November 1972, and takes the average to derive the parity exchange rate of November 1972, which results in 18.92[681].

- The third step permits that the parity exchange of November 1972 be used to determine the parity exchange for any other month; this is done by adjusting for the

[676] CER-4, Edwards I, para. 108.
[677] CER-4, Edwards I, para. 114 and Appendix K.
[678] CER-4, Edwards I, para. 112.
[679] CER-4, Edwards I, para. 113.
[680] CER-4, Edwards I, paras. 115-116.
[681] CER-4, Edwards I, para. 117.

Peru/US inflation growth differential between the month of determination (November 1972 in Prof. Edward's proposal) and the relevant month[682].

* * *

[The formula to be applied in this third step assuming, as Prof. Edwards does, that the parity exchange rate in November 1972 was 18.29 Soles Oro/USD, is the following:

$PER_m = 18.29 \times (\text{Peru } CPI_m / \text{Peru } CPI_{11.1972}) / (\text{US } CPI_m / \text{US } CPI_{11.1972})$

Where

- PER_m is the parity exchange rate in the month m[683].

- Peru CPI_m, Peru CPI $_{11.1972}$, US CPI_m and US $CPI_{11.1972}$ are the accumulated CPIs of Peru and the U.S., as of month "m" and as of November 1972, respectively.

Assume a simplified example in which the Peru CPI and the US CPI in November 1972 both are 100; also assume that twenty-eight years thereafter, in December 2000, the Peru CPI is 400, while the US CPI has only reached 200; in such case the formula would yield the following:

$PER_{12.2000} = 18.29 \times (400/100)/200/100) = 18.29 \times 2 = 36.58$

In this example, in which the Peruvian inflation has grown twice as quickly as the U.S. inflation, the parity exchange rate would have increased in the same proportion, from 18.29 Soles Oro/USD in November 1972 to 36.58 Soles Oro/USD in December 2000.]

b. The calculation of the parity exchange rate in DS 17/2014 was only in force for four days

853. The DS 17/2014 was the first regulation issued by the MEF in an effort to comply with the mandate given by the *Tribunal Constitucional*. The Annex to DS 17/2004 included a formula for the calculation of the parity exchange rate, directly copied from the Seminario Report, which the MEF had requested two years before. It used as Base Period the years 1950 through 1982[684].

854. This initial formula was only in force for a period of four days.

[682] CER-4, Edwards I, Appendix K.
[683] M is in the future of November 1972; if it is in the past, the formula should be the inverse.
[684] CER-6, Edwards II, para. 86.

c. The historic calculation of the parity exchange rate in DS 19/2014 was plagued by mistakes

855. On 21 January 2014, four days after the issuance of DS 17/2014, the Government published DS 19/2014, which derogated from the first formula, and created two new, separate formulas,

- one for *Bonos* where all *Cupones* were still outstanding, and
- a separate one for securities where certain *Cupones* had been paid[685].

The new formulas, although based on a similar philosophy, showed significant differences to that used in DS 17/2014. The most important one was that the Base Period (which had been 1950-1982 in the first formula) was extended so as to cover the period from 1950 through 2013[686]. Neither the MEF nor its experts have at any stage provided an explanation for this change. As Prof. Edwards has noted, the change was odd, because by extending the Base Period until 2013, a period of hyperinflation was incorporated into the calculation – something which was contrary to the general philosophy of the methodology[687].

856. The formulas attached to DS 19/2014 contained significant mathematical errors. The evidence is overwhelming. Prof. Edwards has convincingly shown that the DS 19/2014 formulas led to the mathematical impossibility that $x=x^2$ [688]. Dr. Lapuerta, a respected expert designated by Peru to review Prof. Seminario's work, also concluded that the formulas contained what he referred to as a typographical error[689] with the result that the calculation of the parity exchange rate in an Annex to the Seminario Report did not comport with the parity exchange formula developed in the body of the Report[690]. Prof. Seminario himself acknowledged, in a letter addressed to the Republic, that the formulas contained two errors and had to be modified[691].

857. Notwithstanding these errors, the DS 19/2014 methodology remained in place for more than three years. In February 2017, the Republic finally issued DS 34/2017, which purported to correct the mistakes, by adding additional explanations but without modifying the formulas.

858. The clarification only made the situation more confusing: as Prof. Edwards has explained, the old formulas with the additional correction of mistakes gave rise to

[685] Doc. R-680.
[686] CER-6, Edwards II, para. 86.
[687] CER-6, Edwards II, para. 86.
[688] HT(ENG), Day 5 (Edwards), p. 1629, ll., 15-22; CER-6, Edwards II, para. 81.
[689] Doc. R-355, para. 6.
[690] Doc. R-355, para. 22.
[691] Doc. CE-596.

significant ambiguities and allowed for six different interpretations, which yielded dramatically different estimates of parity exchange rates[692].

d. The definitive calculation of the parity exchange rate in DS 242/2017 is arbitrary

859. Six months thereafter, on 18 August 2017, the MEF decided to react and published DS 242/2017, which derogated from the three preceding *Decretos Supremos* and their formulas, and which provided a new methodology, based on new formulas, for the calculation of the revaluation, again differentiating between *Bonos* with the totality of *Cupones* and *Bonos* where certain *Cupones* had been paid. These formulas are the ones which have been applied in practice to calculate the revaluation of the (few) *Bonos* tendered for payment by Peruvian bondholders.

860. Under the formula in DS 242/2017, the revaluation is performed in four steps[693]:

- Step 1: the outstanding principal of the *Bonos* is calculated at the date of the last clipped *Cupón*, and converted from Soles Oro to USD using the parity exchange rate in the month of the last clipped *Cupón*;

- Step 2: the USD denominated outstanding face value of the *Bono* as calculated in Step 1 is increased at the rate of U.S. inflation between the date of the last clipped *Cupón* and the present day;

- Step 3: the USD denominated outstanding face value of the *Bono* in Step 1 is increased by the real rate of return implicit in the yields of 1-year U.S. Treasury Bills;

- Step 4: the resulting USD denominated amounts are converted to Soles, using the official Sol/USD exchange rate at the present date (not the Sol/USD parity exchange rate).

861. Claimants say that, in this calculation, there are two elements that are arbitrary and that result in the revaluation yielding unreasonably low amounts, which in turn implies the confiscation of the actual value of the *Bonos*:

- The DS 242/2017 uses an unreasonable Base Period for the calculation of the parity exchange rate, resulting in an unreasonably high parity exchange rate, which in turn resulted in an un unreasonably low valuation of the *Bonos* in USD[694];

- This unreasonably high parity exchange rate is only used when converting into USD; however, to convert back to Soles (the currency in which bondholders are

[692] CER-6, Edwards II, para. 97.
[693] CER-4, Edwards I, para. 245.
[694] C I, para. 203.

actually paid) the formula then adopts the (much lower) market exchange rate – again harming bondholders[695].

Discussion

862. The Tribunal agrees with Claimants.

863. The two measures impugned by Claimants lack any reasonable underpinning, contradict previous positions adopted by Peru, and were issued without any cogent explanation (and the MEF and its advisors, to this day, have been unable to provide any reasoning).

864. In the absence of any other explanation, the Tribunal must assume that the true aim of these measures was to minimize the amount payable to bondholders – something which the measures achieved, but in so doing they made a travesty of the mandate received from the *Tribunal Constitucional* and confirmed the fear, repeatedly voiced by the High Court in its *Resoluciones*, that the methodology developed by the MEF would result in a practical rejection of the *principio valorista* to the detriment of the bondholders.

865. The Tribunal will dedicate separate sections to the two arguments submitted by Claimants:

- that the Base Period selected by the MEF for the calculation was arbitrary (**i.**) and
- that the use of different exchange rates for conversion into USD and back to Soles compounded the arbitrariness (**ii.**).

* * *

(i) The Base Period chosen by the MEF was arbitrary

866. One of the most surprising elements of DS 242/2017 is that it completely jettisoned the Base Period previously utilized by Peru for the calculation of the parity exchange rate. DS 19/2014 had used a 63-year long Base Period, stretching from 1950-2013, but the MEF now decided to reduce the Base Period to one single month, and selected January 1969.

867. Prof. Edwards has convincingly argued that the Base Period for estimating parity exchange rates must be a time during which it is reasonable to conclude that the official exchange rate indeed was at parity. The month of January 1969 was not such a period: Peru had a fixed exchange rate policy and there was political and economic instability[696]. Inflation had increased to over 20% by the end of 1967, the currency had been devalued in September 1967 and in 1968 President Belaunde had been overthrown in a *coup d'état* led by General Velasco. Most strikingly, in January 1969, Peru took

[695] C PHB-M, paras. 60 and 61.
[696] CER-4, Edwards I, para. 260.

the decision to peg the Sol to the USD, and the exchange rate was not floated until 1990. Thus, the official pegged Sol/USD exchange rate in January 1969 did not change in step with relative inflation in Peru and the US, and it is not reasonable to assume that this fixed exchange rate was at parity[697].

Reasons for the MEF's choice

868. What was the reasoning which justified the MEF's decision to abandon its old methodology, and to select a single month, January 1969, the first month when the Sol was pegged to the USD, as the Base Period for the determination of the parity exchange rate?

869. The Republic has provided the two only internal reports prepared by the MEF's technical services to justify the changes introduced in DS 242/2017[698]. Both are reports prepared by the *Director General de Endeudamiento* to the *Vice Ministra de Hacienda*, one dated 7 June and the other 7 July 2017 (*i.e.*, shortly before enactment of DS 242/2017). Both reports are similar, and the later report, which is slightly more extensive, seems to have superseded the earlier one. The second report devotes three pages to the changes being proposed in the revaluation methodology: as regards the calculation of the parity exchange rate, the report simply says that the calculation will be made using the ITCR Index published by the Banco Central of Peru – an index which measures the change in the Sol/USD real exchange rate relative to January 1969[699]. No further explanation or justification is provided.

870. As Prof. Edwards has proven, by using the ITCR, the DS 242/2017 parity exchange rate formula adopts the single month of January 1969 as Base Period and implicitly assumes that the official pegged Sol/USD exchange rate in that month was at parity[700]; *pro memoria*: under the DS 17/2014 and 19/2014 formulas the Base Period initially had encompassed 32 years (1950-1982) and was later on extended to 63 years (1950-2013).

871. Contrary to what Peru has argued[701], it was not the Central Bank, but the MEF, which took the decision to use January 1969 as the Base Period. Publication of the ITCR Index, which is referenced to January 1969, was not a spontaneous decision of the Central Bank – the publication had been requested by the MEF, in a letter sent by the Minister of Economy and Finance, Mr. Alfredo Thorne, to the Governor of *the Banco Central de Reserva del Perú*[702]. The Central Bank simply provided, at the request of the MEF, the ITCR Index, which measures changes in the real exchange rate measured from January 1969. When the Central Bank sent the data to the MEF, it saw fit to

[697] CER-4, Edwards I, para. 262.
[698] Doc. R-392; Doc. R-436.
[699] Doc. R-436, para. 11.
[700] CER-4, Edwards I, para. 259.
[701] R I, para. 117.
[702] Doc. R-1072, ROP 034572, p. 54.

expressly draw the MEF's attention to the fact that determination of the parity exchange rate is dependent on the choice of an appropriate Base Period[703]:

> "*El cálculo del nivel de paridad para un determinado periodo está sujeto al periodo base que se escoja*".

> Notwithstanding this warning, the MEF decided to continue with its choice of January 1969 as the Base Period for its calculation. Vice-Minister Sotelo acknowledged in her deposition before the Tribunal that the decision of anchoring the parity exchange rate to January 1969 was adopted by the MEF – not the Central Bank.[704]

The opinion of the Republic's experts

872. In their two written reports, Respondent's financial experts in the present arbitration, Mr. Kaczmarek and Ms. Kunsman, two highly respected specialists, did not provide any explanation or justification for the MEF's decision. The question came up during the Hearing. Mr. Kaczmarek explained that the only reason for choosing January 1969 was that it coincided with the start of the expropriation program[705]:

> "PRESIDENT FERNANDEZ-ARMESTO: […] do you have any good reason, any economic reason why '69 was chosen? What is the explanation? Is there any explanation in the MEF Decrees why they have choose [sic] '69? Have you seen any internal documents saying, we have chosen '69 because they have – because, really, at this stage it was really the moment of equilibrium?
>
> THE WITNESS (Mr. Kaczmarek): All we've seen I think is that it corresponds to when the Land Reform program and the Bond program was – took effect. So, at the start of the program. So, you know, there were using official rates a the time. That's what people could exchange currency for. That was a real-world constraint, and then they adjust for inflation from that point forward. That's what they are doing.
>
> So, is that economically justified? Sure. I mean, if you're going to apply a real-world constraint that existed, which is that Official Exchange Rate, why wouldn't that be justified.
>
> PRESIDENT FERNANDEZ-ARMESTO: So, the argument is that '69 is the start of the program. That is really the – your argument.
>
> THE WITNESS (Mr. Kaczmarek): Yes".

873. Ms. Kunsman, the other financial expert engaged by Peru, was questioned on the same subject, and she was also unable to provide any cogent explanation[706]:

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[703] Doc. R-1072, ROP 034572, p. 40.
[704] HT(ESP), Day 3 (Sotelo), p. 979, ll. 4-20.
[705] HT(ENG), Day 7 (Kaczmarek), p. 2516, l., 8 – p. 2517, l. 10.
[706] HT(ENG), Day 7 (Kunsman), p. 2522, l., 22 – p. 2524, l. 16.

> "PRESIDENT FERNÁNDEZ ARMESTO: Now, can you explain to me what was changed, and have you seen any justification what it – why it was changed?
>
> THE WITNESS (Ms. Kunsman): So, what was changed was the base period, the base period was originally from 1950 to 1982, being 1982 when the last Bond was –Agrarian Bond was issued. So, that was the first period used and then it changed. And the 1969, I don't know the reasoning why.
>
> […]
>
> PRESIDENT FERNANDEZ ARMESTO: You have not seen any justification.
>
> THE WITNESS (Ms. Kunsman): No".

874. Vice-Minister Sotelo, who also deposed during the Hearing, defended a position similar to that of Mr. Kaczmarek[707]:

> "THE WITNESS (Ms. Sotelo): […] *No me consta si existe un análisis sobre por qué fijaron el índice de tipo de cambio real* [sic; the witness clearly misspoke, because the question referred to the parity exchange rate] *para enero 1969. Puedo suponer que se está refiriendo al año en que se emitieron los bonos de la reforma agraria. Presumo eso, pero no me consta*".

875. Summing up, there is no evidence that, *in tempore insuspecto*, Peru ever produced a cogent explanation on why it decided to radically change its approach and use January 1969 as the Base Period for the calculation of the parity exchange rate.

876. The only reasoning which is now being proffered by Vice-Minister Sotelo and by Mr. Kaczmarek, is that January 1969 coincided with the beginning of the Agrarian Reform. The argument does not convince: the *Ley de Reforma Agraria* was published on 24 June 1969, the *Bonos* were issued between 1970 and 1980[708], and it is difficult to understand why these facts, which were not taken into account to develop the methodologies under DS 17/2014 and 19/2014, suddenly became relevant in 2017, and influenced the Republic's 2017 decision to reduce the Base Period for the calculation of the parity exchange rate from 63 years to one month, and to choose January 1969 as the Base Period.

The real underlying reason

877. What was then the real reason, which impelled Peru in 2017 to deeply modify its methodology and choose the month of January 1969 as the Base Period?

878. Prof. Edwards offers an explanation which rings true: the MEF's purpose when it selected January 1969 as Base Period was to artificially increase the parity exchange rate[709]. The facts support this conclusion: using the methodology developed by the

[707] HT(ESP), Day 3 (Sotelo), p. 1003, ll. 13-17.
[708] CER-4, Edwards I, Model-Sheet "Valuation", Column D, listing issuance dates for all the *Bonos*.
[709] CER-4, Edwards I, para. 264.

Republic in DS 242/2017 systematically provides parity exchange rates that are more than twice as high as the parity exchange rate estimated by Prof. Edwards using a long Base Period.

[For example (all figures Soles Oro/USD):[710]

- January 1969: DS 242/2017 parity exchange 39; Edwards parity exchange rate 17;
- November 1972: DS 242/2017 parity exchange 40; Edwards parity exchange rate 18;
- January 1980: DS 242/2017 parity exchange 219; Edwards parity exchange rate 99;
- January 1990: DS 242/2017 parity exchange 17.669.986; Edwards parity exchange rate 7.986.099
- May 2018: DS 242/2017 parity exchange 7.685.751.377; Edwards parity exchange rate 3.427.949.108]

879. Why did the MEF have an interest that the methodology consistently results in a high parity exchange rate?

880. The answer is to reduce the financial burden which Peru had to assume to comply with the *Resolución TC Julio 2013*: The higher the parity exchange rate applied for the conversion of the *Bonos* into USD, the lower the resulting outstanding debt denominated in USD.

> [If the principal of the *Bono* is 100 Soles, and the parity exchange rate is 10 Soles/USD, the outstanding amount is 10 USD; if, through an unreasonable calculation, the parity exchange rate is inflated to 20 Soles/USD, the outstanding debt in USD is halved from 10 USD to 5 USD]

881. Respondent's financial experts have made a precise calculation of the difference in the amount which the Republic would have to pay to Gramercy, assuming (*ceteris paribus*)

- the parity exchange rate proposed in the DS 242/2017, and
- that proposed by Prof. Edwards[711].

Under the DS 242/2017 parity exchange rate, the Republic would only be obliged to pay USD 33.6 million to Gramercy for the totality of its portfolio; but if, instead of the DS 242/2017 parity exchange rate, one was to apply that proposed by Prof. Edwards (and all other elements in the calculation are left without change), the amount payable more than doubles to USD 74.3 million.

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[710] CER-4, Edwards I, Appendix P.
[711] H-14, p. 28. At the Tribunal's request, Prof. Edwards has confirmed that the calculation is correct.

882. In other words: the use of the parity exchange rate developed under DS 242/2017, by itself, reduced the amount which the Republic owes to Gramercy by USD 40.7 million.

883. Peru's financial incentive in using an artificially high parity exchange rate is undisputable.

* * *

(ii) The successive use of the parity and official exchange rates reinforced the arbitrariness

884. The mandate given by the *Tribunal Constitucional* to the MEF required the methodology to be based on the parity exchange rate ("*basándose en el tipo de cambio de paridad*").

885. *Ubi lex non distinguit, nec nos distinguere debemus.* The reasonable interpretation of the words used by the *Tribunal Constitucional* implied that the parity exchange between the Sol and the USD rate should be applied consistently in all the steps of the calculation.

886. But that is not what the DS 242/2017 formula does[712]:

- In step 1, the outstanding principal of the *Bonos* is converted from Soles to USD, using the parity exchange rate; while

- In step 4, the USD denominated amounts are converted back to Soles, using the official Sol/USD exchange rate at the present date (not the Sol/USD parity exchange rate which corresponds to the present date).

887. Prof. Edwards has explained that, since the parity exchange rate is used to calculate the initial amount, the financially correct decision is to also use the parity exchange rate as of the date of payment, to establish the number of Soles which the Republic owes to the bondholder[713].

Explanation

888. Why did the MEF decide to use the parity exchange rate to convert into USD, and the official exchange rate to move back into Soles?

889. Again, there is no explanation, either in the record or in the declarations of Peru's expert witnesses, justifying why the MEF's formula creates this mismatch between exchange rates. During the Hearing, Mr. Kaczmarek was asked by counsel to Claimants if using

[712] CER-4, Edwards I, para. 245
[713] HT(ENG), Day 5 (Edwards), p. 1605, ll. 3-5.

the parity exchange rate for the conversion back into Soles would increase the value of the Bonos by about 2.5 or 3 times. His answer was the following[714]:

> "I have no idea. We didn't do that calculation".

890. In fact, and contrary to the assertion of Mr. Kaczmarek, there is sufficient information in the file to obtain an idea of the financial impact of Peru's decision. Assume a *Bono* of nominal value Soles 100, which is converted into USD as of January 1975 and which is converted back into Soles as of May 2018[715].

891. Under the methodology of DS 242/2017:

- The parity exchange rate as of January 1975 was 46 Soles Oro/USD, so that Soles 100 would convert into USD 2.17;

- The official exchange rate as of May 2018 was 3,272,295,652[716], so that the USD 2.17 would convert back into Soles 7.1 billion.

892. If the correct alternative is used, and the parity exchange rate is applied in both conversions, the result would be strikingly different:

- The initial conversion would not change, and the Soles 100 would still result in USD 2.17;

- But the conversion back into Soles would be significantly affected: the parity exchange rate (again under the DS 242/2017 methodology) as of May 2018 was 7,685,751,377 – much higher than the official exchange rate; the USD 2.17 would convert back into Soles 16.678 billion – more than twice the amount obtained under the methodology adopted by the MEF in DS 242/2017.

893. Summing up, the MEF's methodology in DS 242/2017 compounded the arbitrariness, by using the (very high) parity exchange rate for the initial conversion into USD and then applying the (comparatively lower) official exchange rate for the back-end conversion of the principal and interest, denominated in USD, to Soles, to further reduce the amount due to the bondholders.

B. The date of revaluation is not arbitrary

894. Claimants say that the problems associated with the parity exchange rate as defined in the DS 242/2014 were additionally compounded by the fact that the formula employed the exchange rate that corresponds to the date of the last clipped *Cupón* and not that of issuance of the *Bono*. Thus – say Claimants – the DS 242/2017 formula only partially accounts for the erosive effect of inflation between the date of issuance and the date of

[714] HT(ENG), Day 7 (Kaczmarek), p. 2534, ll. 12-13.
[715] The information is taken from Annex P to CER-4, Edwards I.
[716] Denominated in Soles Oro.

the last clipped *Cupón*[717]. This allegedly has a dramatic impact on the value of *Bonos* with clipped *Cupones* in Gramercy's portfolio. Under the DS 242/2017 formula, their value is USD 1.47 million; applying the same formula, but using the parity exchange rate corresponding to the date of issuance rather than the date of the last *Cupón* would increase the value of the portfolio by nearly 13 times[718].

895. Respondent disagrees. It argues that under Gramercy's proposed methodology, the principal of *Bonos* with unclipped *Cupones* is accelerated to the date of issuance, and then revalued to the date of the last clipped *Cupón* before applying interest rate. In Respondent's opinion, Claimants' approach is flawed for two reasons[719]:

- because there is no acceleration clause in the *Bonos*; and

- because there is no logical basis to accelerate the unpaid principal to the issuance date.

Discussion

896. The Tribunal concurs with Respondent.

897. The *Ley de Reforma Agraria 1969* established the three types of *Bonos Agrarios*, all denominated in Soles Oro, Peru's official currency at the time, called *Clase A, B* and *C*[720]. The principal was to be paid in equal annual payments, and the interest that accrued on the outstanding principal was to be paid together with the principal, against delivery of the corresponding *Cupón*[721].

898. Each *Cupón* then incorporated the annual payment ("*armada*") which the Republic undertook to perform, and which consisted of the *pro rata* portion of principal plus the interest accrued for that year at the corresponding interest rate. The "*armadas*" declined year by year, because interest payments became smaller as the principal was partially paid.

899. Some of the bondholders decided not to tender any of the *Cupones* to payment – they failed to "clip" them, to use financial jargon. Others, however, preferred to submit their *Cupones* as they became due, and to cash the principal and interest, until eventually they stopped doing so (at the latest, when the paying agent was liquidated, and the *Bonos* became, in nominal terms, worthless; all *Bonos* have at least one *Cupón* still attached).

900. The question which the Tribunal must address is the proper date of revaluation for *Bonos* where certain *Cupones* have been clipped (if no *Cupón* has been clipped, there is no discussion that the appropriate date is that of issuance of the *Bono*). This question

[717] CER-6, Edwards II, para. 115.
[718] CER-6, Edwards II, para. 116.
[719] RER-11, Quantum II, paras. 172-175.
[720] Doc. CE-1, Art. 174.
[721] Doc. CE-1, Art. 174.

was already addressed in the *Resolución TC Julio 2013*, which clearly stated that the revaluation must be done as of the date of the earliest unpaid *Cupón* ("*desde la fecha de la primera vez en que se dejó de atender el pago de los cupones de dicho bono*")[722];

901. The solution mandated by the *Tribunal Constitucional* is both legally correct and financially sound.

902. In the case of a *Bono* with clipped *Cupones*, the bondholder has voluntarily decided to cash the principal and interest formalized in the clipped *Cupones*. The debt reflected by those *Cupones* has been satisfied by the Republic, to the debtor's satisfaction, and has become extinct. There is no legal basis for revaluing an extinct debt, which has been extinguished with the debtor's consent.

903. From a financial point of view, the proposal submitted by Claimants lacks any logic: when a bond is unpaid, this may result in the acceleration of the totality of the outstanding principal, which becomes due and payable *as of the date of default*.

904. In the present case, the default occurred as of the date of the earliest unclipped *Cupón*; and financial logic requires that the outstanding principal be accelerated as of that date, that it becomes due and payable as of that date and that it be revalued applying the parity exchange rate as of that date. There is no financial logic in Claimants' proposal to give retroactive effect to the acceleration, and to take its effects back to the date of issuance. As Mr. Kaczmarek has convincingly argued[723]:

> "Accelerating the principal portion of the Unclipped Coupons to the issuance date, and then re-inflating it forward with inflation, is an indirect manner of stating that all Coupons actually paid were not paid at the proper amount, because they were not paid with inflation adjustment. There is no logical or financial basis to state [that] coupons paid without an inflation adjustment from the issuance date were paid properly, but Unclipped Coupons must incorporate this retroactive inflation adjustment to be paid properly".

C. The calculation of interest is partially arbitrary

905. Claimants say that none of the MEF formulas, including that in DS 242/2017, made good on the *Tribunal Constitucional's* directive to pay compensatory interest, on top of the U.S. Treasury bond yield, until the date of actual payment. Peru's *Tribunal Supremo*, in decisions applying the *Resolución*, always foresaw payment of interest on top of the dollarization-updated principal. But the MEF never included compensatory interest in its formulas[724]. Furthermore, the purpose of the revaluation must be to update the value of the *Bonos* "to present day" – something which the formulas do not achieve[725]

[722] Doc. CE-17, para. 25.
[723] RER-11, Quantum II, para. 177.
[724] C PHB-M, para. 62.
[725] C I, para. 205.

906. Respondent disagrees: in its opinion, the *Resolución TC Julio 2013* decided to use the 1-year U.S. Treasury Bill rate, and this was implemented in the *Decretos Supremos*[726].

Discussion

907. The Tribunal concurs partially with Respondent and partially with Claimants.

908. The *Resolución TC Julio 2013* provides that the principal of the *Bonos*, converted into USD, must accrue interest at the rate applicable to U.S. Treasury Bonds ("*más la tasa de interés de los bonos del Tesoro americano*")[727] – and not at the fixed rate of 4%, 5% and 6% rates originally provided for in the *Bonos*. The *Resolución* simply referred to "*bonos del Tesoro americano*", without giving more indications to what type of U.S. Treasury Bonds it was referring.

909. The law of the land is thus that the Agrarian Bonds, once they have been converted into USD at the parity exchange rate, must accrue the same interest as U.S. Treasury Bonds – from the date of conversion until the date of actual payment.

910. The formula for calculation of interest used in the DS 242/2017 gives rise to two questions: whether the interest rate (**a.**) and/or the dates of accrual (**b.**) are arbitrary.

a. The interest rate applied is not arbitrary

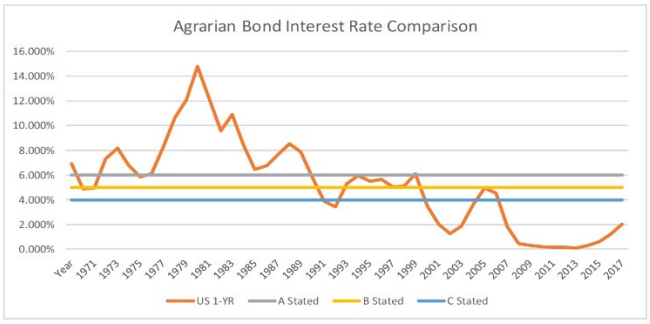
911. As Mr. Kaczmarek has convincingly explained, the interest rate mandated by the *Tribunal Constitucional* and used in the DS 242/2017 formula, is the rate corresponding to U.S. Treasury Bills, and this rate[728]:

> "[…] is more than fair, especially considering the very low rates that were effectively stipulated in each Agrarian Bond".

912. In support of this statement, Mr. Kaczmarek produced a graph, comparing the fixed 4%, 5% and 6% Agrarian Bond Interest rates, and the U.S. Treasury Bill Rates from 1970 through 2018:

[726] RER-11, Quantum II, para. 122.
[727] Doc. CE-17, para. 25.
[728] RER-11, Quantum II, para. 122.

- Average US T-Bill Rate from 1970 to 2018 was 5.2%



913. This graph shows that the average of the Treasury Bill rate was 5.2%, which is just above the average of the 4%, 5% and 6% originally fixed in the *Bonos*[729].

914. The Tribunal concludes that the interest rate foreseen by the *Tribunal Constitucional,* which represents the law of the land as regards the interest to be applied to outstanding *Bonos,* has been properly introduced into the formula used in the DS 242/2017 and cannot be labelled arbitrary or unjust.

b. The dates of accrual established by the Government are arbitrary

915. When regulating the interest which the *Bonos* should accrue, the *Tribunal Constitucional* simply provided that the interest rate of U.S. Treasury bonds should be added to the principal ("*más la tasa de interés de los bonos del Tesoro americano*")[730]. Implicit in this mandate was the rule that interest should start accruing on the date of revaluation into USD (which in *Bonos* without clipped *Cupones* coincided with the date of issuance, and in *Bonos* where some *Cupones* had been tendered and paid corresponded to the date of the last unclipped *Cupón*) and should cease to accrue on the date when the Republic actually paid the bondholders.

916. The DS 242/2017 formula complies with the first requirement, but not with the second.

917. Interest starts accruing on the date of issuance of the first unclipped *Cupón*. But in accordance with the formula, interest ceases to accrue "*Hoy*", which is defined as the "*fecha de actualización*", *i.e.*, the date when the MEF calculates the revaluation. This definition is contrary to the intention of the *Resolución TC Julio 2013*. It is also arbitrary, because the MEF, without any reason or justification, effectively deprives bondholders of the interest accruing between the date of revaluation and the date of actual payment by the State (which *de lege* can occur up to eight years after the acknowledgement by the MEF).

[729] HT(ENG), Day 7 (Kaczmarek), p. 2389, ll. 18-22.
[730] Doc. CE-17, para. 25.

918. The proper and reasonable interpretation of the *Resolución TC Julio 2013* is that the conversion back into Soles of the outstanding principal in USD should occur on the date of actual payment, and the accrual of interest at the rate of one-year U.S. Treasury Bills, should continue until such date. To the extent that the formulas contained in DS 242/2017 provide for a different date of conversion back into Soles, or purport to constrain accrual of interest to a shorter period of time, such formulas unreasonably and arbitrarily impair the rights of the bondholder.

3.3 CERTAIN ASPECTS OF THE BONDHOLDER PROCESS ARE ARBITRARY

919. Claimants say that the evidence confirms that the bondholder process is arbitrary in design and a complete failure in execution[731]. It is arbitrary in design because it strips bondholders of all rights by:

- Requiring them to waive their right to seek relief in other forum as a prerequisite to participating in the administrative process, with no guarantee that Peru will eventually provide any payment;

- Granting the Government full discretion to determine not only the payment amount, but also its form, including a non-financial form of property;

- Mandating companies that purchased *Bonos* with "speculative ends, a provision which presumably applies to Gramercy", to receive cash payments, if at all, after all other bondholders[732].

920. Respondent denies that the bondholder process is arbitrary[733]; and submits that it offers a transparent, detailed and organized system for bondholders to receive payment for their securities[734]. The bondholder process conforms with both Peruvian law and international best practices for claims mechanisms[735]:

- Participation in the bondholder process requires that a bondholder with claims pending in Court, with no decision rendered yet, withdraw those claims in order to be paid through the process – but this is a common feature of mass claims; bondholders preserve the right to seek recourse through administrative appeals and litigation;

- The process offers bondholders the choice of four payment options, and this constitutes a distinct advantage;

- The process implements a reasonable and transparent payment order.

* * *

[731] C II, para. 390; C PHB-M, para. 87.
[732] C I, para. 206.
[733] R I, para. 273.
[734] R I, para. 279.
[735] R I, para. 278.

Discussion

921. Claimants say that the methodology of revaluation of the *Bonos,* as developed in the *Decretos Supremos* is arbitrary – something which the Tribunal has analyzed and (partially) accepted in the previous section. Now Gramercy adds a second leg to its argument: it submits that the bondholder process itself also incurs in arbitrariness – something which the Republic denies.

922. To adjudicate this issue the Tribunal will in turn review the three areas of alleged arbitrariness highlighted by Claimants:

- The waiver requirement (**A.**),
- The right of the Government to determine payment (**B.**), and
- The deferment of speculative investors (**C.**).

923. Thereafter, the Tribunal will briefly address whether the acknowledged failure of the bondholder process reinforces the Tribunal's findings (**D.**).

A. The waiver requirement is not arbitrary

924. It is undisputed that the bondholder process is mandatory. Art. 4 of the *Texto Único* provides as follows:

> "*Los procedimientos administrativos establecidos en el presente Reglamento son obligatorios*"

925. The First Disposición Complementaria Final adds[736]:

> "*Los procedimientos administrativos regulados en este Reglamento son incompatibles con la actualización, en la vía judicial, de la deuda correspondiente a los Bonos de la Deuda Agraria.*
>
> *En caso de existir un proceso judicial de actualización de la Deuda Agraria en trámite, sin que se haya emitido sentencia, el demandante para acogerse a lo dispuesto en el presente Reglamento, debe acreditar, previamente, haberse desistido de la pretensión iniciada en la vía judicial*".

926. And the Second *Disposición Complementaria Final* of the *Texto Único* finally provides as follows[737]:

> "*La metodología para la actualización de la deuda correspondiente a los Bonos de la Deuda Agraria materia de la solicitud, a que se refiere el Capítulo II de este Reglamento, se aplica en los procesos judiciales siempre que:*

[736] Doc. CE-275.
[737] Doc. CE-275.

> *1. El proceso judicial se encuentre en trámite sin sentencia.*
>
> *2. Exista sentencia con calidad de cosa juzgada, en la cual no se ha señalado la metodología de actualización, dejando la determinación de la misma al perito contable y que la pericia contable no se hubiere realizado; o de haberse realizado dicha pericia, estuviere pendiente de resolución un recurso impugnativo contra la resolución que apruebe el peritaje*".

927. The waiver regulation contained in the *Texto Único* can be summarized as follows:

- Bondholders who before the enactment of the DS 17/2014[738] had not filed a lawsuit, must necessarily claim through the bondholder process, which is mandatory and exclusive;

- Bondholders who had filed such a lawsuit before the cut-off date are exempted from the bondholder process, but, if judgment has not been rendered or if the judgment has been rendered but does not provide a specific methodology, their compensation will be established applying the *Texto Único*; the implication is that if the judgment had been rendered and had applied a different methodology, the judgment's findings would be respected.

928. The regulation contained in the *Texto Único* conforms with the mandate given by the *Tribunal Constitucional* in its *Resolución TC Agosto 2013*[739]:

> "*Que, en dicha línea, este Tribunal debe aclarar que el procedimiento establecido en el punto resolutivo 3 y en los fundamentos 26 a 29 de la resolución ejecutoria de fecha 16 de julio de 2013, es uno de tipo obligatorio, pues solo de ese modo se cumplen los fines de equilibrio y ponderación constitucional con los cuales ha determinado las reglas para el pago actualizado de los bonos de la deuda agraria. Es decir, en adelante la pretensión de cobro de dicha deuda solo puede efectuarse ante el referido procedimiento y no ante uno judicial, lo que no obsta a que los acreedores de la deuda recurran a un proceso judicial en caso de producirse una arbitrariedad en el curso de dicho procedimiento ante el Poder Ejecutivo*". (Emphasis added)

929. The *Tribunal Constitucional* ordered that the bondholder process be mandatory, subject to the *proviso* that, if the Government acted arbitrarily, bondholders had the right to seek redress from the Courts of Justice. This right is acknowledged in the *Texto Único*, which specifically foresees that the MEF's decision regarding the revaluation is subject to a "*recurso de reconsideración*" and *recurso de apelación*[740]; and thereafter to a "*recurso contencioso-administrativo*" before the Peruvian Courts[741].

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[738] This DS already included the text of the First and Second DS.
[739] Doc. CE-180, para. 16.
[740] Doc. CE-275, Art. 14.2; Doc. RA-282, Arts. 208-209.
[741] RER-8, García-Godos, para. 107; Doc. RA-282, Art. 218.

930. The waiver regulation included by the Government in the *Texto Único* thus conforms with the requirements established by the *Tribunal Constitucional* in its *Resoluciones*.

931. Claimants say that this regulation is arbitrary, because it requires bondholders to waive their right, "with no guarantee that Peru will ultimately provide any payment".

932. The Tribunal disagrees.

933. There is nothing arbitrary in the decision to make a mass claim administrative procedure mandatory. The very purpose of creating such a scheme is to channel all claims through one single procedure, avoiding dispersion and contradictory decisions from multiple Courts. The one requirement which due process requires, is that the decisions taken in the administrative procedure be open to challenge through the Courts – a right that is available to the bondholders and is unaltered by the *Texto Único*.

B. The right of the Government to determine payment is partially arbitrary

934. Claimants' second argument is that the *Decretos Supremos* are arbitrary, because they grant the Government full discretion to determine the payment amount and its form, including non-financial form of property[742].

935. The *Texto Único* has a detailed regime, setting forth the amount to which the bondholder is entitled (**a.**), and the procedure for the payment of such amount (**b.**).

a. The determination of the amount due by the MEF is not arbitrary

936. As regards the amount due, the determination is performed by the MEF, but the *Texto Único* requires that the MEF apply the methodology established in the *Resoluciones TC Julio, Agosto y Noviembre 2013*[743]:

> "*Dicho valor actualizado es determinado de acuerdo con la metodología enunciada por el Tribunal Constitucional en* [*las Resoluciones*]".

937. Furthermore, the MEF's decision regarding the revaluation was also subject to a "*recurso de reconsideración*" and a *recurso de apelación*[744]; and subsequently to a "*recurso contencioso-administrativo*" before the Peruvian Courts[745].

938. The Tribunal does not find any arbitrariness in these provisions. In a mass claim procedure, it seems reasonable that the Government is entrusted with making the initial calculation of the outstanding debt, by applying certain predetermined criteria, provided that such calculation is subject to review by the Courts – as precisely occurs in the present case.

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[742] C I, para. 206.
[743] Doc. CE-275, Art. 11.1.
[744] Doc. CE-275, Art. 14.2; Doc. RA-282, Arts. 208-209.
[745] RER-8, García-Godos, para. 107; Doc. RA-282, Art. 218.

b. Certain elements of the procedure for payment established by the Government are arbitrary

939. Once the amount due to each bondholder has been established, either through an administrative act of the MEF or by a final judgment rendered by a *Tribunal Contencioso-Administrativo*, the *Texto Único* provides the bondholder with the possibility of choosing between various payment options[746]:

- Payment in cash, but subject to an important limitation: the cash to be paid cannot exceed Soles 100,000 per bondholder (less than USD 30,000);

- Payment with Peruvian public debt; or

- Payment with land or investments in certain sectors owned by the Peruvian State.

940. Bondholders are authorized to combine the various options, and in such case, the cash portion can reach 20% of the total (even if the cash amount exceeds Soles 100,000)[747]; the Republic is entitled to pay this cash portion in up to eight years[748].

941. Under the *Texto Único* the initiative to request a combination of the various payment options rests with the bondholder. But the bondholder's preference must be approved by the MEF. If the MEF disagrees with the proposal, it can react with a counterproposal that in turn must be accepted by the bondholder. If no agreement is reached, the decision on how the *Bonos* are to be paid is taken unilaterally by the MEF[749]:

> "*De no haber acuerdo entre las partes, la Dirección de Créditos, o la que haga sus veces, de la DGETP del MEF, emite la resolución directoral debidamente sustentada que defina la opción de pago y suscribe los documentos complementarios correspondientes, en un plazo máximo de treinta (30) días hábiles, contados a partir del vencimiento del plazo adicional otorgado para llegar a una propuesta consensuada*" (Emphasis added)

942. The *Resoluciones* adopted by the *Tribunal Constitucional* foresaw a radically different procedure for the payment of bondholders:

- The State's obligation to pay the bondholders' debt in cash is not subject to any quantitative limitation; the only permitted limitation is in the term: the debt can be paid in yearly instalments, with a maximum deferment of eight budget years;

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[746] Doc. CE-275, Art. 16.
[747] Doc. CE-275, Art. 16 *in fine*.
[748] Doc. CE-275, Art. 18 *in fine*.
[749] Doc. CE-275, Art. 17.5; against this decision, the bondholder is entitled to file a *recurso de reconsideración* and a *recurso de apelación*; and eventually a *recurso contencioso-administrativo* before the Peruvian Courts.

- Cash payments can be substituted by delivery of freely transferable interest-bearing Government bonds, similar to those presently being issued by the Republic[750], but this option must be accepted by the bondholder ("*libremente acordada*")[751].

943. The Tribunal concurs with Claimants that certain aspects of the payment procedure, in which the *Decretos Supremos* deviate from the mandate given by the *Tribunal Constitucional*, and the fact that MEF is granted unfettered discretionary powers as regards the payment procedure, must be considered arbitrary:

- First, the MEF's decision to limit the portion of the outstanding debt that is to be settled with cash to Soles 100,000 or to 20% of the total; the *Tribunal Constitucional* had authorized the Government to postpone payment of the outstanding amount for a maximum of eight budget years, with the purpose of balancing the bondholders' right to obtain a fair compensation, and the State's right to preserve a financial equilibrium ("*principio presupuestario de equilibrio financiero*")[752]; it is unreasonable for the MEF to upend the *Tribunal Constucional's* balancing decision, and to impose on bondholders the additional burden of limiting the cash portion to which they are entitled (in the best case) to 20% of the total;

- Second, the MEF's right to impose on bondholders the form of payment; the *Texto Único* authorizes the MEF not only to define the "menu" of public debt which the bondholder must accept, but even to force the bondholder to accept ownership of land or other assets as a form of payment; the *Resoluciones* did foresee delivery of public debt *in lieu* of cash, but only with the consent of the bondholder; the rights that the *Texto Único* purports to grant to the MEF go way beyond the solution adopted by the *Tribunal Constitucional* and would permit the MEF to impose a payment form (*e.g.*, 100% delivery of land or shares) which makes the satisfaction of the bondholder illusory.

C. The treatment of speculative investors is arbitrary

944. The *Resolución TC Julio 2013* provides that the *Decreto Supremo* may prioritize payments to certain groups of bondholders. The *Tribunal Constitucional* indeed ordered that payments in cash to natural persons be prioritized, and within natural persons, priority may be given to original holders of the *Bonos* and their heirs, and within this category to holders older than 65 years of age[753]. There is no reference in the *Resolución TC Julio 2013* (nor in any other *Resolución* issued by the *Tribunal Constitucional*) to the possibility of deferring payments to purchaser of *Bonos* who had bought the securities "*con fines especulativos*" – this concept is not even mentioned in the *Resoluciones*.

[750] Doc. CE-17, para. 29.
[751] Doc. CE-183, para. 8 *in fine*.
[752] Doc. CE-17, paras. 21, 28.
[753] Doc. CE-17, para. 29.

945. The *Texto Único* deviates from the instructions provided for by the *Tribunal Constitucional*. It creates a complex system, with seven categories of bondholders[754], each category having "*prelación de pago*" over the next one (*i.e.*, it must be paid in full, before settlement of the next category starts). The first category is composed of natural persons or their heirs, who are 65 or older; and the second, third and fourth by different types of natural persons; category five comprises juridical persons, which are original holders of agrarian debt; and category six juridical persons which have received Bonos as payment of their credits.

946. In Art. 18 of the *Texto Único* there is a final, seventh category in priority of payment, which is defined as:

> "*Personas jurídicas que sean tenedores no originales de los bonos de la deuda agraria, que fueron adquiridos con fines especulativos*". (Emphasis added)

947. The *Texto Único* does not provide any indication of the basis on which the acquisition of Bonos by a bondholder is to be deemed "*con fines especulativos*".

948. Peru has not provided any explanation of the reasons underlying the inclusion in the *Texto Único* of a criterion not mentioned in the *Resoluciones* of the *Tribunal Constitucional*. Respondent has also not clarified the requirements for a purchase of *Bonos* to be considered "*con fines especulativos*". Finally, the Republic has also failed to provide any study regarding the existence of "speculative bondholders" and their relative importance within the totality of bondholders, or any information regarding the existence of bondholders (other than Gramercy) who could fit into the definition of the *Texto Único*.

949. In the absence of any such explanation, the Tribunal is forced to find that the inclusion in the *Texto Único* of a category of bondholders who purchased "*con fines especulativos*" is in fact a regulation *ad hominem,* directly aimed at Gramercy, the only known investor who could arguably fall within that category.

950. The practical effect of the rule is to deter Gramercy from opting into the bondholder process and requesting payment under the *Texto Único.* If Gramercy were to follow that route, the MEF would be entitled to invoke Art. 18 of the *Texto Único*, label Gramercy as a bondholder "*con fines especulativos*" and, at its discretion, postpone any cash payment to Gramercy, until all other bondholders had been fully paid.

951. In the Tribunal's opinion, such an unfettered discretion, unmoored to any rational standard, can only be considered arbitrary.

D. The failure of the bondholder process confirms the arbitrariness

952. Gramercy finally argues that a clear indication that the bondholder process is arbitrary is that it has been unsuccessful in engaging a significant number of bondholders into

[754] Doc. CE-275, Art. 18.

submitting their *Bonos* for payment. Claimants point out that the administrative process implemented by the MEF attracted less than 10% of the outstanding value of the agrarian debt; and the Republic has only paid 1% of the outstanding principal submitted for payment.

953. The Tribunal sees some merit in Claimants' arguments.

954. The fact that a State measure does not effectively achieve the objective it purported to attain, does not, *per se*, render such measure arbitrary.

955. The divergence between the objective of the measure and its eventual result may, however, serve as an indication that the measure was inspired in arbitrary motives. In assessing the arbitrariness of a measure, the tribunal in *Tza Yap Shum* said[755]:

> "*Una indicación adicional de la arbitrariedad en el accionar de la [administración tributaria], aun cuando sea en retrospectiva, resulta de examinar los resultados de su proceder. Los resultados tanto para el contribuyente como para la [administración tributaria] misma fueron abrumadoramente negativos*".

956. The Tribunal has already concluded that the DS 242/2017 was arbitrary because it adopted a methodology for the revaluation of the *Bonos*, with three factors that have no reasonable justification and can only be explained by the Government's drive to reduce the valuation of the *Bonos*:

- The parity exchange rate was calculated using a single month, January 1969, as the Base Period;

- The parity exchange rate is only used to convert into USD; however, to convert back to Soles, the methodology employs the current exchange rate;

- The accrual of interest finalizes on the *fecha de actualización*, without covering the span of eight years in which the Government is allowed to make the payment.

957. These methodological faults had a relevant impact in the revaluation of the *Bonos*, significantly reducing the amounts due to individual bondholders and rendering the process unreliable. And this is reflected in the overall success (or lack thereof) of the bondholder process.

Evaluation of the bondholder process

958. The bondholder process regulated by the *Texto Único* was obligatory – bondholders had a five-year window in which they had to submit their claims. This time window was to be counted from January 2014, and consequently finalized in January 2019, as confirmed by Vice-Minister Sotelo in her deposition before the Tribunal[756].

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[755] *Tza Yap Shum*, para. 219.
[756] HT(ESP), Day 3 (Sotelo), p. 1039, ll. 4-13.

959. Consequently, presently no new claims may be filed, and it is now possible to assess whether and to what degree the bondholder process, as structured in the *Texto Único*, has been a success.

960. Peru has presented a table, showing the number of bondholders who had participated in the different steps of the process[757]:

- 443 bondholders completed the first step, and asked for authentication of their Bonos;
- The number of bondholders who then proceeded to the second step, registration, was much smaller: only 254;
- There was again a significant reduction in the number of bondholders who asked for revaluation of their Bonos: 146;
- And only 29 bondholders actually proceeded to the last phase and proposed a payment option to the MEF.

961. Vice-Minister Sotelo testified that as of 10 January 2020, only 22 cases, representing 191 Bonos, had reached the final valuation, for a total of about Soles 4.5 million (approximately USD 1.36 million) and that only Soles 1 million (USD 300,000) had actually been paid in cash[758].

962. The numbers clearly show that most bondholders have been reluctant to participate in the bondholder process – as indeed was Gramercy, which never requested its inclusion in the scheme.

963. Summing up, the Tribunal concurs with the opinion expressed by Minister Castilla during his testimony, when he acknowledged that the process had been "disappointing" and that he "would have wanted that a large number of Bondholders would have benefited from the administrative process"[759].

964. The failure of the bondholder process, which was only accepted by a minority of bondholders, reinforces the Tribunal's findings that the DS 242/2017 created a procedure with methodological errors, which did not adhere to the instructions provided for by the *Tribunal Constitucional,* which granted the MEF a high degree of discretion and which resulted in a severe and improper curtailment of the rights to which bondholders were entitled under Peruvian law, as interpreted and mandated by the *Tribunal Constitucional*.

965. Res ipsa loquitur.

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[757] Doc. R-1064.
[758] HT(ESP), Day 3 (Sotelo), p. 1042, ll. 10-19; p. 1068, ll. 3-12.
[759] HT(ENG), Day 4 (Castilla), p. 1306, ll. 2-4.

3.4 THE PROCEDURE FOR THE ISSUANCE OF *DECRETOS SUPREMOS* DID NOT VIOLATE PERUVIAN LAW

966. Claimants submit, as an additional argument, that the Republic also breached Art. 10.5 of the Treaty because the *Decretos Supremos* did not comply with the legal formalities required by Peruvian law, in particular:

- They failed to provide a statement of reasons that clearly explains the proposal;
- The MEF failed to pre-publish the draft regulation to grant stakeholders the opportunity to give their input;
- The MEF failed to provide a cost-benefit analysis, showing the impact of the *Decretos Supremos* as compared to other alternatives;
- The MEF's Legal Office made no serious legal review of the draft regulation to ensure compliance with the mandatory legal framework;
- The MEF failed to satisfy the reasonability principle; it did not address necessity, adequacy and proportionality as required by Peruvian law.
- The MEF finally failed to prepare and submit the Análisis de Calidad Regulatoria de la Comisión Multisectorial.

967. The Republic denies this proposition and avers that the *Decretos Supremos* were approved following a comprehensive and methodical process, in compliance with Peruvian law.

Discussion

968. As a starting point, the Tribunal concurs with the U.S.[760] and Respondent[761] that a breach of domestic law does not *per se* entail a breach of the MST under the Treaty. It is not the role of investment tribunals to review whether certain administrative measures adopted by the host State comply with or breach domestic administrative law[762]. This Tribunal's task is confined to adjudicating whether Peru's measures, in this case the *Decretos Supremos,* are consistent with the provisions of the Treaty.

969. Claimants invoke certain Peruvian administrative law principles and provisions, which govern the procedure for the drafting, approval and publications of legislation and regulation – including decrees, like the *Decretos Supremos,* issued by the Government[763]. Claimants say that the Government has failed to abide by its own regulations, while the Republic submits that the administrative regulation was properly

[760] USS, para. 35.
[761] R II, para. 376.
[762] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, Doc. CA-73, para. 190; *Thunderbird*, para. 160.
[763] C II, para. 377.

applied, and that, even if it were established that minor departures from the prescribed procedure occurred, such discrepancy would under no circumstances engage the international responsibility of the State under the FTA[764].

970. The Tribunal sides with Peru.

971. Claimants have failed to prove that the MEF did not comply with Peruvian administrative law when drafting, approving and publishing the *Decretos Supremos.*

972. First, Respondent's legal expert, Prof. García-Godos, has convincingly argued that the main legal source invoked by Claimants to challenge the *Decretos* – the *Manual para el Análisis Económico y Legal de la Producción Normativa en el MEF* – is not applicable in this case. These guidelines expressly state that they do not apply to regulations issued by the MEF that are "*asociadas a los Sistemas de Presupuesto, Endeudamiento, Contabilidad, Tesorería e Inversión Pública*" [765]. Since the *Decretos Supremos* evidently concern the State's budget, the Tribunal shares the MEF's interpretation, which considered these guidelines not to be applicable.

973. Second, regarding the pre-publication requirement, Prof García-Godos clarified that regulations issued by the Government have to be pre-published for five days on the web of the relevant Ministry, but only if such pre-publication is required by law[766]. In this case, since the mandate to issue the *Decretos Supremos* came from the *Tribunal Constitucional*, which did not give any instruction regarding pre-publication, no pre-publication period was required[767].

974. Third, the Tribunal fails to see any deficiency in the *Exposición de Motivos* of DS 242/2017. The *Decreto Supremo* includes a succinct but sufficient account of the mandate received from the *Tribunal Constitucional* and the motives which, in the MEF's understanding justify the solutions adopted in the *Texto Único*[768].

975. Finally, as regards the so-called *Análisis de Calidad Regulatoria* set forth by *Decreto Legislativo 1310*, a report which analyzes whether that draft regulation complies with the necessity, adequacy, proportionality and effectiveness principles[769], Respondent's expert Prof. García-Godos says that the DS 242/2017 did not fall within the scope of regulations that are mandatorily subject to this requirement. The control mechanism is intended for administrative proceedings of general application, but not for those

[764] R I, paras. 274-278.
[765] Doc. RA-402, Section 1.
[766] Doc. RA-396, Art. 13.3 of the *Ley Orgánica del Poder Ejecutivo* provides that "[*l*]*os proyectos de reglamento se publican en el portal electrónico respectivo y por no menos de cinco (5) días calendario, para recibir aportes de la ciudadanía, cuando así lo requiera la Ley*".
[767] Doc. RA-396, Art. 13.3; RER-8, García-Godos, paras. 65-68.
[768] Doc. CEC-275, Considerandos.
[769] CER-10, Bullard, para. 205; RER-8, García-Godos, para. 102.

addressed for a specific collective of citizens, such as the DS 242/2017, which only affects bondholders[770].

3.5 CONCLUSION

976. In this section the Tribunal has analyzed Claimants' allegation that:

- the formulas used in the *Decretos Supremos* were arbitrary and irrational;
- the bondholder process was arbitrary in design and a complete failure in execution; and
- the *Decretos Supremos* violate basic Peruvian law requirements of legality and reasonableness.

977. The conclusions reached by the Tribunal can be summarized as follows:

978. First, the Tribunal has analyzed the Base Period used in the calculation of the parity exchange rate under the DS 242/2017, a *Decreto Supremo* issued by the Peruvian Government.

979. Prof. Edwards, Claimant's financial expert and a highly respected academic, specialized in the field of currency exchange rates, has written:

> "In my opinion, the August 2017 MEF Parity Exchange Rate Formula's use of a January 1969 base period to estimate parity exchange rate is unreasonable"[771].

980. The Tribunal concurs. Peru and its experts have failed to provide any reason justifying why the DS 242/2017 revaluation methodology diverged from that used in previous *Decretos Supremos*, and why DS 242/2017 selected a single month, January 1969, as the Base Period for the calculation of the parity exchange rate. The mandate received from the *Tribunal Constitucional* required the MEF to develop a methodology that would result in a fair application of the *principio valorista.* The DS 242/2017 parity exchange rate was designed, not to comply with the instructions of Peru's Highest Court, but to achieve an unreasonably low revaluation of the *Bonos*.

981. Second, the arbitrariness was compounded because under DS 242/2017 the (higher) parity exchange is only used when converting into USD; however, to convert the USD amount back to Soles, the *Decreto Supremo* applies the (lower) market exchange rate at the date of revaluation; this methodology is contrary to the mandate received from the *Tribunal Constitucional*, and its purpose is to arbitrarily reduce further the amount due to the bondholders.

982. Third, under the DS 242/2017 formula interest ceases to accrue "*Hoy*", which is defined as the "*fecha de actualización*", *i.e.*, the date when the MEF calculates the revaluation.

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[770] RER-8, García-Godos, para. 20.
[771] CER-4 Edwards I, para. 264.

This definition is contrary to the mandate given by the *Tribunal Constitucional* and it is also arbitrary, because the MEF, without any reason or justification, deprives bondholders of the interest accruing between the date of revaluation and the date of actual payment by the State (which can occur up to eight years after the acknowledgement by the MEF).

983. The proper and reasonable interpretation of the *Resolución TC Julio 2013* is that the conversion back into Soles of the outstanding principal in USD should occur on the date of actual payment, and the accrual of interest at the rate of one-year U.S Treasury Bills, should continue until such date.

984. Fourth, there are certain elements of the bondholder process regulated in the *Decretos Supremos* which must be labelled as arbitrary:

- the limitation of the portion of the outstanding debt that can be settled with cash to Soles 100,000 or to 20% of the total;

- the MEF's right to impose the form of payment on bondholders;

- the creation of a category of bondholders, defined as those who had purchased their Bonos "*con fines especulativos*" who are last in the payment line and who will receive cash payments only once all other bondholders have been settled, without clarifying the criteria to deem what can be considered a purchase of *Bonos* "*con fines especulativos*".

985. Fifth, the failure of the bondholder process, which was only accepted by a minority of bondholders, reinforces the Tribunal's findings that the DS 242/2017 created a procedure with methodological errors, which did not adhere to the instructions provided for by the *Tribunal Constitucional,* and which resulted in a severe and improper curtailment of the bondholder's rights under Peruvian law, as construed by the *Tribunal Constitucional*.

986. In sum, the Tribunal finds that the measures adopted by the Republic, which have been described in the previous sections, constitute a breach of the MST of aliens required by customary international law including the FET standard, guaranteed in Art. 10.5 of the FTA: these measures do not properly transpose the mandate received from the *Tribunal Constitucional*, but rather create an arbitrary and unjust regime, the sole purpose of which appears to be to minimize the amounts payable by the Republic to the holders of *Bonos Agrarios*, including (and in particular) Gramercy.

High threshold

987. The Tribunal acknowledges that the threshold for proving that State conduct is arbitrary or unjust is high. But in the present case, this high threshold is met.

988. Prof. Schreuer has stated that measures "not based on legal standards but on discretion, prejudice, or personal preference" or "taken for reasons that are different from those put forward by the decision-maker" must be deemed arbitrary[772].

989. Peru has been unable to provide a cogent explanation of the reasons justifying the methodology selected and procedure developed in the *Decretos Supremos*. In the absence of any explanation, taking into consideration the practical effects of these measures, and after carefully reviewing the submissions made and the evidence marshalled by the Parties, the Tribunal has concluded that:

- the measures adopted by the Peruvian Government and formalized in the *Decretos Supremos* did not seek to develop in good faith the mandate received from the *Tribunal Constitucional*,

- their real purpose was to minimize the amounts due under the *Bonos Agrarios*, and

- in the pursuit of this objective, the *Decretos Supremos* did not shy away from adopting solutions which lack any reasonable justification and shock or at least surprise the Tribunal's sense of juridical propriety.

Measures not found contrary to Art. 10.5 of the FTA

990. The Tribunal, however, has found that several measures adopted by Peru and impugned by Claimants, did not amount to a breach of international law commitments assumed by Peru under Art. 10.5 of the FTA

- The definition of the date of revaluation of the *Bonos* as established in DS 242/2017;

- The interest rate applicable to the *Bonos,* equal to that of U.S. Treasury Bills as mandated by the *Tribunal Constitucional*;

- The waiver requirement;

- The provisions which entitle the MEF to calculate the amount due to each requesting bondholder;

- The legal formalities surrounding the approval of the *Decretos Supremos* under Peruvian law.

[772] C. Schreuer: "Protection against Arbitrary or Discriminatory Measures". In C. Rogers and R. Alford (Eds.) *The Future of Investment Arbitration*, OUP (2009), p. 188.

XI. ANCILLARY CLAIMS

991. In the preceding section, the Tribunal has concluded that the *Decretos Supremos* are arbitrary in breach of the MST of Art. 10.5 of the Treaty and that the Republic has indeed incurred in a breach of its international obligations under the FTA. Claimants have additionally submitted a number of what the Tribunal refers to as Ancillary Claims, which, from a financial point of view, are moot, because the amount of compensation due to Claimant (which will be established in section **XII.**) is not affected by the Tribunal's decision with regard to these Claims.

992. However, since Claimants are requesting declaratory relief with regard to the Ancillary Claims ("Declare that Peru breached Articles 10.3, 10.4, 10.5, and 10.7 of the Treaty"), the Tribunal is bound to take a decision, and will do so in the subsequent subsections, in all cases finding for the Republic and dismissing Claimants' request for declaratory relief:

- In subsection **XI.1.** the Tribunal will dismiss, after careful consideration and not without some hesitation, Claimants' allegation that the *Resolución TC Julio 2013* constitutes a denial of justice;

- In subsection **XI.2.** the Tribunal will dismiss the claim that the Impugned Measures constituted an indirect expropriation;

- In subsection **XI.3.** the Tribunal will find that Peru has not breached the Effective Means Clause; and finally

- In subsection **XI.4.** the Tribunal will find that the *Decretos Supremos* did not breach the National Treatment Standard.

XI.1. WHETHER THE RESOLUCIÓN TC JULIO 2013 CONSTITUTES A DENIAL OF JUSTICE

993. Claimants argue that the *Resolución TC Julio 2013*, issued by the *Tribunal Constitucional*, amounts to a denial of justice in breach of the MST of Article 10.5 of the FTA – an assertion rejected by the Republic. In order to decide this first claim the Tribunal will first establish the proven facts (**1.**), then analyze the denial of justice standard under customary international law enshrined in Article 10.5 of the Treaty (**2.**), and finally adopt a decision (**3.**).

1. PROVEN FACTS

1.1 THE *VOTOS SINGULARES* OF THE RESOLUCIÓN TC JULIO 2013

994. On 16 July 2013, the *Tribunal Constitucional* – at that time composed by six members, following the resignation of Justice Beaumont in May of that year – adopted the *Resolución TC Julio 2013*, with the casting vote of the President of the *Tribunal Constitucional* resolving the tie between the Justices.

The *Votos Singulares*

995. The decision contained in *Resolución TC Julio 2013* was not unanimous. Three Justices issued *votos singulares* (separate opinions), attached to the *Resolución*:

- Justice Vergara Gotelli opined that the request by the *Colegio de Ingenieros* was time-barred[773];

- Justice Calle Hayen also considered that the request was inadmissible, but for a different reason: in his view, the *proceso de constitucionalidad* has the specific task of reviewing the constitutionality of norms in the abstract; not to declare subjective rights of individuals[774]; in his opinion, the bondholders were entitled to enforce their subjective rights before the ordinary courts, but not before the *Tribunal Constitucional*[775];

- Justice Mesía adhered to the majority regarding the admissibility of the enforcement request; however, he considered that the appropriate methodology to update the *Bonos* should be the CPI method, from the date of issuance of the *Bonos*, and applying the interest rate foreseen in each *Bono*[776].

[773] Doc. CE-17, Voto Singular Vergara Gotelli, paras. 21-26.
[774] Doc. CE-17, Voto Singular Calle Hayen, para. 8.
[775] Doc. CE-17, Voto Singular Calle Hayen, para. 16.
[776] Doc. CE-17, Voto Singular Mesía, paras.23-25.

1.2 THE RESOLUCIÓN TC AGOSTO 2013

996. Both the MEF and the Congress of the Republic filed an appeal (*recurso de reposición*) against the *Resolución TC Julio 2013*, and various private individuals requested clarifications. A month later, on 8 August 2013, the *Tribunal Constitucional* issued its *Resolución TC Agosto 2013*[777], dismissing the appeals and offering certain clarifications.

1.3 THE RESOLUCIÓN TC NOVIEMBRE 2013

997. The *Resolución TC Agosto 2013* in turn gave rise to a number of requests for annulment and for clarification, such that the *Tribunal Constitucional* was forced to issue a third ruling on 4 November 2013, the *Resolución TC Noviembre 2013*[778]. In this final *Resolución*, the *Tribunal Constitucional* made certain additional clarifications.

1.4 CRIMINAL PROCEEDINGS

998. In January 2015 a press article was published making serious accusations regarding the procedure for the adoption of *Resolución TC Julio 2013*[779].

999. At the beginning of July 2013, Justice Gerardo Eto, who was the *vocal ponente* in charge of drafting the decision, had written and signed a first version ordering the revaluation and payment of the *Bonos* using the CPI method (the "**First Draft**"). This First Draft had been submitted to the other Justices of the *Tribunal Constitucional* for their approval and signature. Justice Mesía – who agreed with such proposal – stamped his signature in this document[780].

1000. According to the press article, this First Draft was leaked to the Government. Allegedly, following the leak, certain advisors of the Government and the Minister of Justice approached the Justices in order to have them reconsider their decision. Despite their initially unsuccessful attempt, in the end, the pressure exerted by the Minister of Economy, Mr. Castilla, on the President of the *Tribunal Constitucional*, Justice Urviola, resulted in the latter favoring the dollarization method, a formula that had been contemplated by the MEF since 2011[781].

1001. As a result of this pressure, a new proposal endorsing the dollarization method was submitted to the plenary of the *Tribunal Constitucional* on 16 July 2013. Three Justices voted in favor: President Urviola, Justice Eto, and Justice Álvarez. The other three – Justices Mesía, Vergara Gotelli and Calle Hayen – opposed. On that same day, the

[777] Doc. CE-180.
[778] Doc. CE-183.
[779] Doc. CE-197.
[780] Doc. CE-197, p. 1.
[781] Doc. CE-197, pp. 1-2.

article continues, Justice Mesía complained that the Justices required further time to study this proposed new decision[782].

1002. President Urviola, however, opted to publish the *Resolución* that same day; but since Justice Mesía had not presented his *voto singular*, President Urviola allegedly authorized the clerk of the *Tribunal Constitucional* to manipulate the First Draft, removing the signature of Justice Eto and leaving only the signature of Justice Mesía, effectively converting the First Draft into Justice Mesia's *voto singular* (the "***Voto Singular***").

The criminal complaint

1003. Following these allegations, in March 2015, an individual bondholder filed a criminal complaint against Mr. Oscar Díaz Muñoz, the clerk of the *Tribunal Constitucional*. The complainant alleged that Justice Mesía had never authorized the issuance of the *Voto Singular* that was attached to the published *Resolución TC Julio 2013* and that was wrongfully attributed to him; and that this *Voto Singular* had been adulterated, using white-out in order to remove parts of the text and the signature of Justice Eto[783].

1004. The criminal investigations commenced and, on 14 August 2015, the *Instituto de Medicina Legal y Ciencias Forenses* issued an expert report, confirming the use of white-out in several parts of the *Voto Singular*, including the removal of Justice Eto's signature[784].

1005. These events led the public prosecutor to charge the clerk of the *Tribunal Constitucional*, Mr. Díaz, with falsification of court documents[785].

1006. There is no evidence in the record as to whether the criminal proceedings against Mr. Díaz eventually led to his conviction[786].

1.5 THE CONGRESSIONAL INVESTIGATION

1007. On November 2017, Congress initiated a parliamentary investigation on the conduct of President Urviola, including the allegations that the Government had exercised undue influence to secure the *Resolución TC Julio 2013*[787].

1008. Three of the Justices – Urviola, Álvarez Miranda and Eto – and the clerk Mr. Díaz were summoned to present their testimony before Congress[788].

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[782] Doc. CE-197, p. 2.
[783] Doc. CE-30.
[784] Doc. CE-25, pp. 27-29.
[785] Doc. CE-213.
[786] Doc. CE-36; Doc. CE-304.
[787] Doc. R-520.
[788] Doc. R-1100.

1009. On March 2019, Congress issued a report with its conclusions, dismissing the accusations of fraud[789].

1.6 FURTHER APPEALS AGAINST *RESOLUCIÓN TC JULIO 2013*

1010. In early 2015, the ABDA sought to challenge the *Resolución TC Julio 2013* and the *Decretos Supremos 2014* before the *Tribunal Constitucional*, now composed by different Justices – except for President Urviola[790].

1011. On this occasion, by a majority of five votes (with the abstention of Justice Urviola and the opposition of Justice Blume Fortini), the *Tribunal Constitucional* dismissed the challenge stating that[791]:

- The request was inadmissible; and

- In any case, the allegation by the ABDA that the *Resolución TC Julio 2013* and the *Decreto Supremo* 2014 rendered the *Bonos* worthless was premature, since the exact calculation of the value of each *Bono* had to be done by the MEF, following the administrative procedure, something that had not taken place yet.

- Notwithstanding the above, *ad cautelam*, the *Tribunal Constitucional* reiterated that[792]:

> "*[…] en ningún caso la operación de actualización de la deuda puede conllevar a un resultado que suponga en los hechos la aplicación de un criterio nominalista que perjudique a los tenedores de bonos. Por ello, este Tribunal se reserva, en todo caso, la competencia para asegurar el cabal desarrollo de la operación de determinación de la deuda*". (Emphasis added)

1012. And again, in 2018, a similar request was formulated by an individual bondholder, seeking to nullify the *Resolución TC Julio 2013*, in particular, the provision requiring the mandatory submission of the bondholders to the process established by the MEF. The appeal argued that this mandate contravened *Sentencia TC 2004* that had established that the administrative proceeding established by the MEF should always be an option of the bondholder, not a compulsory procedure[793].

1013. On 25 July 2019, the *Tribunal Constitucional*, by majority of four to three votes, rejected the appeal, confirming the validity of *Resolución TC Julio 2013* and its conformity with *Sentencia TC 2001*[794].

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[789] Doc. R-1102. The Parties have only produced a press article commenting on the report issued by Congress, but not the report.
[790] The *Tribunal Constitucional* was now composed by Justices Urivola, Miranda Canales, Ramos Nuñez, Sardón de Taboada, Ledesma Narváez, Espinosa-Saldaña Barrera and Blume Fortini.
[791] Doc. CE-40.
[792] Doc. CE-40, para. 8.
[793] Doc. CE-781, para. 1.
[794] Doc. CE-781, para. 4.

* * *

1014. In sum: the *Resolución TC Julio 2013* has been subject to challenges in many fronts, including several *recursos de reposición*, a Congressional investigation, and a criminal complaint. None of the Justices or clerks who participated in the drafting and issuance of the *Resolución* have been convicted, and none of the attempts to nullify the decision have succeeded; to this date, the *Resolución TC Julio 2013*, issued further to the *Sentencia TC 2001*, is the law of the land: the constitutional framework in force regarding the revaluation of the *Bonos Agrarios*.

2. THE STANDARD OF DENIAL OF JUSTICE

2.1 THE TREATY

1015. Art. 10.5 of the Treaty contains the Republic's assurance to provide U.S. investors with the MST under customary international law, which in turn entails the obligation to provide "fair and equitable treatment", and more specifically, the prohibition of incurring in denial of justice:

> "Article 10.5: Minimum Standard of Treatment
>
> 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 principal legal systems of the world;
> >
> > […]" (Emphasis added)

1016. In Annex 10-A of the Treaty the Contracting Parties offer additional guidance for interpretation of Art. 10.5:

> "**Annex 10-A**
>
> **Customary International Law**
>
> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law

> minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens".

1017. The Contracting Parties' intent, as expressed in the FTA, was therefore to assume

> "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world"

in accordance with the

> "customary international law minimum standard of treatment of aliens",

a standard which results from the

> "general and consistent practice of States that they follow from a sense of legal obligation".

2.2 DENIAL OF JUSTICE IN CUSTOMARY INTERNATIONAL LAW

1018. Claimants, Respondent and the Non-Disputing Party are in agreement with respect to the majority of aspects that the standard of denial of justice under customary international law entails. It is common ground that the threshold to establish a denial of justice is high: it is only reserved to final decisions of the State's highest courts, which result from an improper and egregious procedural conduct, which fail to meet basic, internationally required standards of administration of justice and due process, and which shock or surprise a sense of judicial propriety[795].

1019. As the *Chevron II* tribunal recently held:[796]

> "[T]he standard for denial of justice […] [i]s 'a demanding one. To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards'". (Emphasis added)

1020. The demanding standard stems from the internationally recognized principle of judicial independence; if the States' judiciary systems are independent and impartial, their decisions when administering justice within their borders must be accorded high

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[795] *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021 ["***Lion***"], para. 299; *Loewen*, para. 132; *Mondev*, para. 127; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, Doc. CA-28 ["***Jan de Nul***"], para. 193; *Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, Doc. RA-152 ["***Chevron II***"], paras. 8.36, 8.40; See also J. Paulsson, "Denial of Justice in International Law", Cambridge University Press, 2005 ["**Paulsson**, p. 4.
[796] Chevron II, para. 8.36.

deference[797], and must enjoy a presumption of legality[798]. International tribunals are not instances of appeal[799], and judicial errors in the misinterpretation or misapplication of municipal law do not engage the State's international responsibility for denial of justice[800].

1021. Denial of justice is a broad concept, which encompasses a varied range of reprehensible conducts by the State's judiciary, including to deprive aliens of access to available judicial remedies[801], to incur in egregious breaches of due process,[802] or to incur in undue delay, to the detriment of aliens[803].

1022. In this case, Claimants impugn the *Resolución TC Julio 2013* for egregious violations of basic due process:

- The right to an impartial and independent judge (**A.**);
- The right to a motivated judgment (**B.**);
- The right to present evidence (**C.**).

A. <u>The right to an impartial and independent judge</u>

1023. In its Non-Disputing Party Submission, the U.S. referred to the situation where the State fails to guarantee the alien access to a judicial proceeding before an impartial and independent adjudicator[804]:

> "Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom or impartiality of the judicial process".

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[797] *Case concerning the Barcelona Traction, Light and Power Company Limited*, Judgment (Merits) (5 February 1970), I.C.J. Reports 3 (1970) ["***Barcelona Traction***"], Separate Opinion Tanaka, pp. 157-158.
[798] *Chevron II*, para. 8.41.
[799] *Apotex Inc. v. the Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013, Doc. RA-131 ["***Apotex***"], para. 278; *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, Doc. RA-128 ["***Franck Charles Arif***"], para. 441; *Lion*, para. 217.
[800] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, Doc. CA-82 ["***Azinian***"], para. 99; Paulsson, p. 81.
[801] Paulsson, p. 134.
[802] *B. E. Chattin (United States) v. United Mexican States*, General Claims Commission, Award, 23 July 1927, 4 U.N.R.I.A.A. ["***Chattin***"], p. 292, para. 22.
[803] *Chevron v. Republic of Ecuador*, UNCITRAL, Partial Award on the Merits, 30 March 2010, Doc. RA-106 ["***Chevron I***"], para. 250; *Lion*, para. 241; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, Doc. RA-119 ["***Oostergetel***"], para. 290.
[804] USS, para. 45.

1024. In one of the earliest cases of the 20th century, *Robert E. Brown*, the tribunal confirmed that the collusion between the Government and the judiciary in order to defeat the foreigner's claims to certain mining rights, amounted to a denial of justice[805]:

> "All three branches of the Government conspired to ruin his enterprise […]. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions".

1025. Citing to Judge Fitzmaurice, Paulsson highlights the importance of an independent judiciary[806]:

> "If no judge could reasonably have reached the challenged decision, the inference is that it was not rendered by an independent judicial mind deciding according to its conscience. What is required is that the international tribunal be persuaded that the error was of a kind which no 'competent judge could reasonably have made'".

1026. The same is true with respect to the requirement that the adjudicator be unbiased. Paulsson reiterates that denial of justice may occur with respect to judgments that[807]:

> "[…] impel the adjudicator to conclude that it could not have been reached by any impartial judicial body worthy of that name". (Emphasis added)

Case law

1027. Recent case law confirms that denial of justice occurs when the State fails to provide independent and impartial justice:

1028. In *Petrobart,* the foreign investor had obtained a favorable judgment against KGM, a state-owned company. The day following that judgment, a Vice-Minister of the Kyrgyz Republic approached the President of the Court, asking him to stay the enforcement of the judgment, because of the dire financial situation of KGM. Some days later, the Court suspended the enforcement, and before the expiry of the suspension, KGM was declared bankrupt and the investor was unable to enforce its favorable judgment. The arbitral tribunal concluded that[808]:

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[805] *Robert E. Brown (United States) v. Great Britain*, Award, 23 November 1923, 6 U.N.R.I.A.A. ["***Brown***"], p. 129.
[806] Paulsson, p. 89, citing to Fitzmaurice, "The Meaning of the Term Denial of Justice".
[807] Paulsson, p. 65.
[808] *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, 29 March 2005, Doc. RA-74 ["***Petrobart***"], pp. 74-77. Even though the investor alleged a denial of justice under international law, the tribunal considered the State's conduct as a breach of Art. 10(12) of the ECT, containing the Effective Means Clause, which is to great extent equivalent to denial of justice (See Section **XI.3.** *infra*).

> "[…] such Government intervention in judicial proceedings is not in conformity with the rule of law in a democratic society and that it shows a lack of respect for Petrobart's rights as an investor having an investment under the Treaty"[809].

1029. In *Chevron II,* the tribunal also addressed the issue of undue interference with the administration of justice – not by the legislative or executive branches, but by private individuals though corrupt practices. The tribunal assessed the "clearly improper and discreditable"[810] conduct of a judge, who, in exchange of the promise of a bribe, allowed the ghost-writing of his decision by one of the local plaintiffs, resulting in a multibillion USD award against the foreign investor: The tribunal concluded that[811]:

> "Judge Zambrano's collusive conduct in the 'ghostwriting' of the Lago Agrio Judgment was not authorised under Ecuadorian law. Nor was it under judicial standards long established under international law. He was far from acting as an independent or impartial judge deciding the Lago Agrio Litigation fairly between the parties, under minimum standards for judicial conduct long recognized under international law". (Emphasis added)

1030. Finally, the tribunal in *Flughafen* also referred to this type of denial of justice concerning[812]:

> "*Resoluciones dictadas por tribunales faltos de independencia o imparcialidad, cuyas decisiones se vean afectadas por injerencias externas*".

1031. In sum, denial of justice may be found where there is convincing evidence of undue external influence on the judiciary or of prejudice or bias against the foreign investor.

B. The right to a motivated judgment

1032. An internationally protected principle of administration of justice is that judicial decisions must be grounded on an assessment of the relevant facts and applicable law, and that the *ratio decidendi* must be sufficiently motivated on those grounds.

1033. De Visscher noticed that a decision that has an "extreme defectiveness of its reasoning" may lead to the conclusion that a denial of justice has been committed[813]. Citing to the *Barcelona Traction* pleadings, Paulsson notes that judicial bad faith that amounts to denial of justice may occur when

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[809] *Petrobart*, p. 75.
[810] *Chevron II*, para. 8.60.
[811] *Chevron II*, para. 8.56.
[812] *Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, Doc. RA-134 ["***Flughafen***"], para. 639.
[813] Paulsson, p. 73, citing to De Visscher: "Le déni de justice en droit international", Collected Courses of the Hague Academy of International Law, p. 407.

> "[…] one can no longer explain the sentence rendered by any factual consideration or by any valid legal reason"[814].

Case law

1034. The contemporary case law on denial of justice confirms the above views. In *Flughafen,* the tribunal concluded that municipal judgments with a manifest lack of reasoning are liable to constitute a denial of justice[815]. The tribunal considered that the test for denial of justice in these circumstances is[816]:

> "*Decisiones manifiestamente arbitrarias que carezcan de motivación, justificación alguna o de toda lógica jurídica y que excedan de un mero error judicial*".

1035. The *Flughafen* tribunal offered the following criteria to discern whether a judgment manifestly lacks reasoning and amounts to a denial of justice:

- First, when the judgment "*omite toda referencia a la norma en el ordenamiento Jurídico [municipal] en que se ampara el [tribunal local] para tomar la decisión que adoptó*"[817];
- Second, when the judgment contains illogical or inconsistent explanations[818]; and
- Third, when purporting to offer valid reasons, the judgment instead clearly exposes the court's bias or prejudice[819].

C. The right to marshal evidence

1036. Finally, another subtype of due process violation that can amount to denial of justice is the local Court's improper handling of evidence or outright refusal to permit the marshalling of evidence by the alien.

1037. The US-Mexico General Claims Commission in *Chattin* found that local courts displayed "a most astonishing lack of seriousness" because there was "no trace of an effort to have the two foremost pieces of evidence explained", there was no inquiry made into verifying the statement of a key witness in the domestic prosecution proceedings and there was no effort to examine a witness who could have presented important exculpatory evidence[820].

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[814] Paulson, p. 83, citing to *Barcelona Traction* pleading in Jiménez de Aréchaga: "International Responsibility of States", p. 185.
[815] *Flughafen*, paras. 698, 707-708.
[816] *Flughafen*, para. 639.
[817] *Flughafen*, para. 697.
[818] *Flughafen*, paras. 698-699.
[819] *Flughafen*, paras. 700-701.
[820] *Chattin*, p. 292, para. 22.

1038. In *Ballistini*, the claimant was denied a crucial piece of evidence necessary to make his case because the judge he accused of arbitrariness deliberately withheld the documents. The French-Venezuelan Commission found a denial of justice[821]:

> "[…] because the local authorities deprived Ballistini of the legal means of instituting before the competent tribunals the actions which the laws would authorize him in case he might improperly have been condemned to a criminal judgment".

1039. More recently, in *Lion*, the tribunal found that the judiciary's repeated failure – in several instances of the judicial proceedings – to admit crucial pieces of evidence that would have allowed the investor to properly defend its right amounted to a denial of justice[822]:

> "The Mexican Courts had four opportunities to address the question of the forgery of the Settlement Agreement. They did not do so for reasons which were unclear, contradictory within the same process, or purely formalistic. The Tribunal finds that the decisions of the Mexican Courts repeatedly denying Lion the right to present relevant and material evidence to defend its case, amount to an improper and egregious procedural conduct, which does not meet the basic internationally accepted standard of administration of justice and due process, and which shocks or surprises the sense of judicial propriety. (Emphasis added)

2.3 EXHAUSTION OF LOCAL REMEDIES

1040. Under customary international law, a claim for denial of justice may only succeed if the alien proves that he or she has attempted to obtain redress by exhausting the legal remedies available under municipal law. The purpose of the rule is twofold[823]:

- the host State judicial system, as a whole, must be granted an opportunity to rectify judicial errors of lower court instances[824]; and

- international tribunals cannot be turned into courts of appeal, which review judicial measures that have not been vetted by the highest Court of the land[825].

1041. In its Non-Disputing Party Submission, the U.S. confirms that the denial of justice claim may only be brought against final acts of the judiciary's highest instance[826].

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[821] *Ballistini case, French-Venezuelan Commission (1902)*, Opinion (1905), 10 U.N.R.I.A.A. ["***Ballistini***"], p. 20.
[822] *Lion*, para. 508.
[823] *Lion*, para. 549.
[824] *Loewen*, para. 156.
[825] OI European Group B.V. v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, Doc. CA-153 ["***OI European***"], paras. 533-536.
[826] USS, para. 47.

1042. Prof. Paparinskis recalls that[827]:

> "[i]t is accepted that denial of justice becomes internationally wrongful only after the whole system of administration of justice has been put to the test by exhaustion of local remedies" (Emphasis added)

1043. And the *Apothex* tribunal avers that claims for denial of justice[828]:

> "[…] depend upon the demonstration of a systemic failure in the judicial system. Hence, a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself". (Emphasis added)

The exception to the rule

1044. The exhaustion of local remedies rule finds an exception when remedies against the impugned judgement are futile, manifestly ineffective[829] or simply unavailable[830].

1045. As formulated by Paulsson[831]:

> "[t]he victim of a denial of justice is not required to pursue improbable remedies. Nor is he required to contrive indirect or extravagant applications beyond the ordinary path of a frontal attempt to have the judgment by which he was unjustly treated set aside, or to be granted a trial he was denied".

3. THE TRIBUNAL'S DECISION

1046. Claimants say that the Republic incurred in a denial of justice through the *Resolución TC Julio 2013* for four reasons:

- First, the MEF interfered and exerted undue influence in the issuance of *Resolución TC Julio 2013*;

- Second, the *Resolución TC Julio 2013* lacked sufficient reasoning, its conclusions were adopted without evidentiary support and its exclusive aim was to reduce the Government's debt;

- Third, the *Resolución TC Julio 2013* lacked the necessary votes to be approved: the only possibility to modify the decisions contained in the *Sentencia TC 2001* was thorough the issuance of a "*sentencia manipulativa*", which required a qualified

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[827] M. Paparinskis, "The International Minimum Standard and Fair and Equitable Treatment", Oxford Monographies in International Law (2013), p. 182.
[828] *Apotex*, para. 282; See also *Waste Management II*, para. 97; *Loewen*, para. 165.
[829] USS, para. 47; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, Doc. RA-94 ["***Duke Energy***"], para. 400; *Lion*, para. 575.
[830] *Ambiente Ufficio*, para. 599; *Lion*, para. 575.
[831] Paulsson, p. 113.

majority of votes of the members of the *Tribunal Constitucional*, a majority that was absent in this case;

- Fourth, Justice Urviola fostered the forgery of the *Voto Singular*, in order to establish an apparent tie, so that he, as President, would have the casting vote to achieve a simple majority.

1047. Respondent, on the contrary, says that the *Tribunal Constitucional* issued the *Resolución TC Julio 2013* in conformity with Peruvian law and with its prior jurisprudence. In any event, even if there had been an error in the application of certain procedures or laws, which the Republic does not accept, these would not be egregious enough to constitute a denial of justice. With respect to Gramercy's specific allegations, the Republic says that:

- First, the allegation that the MEF had any influence in the outcome of *Resolución TC Julio 2013* is baseless and lacks evidentiary support;

- Second, the *Resolución TC Julio 2013* was properly grounded and exhaustively motivated;

- Third, the *Resolución TC Julio 2013* was not a "*sentencia manipulativa*", but a "*resolución ejecutoria"* that did not require a qualifying majority of votes; the voting procedure rules were duly observed and, in light of the tie in votes, the rule providing the casting vote of the President was correctly applied;

- Fourth, there were no irregularities in the issuance of the *Voto Singular*, and even if there were, these could not amount to a denial of justice.

1048. The Tribunal will address these arguments in Section **3.3.**; but before doing so, it will adjudicate two preliminary objections submitted by Respondent:

- That Claimants have no standing to bring a denial of justice claim because they were not a party to the local proceeding that resulted in the *Resolución TC Julio 2013* (**3.1.**); and that

- Claimants failed to exhaust local remedies (**3.2.**).

3.1 CLAIMANTS HAVE STANDING TO CLAIM FOR DENIAL OF JUSTICE

1049. The Parties have discussed whether an investor that was not a party to the municipal proceedings, but has been aggrieved by the local judgment, has standing to bring a denial of justice claim. Respondent says that, since Gramercy was not party to the constitutional proceeding that resulted in *Resolución TC Julio 2013*, it lacks standing, while Claimants hold the opposite view: standing is available if the protected investor is affected by the impugned judicial measure.

1050. The Tribunal tends to side with Claimants.

1051. It is undisputed that the constitutional procedure before the *Tribunal Constitucional* was brought by the *Colegio de Ingenieros del Perú,* and that Claimants did not participate in that procedure. The stated aggrieved party of the alleged failure in Peru's judicial system was the *Colegio*, not Gramercy.

1052. The Tribunal also acknowledges Respondent's argument that Art. 10.5 of the Treaty, which offers protection against denial of justice, is predicated with respect to "covered investments":

> "Article 10.5: Minimum Standard of Treatment
>
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment […]" (Emphasis added)

1053. The necessary consequence is that the Treaty's obligation

> "[…] not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world" (Emphasis added)

entails a commitment by Peru that the judgements rendered by its Courts will not impair the covered investments of protected investors. Based on this reading of the Treaty, Respondent argues that the procedure before the *Tribunal Constitucional* does not directly impair Gramercy's protected investments, since Gramercy did not participate in it.

1054. Respondent's argument would carry full weight if the *Resolución TC Julio 2013* had been issued by an ordinary Court, whose decisions only bind the parties to the specific procedure before that Court.

1055. But it was not.

1056. The *Tribunal Constitucional* is not an ordinary Court, because it is entitled to declare that laws and other regulations are contrary to the Constitution and by law its decisions have *erga omnes* effects. As per Article 81 of the Peruvian Code of Constitutional Procedure[832]:

> "*Las sentencias fundadas recaídas en el proceso de inconstitucionalidad* […] [*t*]*ienen alcances generales y carecen de efectos retroactivos*". (Emphasis added)

1057. Gramercy, a protected investor, is the owner of certain *Bonos*, which, as the Tribunal has already established, constitute covered investments under the FTA. The *Resolución*

[832] Doc. RA-414.

TC Julio 2013 adopts two decisions, within the Peruvian legal order, which affect the legal standing of the *Bonos*[833]:

- The *Resolución* determines how all outstanding *Bonos* – including those being enforced in pending judicial procedures – are to be revalued to comply with the *principio valorista*;

- Furthermore, the *Resolución* instructs the MEF to issue a *Decreto Supremo* that regulates the registration, revaluation, and payment of the *Bonos*.

1058. The Tribunal is thus convinced by Claimants' argument that the *Resolución TC Julio 2013*, due to its *erga omnes* effect, has implications for the legal status of the *Bonos,* which constitute a covered investment; and that a protected investor, owner of such covered investment, is entitled to bring an international claim against the Republic for denial of justice.

1059. Giving preference to Claimants' arguments, the Tribunal dismisses Respondent's standing objection.

3.2 CLAIMANTS EXHAUSTED LOCAL REMEDIES

1060. The Republic also argues that – since Gramercy was not a named party to the constitutional proceedings – it was not entitled to lodge an appeal against *Resolución TC Julio 2013*, and therefore, has not met the exhaustion of local remedies requirement.

1061. The Tribunal does not agree.

1062. The rationale for the requirement to exhaust local remedies is that the State's judiciary, acting through the highest instance available to the aggrieved party, has the opportunity to correct any judicial errors in which lower courts might have incurred[834].

1063. In this case, the *Resolución TC Julio 2013* was the *resolución ejecutoria* of a constitutionality procedure, issued by Peru's Highest Court, subject only to requests for correction or clarification and a "*recurso de reposición*"[835].

1064. The *Resolución TC Julio 2013* was challenged through a "*recurso de reposición*" by the MEF[836] and the Congress of the Republic[837]; this challenge was dismissed by the *Resolución TC Agosto 2013*. In turn, the *Resolución TC Agosto 2013* was subject to two additional *recursos de reposición* (by an association of affected bondholders[838] and by a private company[839]), and these challenges were dismissed in the *Resolución TC*

[833] Doc. CE-17, Dispositives 2-3.
[834] *Loewen*, para. 156.
[835] See Doc. CE-180, para. 1, referencing Art. 121 of the *Código Procesal Constitucional*.
[836] Doc. CE-180, para. 2.
[837] Doc. CE-180, para. 4.
[838] Doc. CE-183, para. 5
[839] Doc. CE-183, para. 11.

Noviembre 2013. Finally, in 2015, the bondholder association ABDA made a last attempt to challenge the *Resoluciones TC Julio*, *Agosto* and *Noviembre 2013* together, and this challenge was also dismissed[840].

1065. The *Tribunal Constitucional* dismissed all of these challenges, *inter alia*, on the grounds that they were inadmissible because they had been submitted by institutions or juridical persons that were not named parties in the constitutional proceedings[841]. Under these circumstances, the Tribunal considers that the exhaustion of local remedies requirement is met because any further attempt by Gramercy to challenge the *Resoluciones* – not being a named party in the constitutional proceedings – would have been futile or manifestly ineffective.

1066. In sum: the *Resoluciones TC* can only be challenged by way of *recursos de reposición* before the *Tribunal Constitucional* itself, this being Peru's highest judicial authority. The evidence shows that the *Resolución TC Julio 2013* was repeatedly challenged by the only means available under Peruvian law, through *recursos de reposición* filed by various types of claimants, ranging from the Congress, the Government, and bondholders' associations to individual bondholders. All challenges were summarily dismissed; in these circumstances, any further attempt by Gramercy to file yet another *recurso de reposición* would have been futile.

1067. In light of the above, the Tribunal considers that the exhaustion of local remedies requirement is met.

3.3 THE REPUBLIC DID NOT ENGAGE IN A DENIAL OF JUSTICE

1068. The Tribunal will now address Claimants' specific allegations underlying its denial of justice claim:

- First, whether the MEF interfered and exerted undue influence in the issuance of *Resolución TC Julio 2013*;

- Second, whether the *Resolución TC Julio 2013* lacked sufficient reasoning and whether its conclusions were adopted without evidentiary support with the exclusive aim to reduce the Government's debt.

- Third, whether the *Resolución TC Julio 2013* lacked the necessary votes to be approved;

- Fourth, whether there were any irregularities in the issuance of the *Voto Singular*.

1069. Gramercy had expected the *Tribunal Constitucional* to issue a *resolución* which was more favorable to the investor's interests and would result in a much higher valuation of the *Bonos.* The decision eventually adopted by the *Tribunal Constitucional* was a

[840] Doc. CE-40.
[841] Doc. CE-180, para. 3 *in fine*, paras. 9, 12, 14; Doc. CE-183, paras. 6, 8, 10, 14; Doc. CE-40, paras. 4-6.

disappointment: the *Tribunal Constitucional* adopted a methodology (dollarization applying the parity exchange rate plus accrual of interest at the rate of the U.S. Treasury Bonds) that rendered the valuation lower than Claimants had expected. In defending their interests, Claimants highlight a number of procedural irregularities which, in their submission, the *Tribunal Constitucional* committed, and which amount to a denial of justice under international law.

1070. The Tribunal does not share Claimants' view.

1071. As the Tribunal has already established in Section **2.2.** *supra*, under customary international law, denial of justice is reserved to improper and egregious procedural conduct that does not meet the basic international accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety[842].

1072. In the present case, Claimants have presented a shocking theory of how the *Resolución TC Julio 2013* came to be issued. Claimants have presented significant circumstantial evidence that, in principle, could give rise to genuine concerns as to whether the *Tribunal Constitucional* adhered to the international standards of judicial propriety. However, after a careful review of the evidentiary record, the Tribunal considers that Gramercy's serious allegations, while not entirely unfounded, have not been sufficiently established by convincing evidence, and thus, Claimants have not met the high standard of proof required to find that the Republic engaged in denial of justice.

1073. The Tribunal will address each of Claimants' allegations (A. through D.). and conclude dismissing the claim (E.).

A. <u>There is insufficient evidence to conclude that the MEF unlawfully influenced the *Tribunal Constitucional*</u>

1074. Claimants' primary contention is that, by early July 2013, the members of the *Tribunal Constitucional* had made up their minds and favored the adoption of the CPI methodology to update the value of the *Bonos*, as reflected in the First Draft prepared by Justice Eto. This First Draft was allegedly leaked to the MEF, which immediately arranged *ex parte* meetings with the Justices, in which the MEF falsely submitted that the proposed decision would severely impair the Republic's budget and pressured them to choose a different methodology based on dollarization at the parity exchange rate and on accrual of interest at the rate of U.S. Treasury Bonds[843].

1075. Respondent says that these allegations are baseless and not proven[844].

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[842] See para. 1018 *supra*.
[843] C PHB-M, paras. 47-50.
[844] R I, para. 267; R II, paras. 365-366.

Discussion

1076. The Tribunal has already established that when a Government exercises undue influence on the judiciary, in order to secure a judgement which favors the State's interests to the detriment of the foreign investor, such conduct represents an egregious violation of the proper administration of justice and to a denial of justice[845].

1077. In the present case, the Tribunal has to decide whether Claimants have convincingly established that the Government unlawfully influenced the Justices of the *Tribunal Constitucional* into adopting the *Resolución TC Julio 2013*.

1078. Claimants suggest that:

- The MEF arranged *ex parte* meetings with the *Tribunal Constitucional* to instruct them on the revaluation methodology that the High Court should adopt in its *Resolución* (**a.**);

- President Urviola prepared an "alternate draft" of the decision, based on documentation and instructions of the MEF, handed the draft to the *vocal ponente*, who then submitted it to the plenary, averring that it was his own, and the *Tribunal Constitucional* eventually adopted it (**b.**).

a. There is insufficient evidence that the Resolución was the result of undue pressure by the Government

1079. The evidence shows that during the month of July 2013 there were indeed meetings between the Justices of the *Tribunal Constitucional* and officers from the MEF. In the congressional investigation, Justice Eto candidly acknowledged that an inter-institutional meeting between the MEF and the *Tribunal Constitucional en pleno* (*i.e.*, all the members of the *Tribunal Constitucional*) had taken place[846]:

> "*Se tuvo muchas conversaciones sobre esta materia y las proyecciones que tenían eran esas, el Ministerio de Economía en algún momento, el Tribunal Constitucional tuvo una reunión institucional con el Ministerio de Economía para que explicara por qué no se había hecho el pago, hubo una reunión histórica en algún momento en el Ministerio de Economía, todo el pleno del Tribunal Constitucional, porque eso sí es una relación interinstitucional, cómo es este tema, y ahí explicaron cómo era el impacto de la deuda que se tenía, y ahí se tuvo conocimiento en boca de aquel ministro de Economía, que la deuda oficial era esta suma más o menos que yo recuerdo, cuatro mil quinientos millones como base de deuda así sin intereses y que podía con los intereses y moras llegar a una suma estratosférica de dieciocho mil quinientos millones*". (Emphasis added)

1080. In his deposition at the Hearing, Minister Castilla – who was Minister of Economy and Finance at the time – said that he did not recall having a meeting with the *Tribunal*

[845] See para. 1031 *supra*.
[846] Doc. R-1100, p. 40.

Constitucional[847]; but he acknowledged that such meeting could have perfectly taken place (as Justice Eto recalled), because as Minister of Economy and Finance he regularly conducted meetings with other authorities of the Peruvian State to discuss budgetary issues[848]:

> MINISTER CASTILLA: "*Usualmente las reuniones que yo tenía con este tipo de autoridades eran para discutir pliegos presupuestales, como es natural siendo el Ministerio de Economía quine administraba la hacienda pública […]*".

1081. As a general proposition, it is not necessarily or in all cases improper for different organs of the State to engage in inter-institutional meetings to address matters that are tangential to their constitutional duties. The corollary is that it is not necessarily or in all cases proper for judicial or quasi-judicial organs to engage in such meetings.

1082. That being said, it is uncontroversial that due process (natural justice) requires that Courts and tribunals adopt decisions on the basis of the facts alleged and the evidence marshalled by the parties within the procedure at hand, and that all parties be given a fair opportunity to be heard on the issues to be decided.

1083. In an ordinary Court, it would be highly improper for its Judges to meet with the officers of one of the parties to the exclusion of the other parties, and to receive evidence or hear submissions from these officers to which the remaining parties are not privy and on which the remaining parties cannot comment.

1084. The specific issue in the present case is whether, in a meeting between the plenary of the *Tribunal Constitucional* and officers of the Minister of Economy and Finance, the Government can be found to have issued instructions to the *Tribunal Constitucional* or otherwise exerted undue pressure on the Justices in order to have them, and which in fact caused them, to change their judgment on the issue of the *Bonos Agrarios*.

Was the *Resolución* the result of undue pressure?

1085. Is there evidence that the *Tribunal Constitucional* issued the *Resolución TC Julio 2013* under undue pressure from the Peruvian Government?

1086. Minister Castilla denies having exerted pressure on the Justices to issue the *Resolución* as it was finally adopted[849].

> MINISTER CASTILLA: […] "*'Nunca he tenido reuniones ex profesas para tocar este tema'.*

[847] HT(ESP), Day 4 (Castillo), p. 1213, l. 15 – p. 1215, l. 19; p. 1247, l. 16 – p. 1251, l. 13.
[848] HT(ESP), Day 4 (Castillo), p. 1218, ll. 20 – p. 1219, l. 3.
[849] HT(ESP), Day 4 (Castillo), p. 1222, l. 9 – p. 1223, l. 3.

> *Y también he dicho, y ratifico lo que he dicho, de que yo no recuerdo reuniones exactas pero no es improbable que el magistrado Urviola me haya comentado acerca de distintos fallos que él tenía, y posiblemente incluido éste* […]
>
> *Pero en ningún momento hubo ningún tipo de injerencia, ningún tipo de decirle nada al – nada, digamos, al presidente del Tribunal Constitucional […]*".

1087. The declaration of Minister Castilla only carries a certain evidentiary weight, because it would be unprecedented for a member of the Executive to acknowledge that he had improperly influenced the Nation's Constitutional Court.

1088. The Justices of the *Tribunal Constitucional* themselves have repeatedly averred that the meetings did not affect their ability to render an independent judgement:

> JUSTICE ETO: "[…] *jamás en la vida [se ha] establecido algún tipo de presión del Ejecutivo, nunca lo hemos tenido, nunca lo hemos tenido*"[850]. (Emphasis added)

1089. There is another piece of evidence: the public declaration of Justice Mesía, who was the most vocal opponent of the *Resolución TC Julio 2013* and who signed a dissenting opinion, which would give rise to significant controversy. The day following the publication of the *Resolución TC Julio 2013*, he offered a televised interview commenting on the decision and publicly stating that the *Tribunal* had not been subject to any undue pressure[851]:

> "[…] *no han habido presiones, pero más bien, lo que yo creo en el caso, es que lo que el Tribunal ha querido decir es que en este país hay seguridad jurídica, se respeta la propiedad privada y el Estado honra su[s] deudas*". (Emphasis added)

1090. In the Tribunal's opinion, what the available evidence shows is that, shortly before issuing the *Resolución TC Julio 2013,* the *Tribunal Constitucional* held a number of meetings with officers from the MEF, in which at least the budgetary issues underlying the decade-old problem of the *Bonos Agrarios* were discussed. With that information, and after having discussed alternative solutions, the *Tribunal Constitucional* adopted the solution formalized in the *Resolución TC Julio 2013*: to revalue the *Bonos* applying the *principio valorista,* thus preserving the bondholder's constitutional rights, but to do so applying the dollarization methodology, the parity exchange rate and the accrual of interest at the rate of the U.S. Treasury Bonds, thus preserving another constitutional principle, that of budgetary constraint.

1091. In sum, the Tribunal, not without hesitation, tends to agree with Respondent that there is insufficient evidence to conclude that the decision of the *Tribunal Constitucional* was the result of undue pressure from the MEF as opposed to the court's own determination that the financial solution adopted in the *Resolución TC Julio 2013* was the one which best reflected the principles at stake enshrined in the Peruvian Constitution.

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[850] Doc. R-1100, p. 37.
[851] Doc. CE-310, p. 3.

Case law

1092. The cases in *Petrobart* and *Chevron II* confirm that if governmental interference with the judiciary or other external influence of third parties obtained by corruption is proven, an international adjudicator may conclude that justice has been denied[852]. In these two cases, the tribunals found convincing proof of external influence, which sapped the independence and impartiality of the local courts:

- In *Chevron II,* the local proceeding between the foreign investor and a local plaintiffs resulted in an award against the investors in the amount of USD 9.5 billion for environmental damage; the arbitration tribunal found "overwhelming"[853] evidence of external interference in the local judgment, because counsel for the plaintiff had ghostwritten the judgment in collusion with the judge, and against promise of a bribe[854];

- In *Petrobart*, a court ordered the stay of enforcement of a judgment in favor of the investor but acknowledged that it adopted its decision because of the request made by a Vice-Minister of the Government[855].

1093. The present case can be distinguished from *Petrobart* because, in that case, there was convincing evidence regarding the pressure exerted by the Government on the judicial proceeding. The local court admitted issuing a stay of enforcement of a judgment that was favorable to the investor, precisely because of the *ex parte* intervention of the Government[856].

b. There is no evidence that the *Resolución* was ghostwritten

1094. Claimants' additional allegation is that *Resolución TC Julio 2013* was based on "an alternate draft" prepared by Justice Urviola, after receiving instructions and documentation handed to him by officers of the Government.

1095. To support this assertion, Claimants have produced the statement of Justice Eto in the criminal proceeding against the clerk of the *Tribunal Constitucional*, where he declared that[857]:

> "[…] *el magistrado Presidente Urviola nos trajo un proyecto alterno a lo que me pidió que lo reestructura*[*ra*] *con mi asesor […] y me pidió que lo suscribiera como ponente, dado que en la práctica tenía la ponencia del caso de los bonos; y es así como ese proyecto fue suscrito tanto por mi persona como por el Presidente Urviola y Ernesto Álvarez*". (Emphasis added)

[852] *Chevron II*, para. 8.59; *Petrobart*, p. 28.
[853] *Chevron II*, para. 8.54.
[854] *Chevron II*, para. 5.230
[855] *Petrobart*, p. 75.
[856] *Petrobart*, p. 75.
[857] Doc. CE-28, p. 2.

1096. But such statement has to be read in conjunction with Justice Eto's full declaration before Congress, where he clarified the procedures for deliberations within the High Court[858]:

> CONGRESSMAN QUESQUÉN: "*Le pregunto al doctor Eto, ¿usted recibió un oficio o el doctor Urviola le alcanzó un proyecto que el Ministerio de Economía les alcanzó, el Ministerio de Economía los emplazó, hubo esas influencias externas al momento de variar este criterio?*"
>
> JUSTICE ETO: "*En absoluto, con su venia presidente, en absoluto, no, simplemente nosotros hemos estado armando los proyectos, se conversaba, se discutía, pero jamás hemos tenido ningún tipo de documento que haya señalado el Ministerio de Economía, cómo deberíamos saber, jamás en la vida establecido algún tipo de presión del Ejecutivo, nunca lo hemos tenido, nunca lo hemos tenido".*
>
> […]
>
> COUNSEL: "[…] *Para que diga, cómo es que en el atestado policial él ha declarado señalando que el día 16 de julio del 2013 le fue entregado el proyecto de resolución por el señor Urviola Hani, al haber declarado de esa manera ante la Fiscalía, cómo es que ahora nos dice una situación diferente.*
>
> JUSTICE ETO: "[…] *No he variado absolutamente nada, lo que realmente ocurrió fue que se discutía el tema de la metodología del pago, y el magistrado presidente habíamos conversado en varias oportunidades cómo podía ser la fórmula que se había establecido, había traído el mismo Ernesto Álvarez, ideas, el mismo presidente Urviola, ideas, el magistrado Vergara tenía también proyectos que nos presentaba para que se declare que ya eso había prescrito. O sea, habían una serie de proyectos y de ideas que se entregaban a todo el mundo para ver si es que se hacía consenso, de tal manera que eso no cambia mi postura de que la autoría definitiva ha sido bajo mi responsabilidad, si alguna idea trajo prácticamente la suscribí yo, porque el asesor que trabajaba conmigo era el que estaba estableciendo el proyecto de lo que se estaba redactando, traían ideas, al final se iba incorporando, se depuraba, pero eso es prácticamente el iter de lo que es la elaboración de una sentencia.*
>
> *Quiero que quede claro, es que no hemos traído absolutamente ningún tipo de recepción de documentos, como por ahí se especula, del Ministerio de Economía, si habrá traído algún proyecto o alguna sugerencia el doctor Óscar Urviola, no lo descarto, eso no significa que ello haya influido en mi proyecto como ponente*" (Emphasis added)

1097. Justice Eto cannot dismiss ("*no lo descarto*") that President Urviola had received a paper ("*algún proyecto o alguna sugerencia*") from the MEF, but he says that, even if President Urviola received a paper from the MEF, he denies that such paper had any

[858] Doc. R-1100, p. 37-39.

influence on the draft *Resolución* which he eventually prepared and submitted to his colleagues.

1098. Justices Urviola and Álvarez Miranda also rejected the proposition that the drafts discussed in the plenary session were based on documentation or drafts prepared by the MEF[859]:

> JUSTICE URVIOLA: "[…] *rechazo rotundamente, [que] había recibido del Ministerio de Economía y Finanzas un proyecto, eso es absolutamente falso, la ponencia la formuló el Magistrado Eto Cruz, es falso señor, nunca se entregó al Magistrado Eto Cruz, un proyecto de resolución sobre el caso bonos agrarios*".
>
> JUSTICE ÁLVAREZ MIRANDA: "*No, no tengo idea, además que no hubiéramos aceptado que hubiera venido un proyecto de una institución, normalmente eso hubiera sido un escándalo*". (Emphasis added)

1099. The evidence on record seems to indicate that the authorship of *Resolución TC Julio 2013* is solely attributable to Justice Eto, following a process of deliberation between the Justices of the *Tribunal Constitucional*, where – as Justice Eto declared – different ideas and proposals were submitted by all Justices.

1100. It may have happened that during these deliberations, President Urviola was relying on a paper which he had received from the MEF and which was not part of the formal record of the case – a paper which, in any event, Justice Eto denies having taken into consideration in the preparation of his draft. Troubling as these revelations and irregularities are, they are insufficient for the Tribunal to conclude that the *Resolución* was ghost-written by the Government or that they prove a denial of justice to the detriment of Claimants.

Case law

1101. The present case stands in stark contrast with the *Chevron II* case, where the tribunal found "overwhelming"[860] evidence of the ghostwriting of the local judgment by a third party[861]. In that case, the arbitral tribunal's conclusions were largely based on the substantial evidentiary record of a parallel RICO trial before the New York Courts addressing the same issue, that proved the misconduct beyond any reasonable doubt[862].

B. The *Resolución TC Julio 2013* shows evidentiary support and reasoning

1102. Claimants second allegation of procedural misconduct is that the *Tribunal Constitucional* adopted the dollarization methodology without providing sufficient reasoning, based on an argument neither briefed nor discussed in the course of the proceedings nor supported by evidence. The *Tribunal Constitucional* wrongly

[859] Doc. R-1100, pp. 14, 24.
[860] *Chevron II*, para. 8.54.
[861] *Chevron II*, para. 5.230
[862] *Chevron II*, Section V.P.

considered that using the CPI method would have a severe impact on the budget, without hearing the parties, or even the MEF.

1103. Respondent does not share Claimants' view and says that, in any event, these alleged defects would not be sufficient to invalidate the *Resolución* under Peruvian law, and even less to amount to a denial of justice.

Discussion

1104. Claimants make two challenges to the *Resolución*:

- First, they say that it was not sufficiently motivated (**a.**);
- Second, it arrived at wrong conclusions regarding the impact of the CPI methodology on the budget, without any evidentiary support or having heard the MEF or the parties to the constitutional proceeding (**b.**).

1105. The Tribunal does not share Claimants' views.

a. The *Resolución* is sufficiently reasoned

1106. As the Tribunal has stated above, final judgments of the State's judiciary that are devoid of any factual or legal considerations may support the finding that justice has been denied[863]. As previously noted, the tribunal in *Flughafen* stated that denial of justice occurs regarding[864]:

> "*Decisiones manifiestamente arbitrarias que carezcan de motivación, justificación alguna o de toda lógica jurídica y que excedan de un mero error judicial*".

1107. The *Flughafen* tribunal offered the following criteria to discern whether a judgment manifestly lacks reasoning and amounts to a denial of justice:

- First, when the judgment "*omite toda referencia a la norma en el ordenamiento jurídico [municipal] en que se ampara el [tribunal local] para tomar la decisión que adoptó*"[865];
- Second, when the judgment contains illogical or inconsistent explanations[866]; and
- Third, when purporting to offer valid factual or legal reasons, the judgment instead clearly shows the court's bias or prejudice[867].

[863] See para. 1034 *supra*.
[864] *Flughafen*, para. 639.
[865] *Flughafen*, para. 697.
[866] *Flughafen*, paras. 698-699.
[867] *Flughafen*, paras. 707-708.

1108. In this case, the Tribunal does not consider that the *Resolución TC Julio 2013* incurred in any of the above faults. On the contrary, the *Tribunal Constitucional* provided substantial reasoning for its decision:

(i) The *Resolución TC Julio 2013* decision is founded on legal reasons

1109. The *Resolución* offers a legal basis to substantiate its decision:

- It acknowledges the precedent of *Sentencia TC 2001*[868], it reiterates that payment of the *Bonos Agrarios* must comply with Art. 70 of the Constitution and must respect the "*principio valorista inherente a la propiedad*"[869] and that the *principio nominalista* should not be applied because of its confiscatory character[870];

- It also refers to Art. 44 of the Constitution and the *principio de justicia presupuestal*, which requires that any public decision also takes into consideration the impact on the Republic's budget.

1110. The *Tribunal Constitucional* thus balanced two conflicting constitutional principles and a duty: the bondholders' right to receive an appropriate compensation for the longstanding agrarian debt and the principle that the Republic must be able to satisfy such debt, without endangering the State's budget and the Republic's duty, enshrined in Art. 44 of the Constitution, to "*promover el bienestar general que se fundamenta en la justicia y en el Desarrollo integral y equilibrado de la Nación*"[871].

1111. The formula adopted was also inspired by a "*criterio de equidad*": it allowed to update the value of a debt that had been eroded by the negligence of the State, but also took into account the special circumstances of economic crisis and hyperinflation suffered by all Peruvians – not only the bondholders[872].

(ii) The decision is logical and consistent

1112. The *Resolución TC Julio 2013* offers valid and logical economic reasons for each of the parameters of the revaluation formula:

- The *Tribunal Constitucional* dismisses the CPI methodology because it understood that, in times of deep economic crisis and hyperinflation, the basket of goods conforming the CPI did not reflect the economic reality; in these times economic agents are naturally driven to alternative goods not reflected in that index[873];

[868] Doc. CE-17, paras. 12-13.
[869] Doc. RA-211, Fundamento Jurídico 7.
[870] Doc. RA-211, Fundamento Jurídico 2.
[871] Doc. CE-17, para. 25, *in fine*.
[872] Doc. CE-17, para. 25, *in fine*.
[873] Doc. CE-17, para. 23.

- The *Tribunal* preferred the dollarization methodology, which had been previously adopted in the *Decreto de Urgencia 88-2000*, because in times of hyperinflation, economic agents seek refuge in strong currencies to maintain the value of money[874];

- The *Tribunal* decided to apply the "*tipo de cambio de paridad*", because in these exceptional times the official exchange rate did not reflect the real market exchange rate[875];

- Finally, it chose "*la tasa de interés de los bonos del Tesoro americano*", rather than the historic interest rate formalized in the *Bonos,* because the revalued debt was denominated in USD and applying a USD interest rate defended the *principio de justicia presupuestal*[876].

(iii) The *Resolución* does not reveal bias or prejudice

1113. Finally, the Tribunal is unable to identify any manifest (or even subtle) partiality of the *Tribunal Constitucional* – either in favor of the bondholder or the Government – in rendering its decision. The *ratio decidendi* does not reveal any intention to favor any of the subjects involved; but rather, as explained above, to resolve the issue of the *Bonos Agrarios* in line with the *Sentencia TC 2001* and, at the same time, to ensure that payment of the agrarian debt did not threaten compliance by the State's with its other commitments as reflected in the budget.

b. The breach of due process does not translate into a denial of justice

1114. Claimants also aver that the *Tribunal Constitucional* wrongly grounded its decision on the unsupported assumption that the CPI methodology would severely impact the State's budget. The *Tribunal Constitucional* was not even briefed on this issue by the MEF or by any of the parties involved in the constitutional dispute[877]. The *Tribunal Constitucional* opted for the dollarization methodology, the parity exchange rate and the accrual of interest at the U.S. Treasury Bonds rate *sua sponte*, without hearing the parties involved (including the MEF), resulting in a decision lacking in evidentiary support and in a breach of due process[878].

Discussion

1115. The Tribunal has already established (in section **2.2.C.** *supra*), that the right to present evidence forms part of the internationally recognized principles of administration of justice, and that an unjustified violation of this procedural right may amount to a denial of justice. In this case, Claimants argue that the *Tribunal Constitucional* acted *sua*

[874] Doc. CE-17, paras. 22, 24.
[875] Doc. CE-17, para. 24.
[876] Doc. CE-17, paras. 22, 24.
[877] CII, para. 418,
[878] C I, para. 212.

sponte in deciding an issue, without evidentiary support and without hearing the involved parties, in breach of the above principles.

1116. The Tribunal agrees with Claimants' general proposition that the *Tribunal Constitucional* did not strictly adhere to the ordinary rules of due process.

1117. The evidence marshalled proves that the Justices met with the MEF and received information on the budgetary impact of the revaluation of the *Bonos.* President Urviola even seems to have received and used in the deliberations a document with precise information from the MEF. Due process would have required that the *Tribunal Constitucional* share this information with the parties to the constitutional procedure, and that these parties be granted the possibility to marshal counter-evidence and to argue the point before the Court.

1118. This apparent irregularity by the Peruvian *Tribunal Constitucional* of the ordinary principles of due process, is somewhat offset by the nature of its task in a Peruvian *causa de inconstitucionalidad*.

1119. The *Tribunal Constitucional* is the highest judicial body of the Republic, vested with quasi-political powers. These quasi-political attributions are derived from its mandate to control the constitutionality of laws, statutes and regulations issued by Government and Congress. In this facet, Peruvian doctrine refers to the *Tribunal Constitutional* as the "*legislador negativo*"[879]. Within these powers, the *Tribunal Constitucional* may issue *sentencias previsoras*, where it takes into account all tangential aspect of its decision and integrates all relevant constitutional principles at stake[880].

1120. The procedural rules of the *procesos de inconstitucionalidad* are not identical to those that apply in ordinary judicial proceedings in Peru[881].

1121. In ordinary proceedings, two parties defend opposing views regarding the status of a subjective right and the *principe dispositif* requires the Court to abide by the relief sought by each of the parties, and to base its decision solely on the evidence marshalled and arguments submitted by them; and the Court's decision only has a direct impact on the subjective rights of the litigants[882].

1122. In the *proceso de inconstitucionalidad*, where the resulting decision has *erga omnes* effects, the *iura novit curia* principle carries greater weight and may permit the *Tribunal Constitucional* to take into account broader considerations of constitutional relevance, even if doing so entails that the interests of the parties are postponed[883].

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[879] See Doc. R-1100, p. 34.
[880] See R-1100, p. 36.
[881] See Doc. RA-414.
[882] Cf. Doc. RA-414, Art. 106.
[883] Doc. RA-414, Arts. 79, 82, 106, 113.

1123. Summing up, the ordinary principle of due process would have required that the *Tribunal Constitucional* share the information received from the MEF with the *Colegio de Ingenieros* and the other parties to the constitutional proceeding. But the Tribunal is loath to find that, in these circumstances, this breach of due process amounts to a denial of justice, because in a Peruvian *proceso de inconstitucionalidad,* the Constitutional Court acts as a *legislador negativo* and in this role it may take into account broader considerations of constitutional relevance.

Case law

1124. Claimants submit that the present case has similarities to the *Flughafen* case, regarding denial of justice – because, in that case, the *Tribunal Supremo Venezolano* deprived the investor of its investment through an unreasoned judicial decision, adopting a *sua sponte* solution not considered by the parties in their briefs or justified by the relief sought.

1125. The Tribunal does not consider the decision in *Flughafen* apposite.

1126. The *Flughafen* case concerned several disputes that had arisen between the concessionaire of a regional airport and the regional government that had awarded the concession; the central issue being discussed was the legality of the concession and who had the legal right to administer the airport. The amount of parallel judicial proceedings that were initiated by both parties and the resulting legal uncertainty that unfolded incited the *Tribunal Supremo Venezolano* to assume jurisdiction over all pending legal controversies and to appoint a provisional board to administer and operate the airport[884]. Three years thereafter, the *Tribunal Supremo Venezolano* extinguished the mandate of the provisional board and handed the management of the airport to the central government[885].

1127. The *Flughafen* tribunal concluded that the decision to grant the administration of the airport to the central government amounted to a denial of justice because of its manifest lack of reasoning[886].

1128. The facts in *Flughafen* are substantially different from those in the present case: the *Tribunal Supremo Venezolano* was not resolving a constitutional issue with *erga omnes* effects; it was called to resolve a legal dispute regarding an administrative concession between a regional government and the investor, concerning specific subjective rights. Instead of adjudicating this dispute, the *Tribunal Supremo Venezolano* decided to deprive both parties of the subjective right at stake in favor of a third party, the central government, which was not a litigant in the proceeding.

[884] *Flughafen*, paras. 644-655; 689.
[885] *Flughafen*, para. 675.
[886] *Flughafen*, para. 697.

C. The *Tribunal Constitucional* complied with its internal procedures

1129. Claimants say that the *Tribunal Constitucional* was not empowered to depart from the conclusions of the *Sentencia TC 2001* through a *resolución ejecutoria*. In Gramercy's view, the *Resolución TC Julio 2013* nullified the current value principle set forth in *Sentencia TC 2001* in clear violation of the *res judicata principle*. Claimants say that the only possible means to modify the conclusions of the *Sentencia TC 2001* was thorough the issuance of a "*sentencia manipulativa*", which required a qualified majority of the members of the *Tribunal Constitucional*. In this case, there was no such majority.

1130. Respondent, on the other hand, submits that the *Tribunal Constitucional* acted within its constitutional powers and in strict adherence with the procedures for adopting its judgments.

Expert reports

1131. The Parties have presented the expert opinions of two authorities in Peruvian law, who hold different views on whether the *Tribunal Constitucional* exceeded its mandate when it issued the *Resolución TC Julio 2013*.

1132. Claimants' expert, former *Tribunal Constitucional* Justice Delia Revoredo, acknowledges that, at the time *Resolucion TC Julio 2013* was adopted, the *Tribunal Constitucional* could revoke, alter or re-interpret its prior constitutional rulings, but only through the so-called "*sentencias manipulativas*", that require at least five votes to be adopted[887]. This type of ruling is not codified in the procedural rules of the *Tribunal Constitucional*, but it is an uncontroversial principle developed by the jurisprudence of Peru's highest Court[888].

1133. Justice Revoredo says that the *Resolución TC Julio 2013*, as a *resolución ejecutoria*, could not re-interpret or alter the ruling of *Sentencia TC 2001*; but, in her opinion, that is precisely what it did, because[889]:

> "*La* [*Sentencia TC 2001*] *confirmó el principio constitucional de que el Estado tenía que pagar un valor justo por la expropiación, pero la* [*Resolucion TC Julio 2013*] *en efecto dice que el Estado puede pagar menos que el valor justo por la expropiación porque pagar ese valor tendría un impacto presupuestario. Es una decisión muy diferente y realmente modifica la decisión original, y en ese aspecto constituye una violación del principio de cosa juzgada".*

[887] CER-5, Revoredo, para. 45. In October 2015 the *Tribunal Constitucional* modified the rule to require four votes.
[888] Doc. CE-208.
[889] CER-5, Revoredo, para. 44.

1134. Respondent's expert, Dr. Oswaldo Hundskopf, considers that the *Tribunal Constitucional* did have jurisdiction to issue the *Resolución TC Julio 2013* in the terms that it did, and did not exceed its constitutional mandate.

1135. Dr. Hundskopf first explains that the *Sentencia TC 2001* declared that the *Ley 26597* was unconstitutional, because this law authorized the State to pay the *Bonos* at their nominal value, something which the *Tribunal Constitucional* found to be in contravention of Article 70 of the Constitution[890]. But, in that judgement, the *Tribunal Constitucional* never established the procedure for the revaluation and payment of the *Bonos*[891]. This *lacuna* was filled through the issuance of a *resolución ejecutoria*, which falls within the jurisdiction of the *Tribunal Constitucional*.

Discussion

1136. The Tribunal accepts that – under Peruvian law – there is room for a debate concerning the scope of a *resolución ejecutoria* in the context of a *proceso de constitucionalidad* – the issue being how far the *Tribunal Constitucional* can go by issuing successive *Resoluciones ejecutorias*, and when a new *sentencia manipulativa* become mandatory. In his testimony before Congress, Justice Eto himself confirmed that this was a vexing issue[892]:

> "*Ese es uno de los temas arduos en los previos del derecho procesal constitucional*".

1137. All the other Justices of the *Tribunal Constitucional* that discussed and voted on the content of *Resolución TC Julio 2013* were also well aware of this issue, and extensively analyzed whether that decision could still be considered a *resolución ejecutoria,* which required a simple majority, or whether it must be labelled as a *sentencia manipulativa*, requiring a qualified majority of five votes.

1138. The minutes of the plenary session of 16 July 2013 record that Justice Vergara Gotelli considered that the *Resolución TC Julio 2013* had to be approved by the qualified majority of five votes. In view of his opinion, the Justices requested the opinion of the legal advisor of the *Tribunal Constitucional* and accepted to put this question to a vote. The result was that all Justices, except Vergara Gotelli, considered that the simple majority sufficed[893]:

> "*Luego de los informes, el debate realizado y la mencionada votación, se concluyó que tratándose de una sentencia que declara la inconstitucionalidad de una ley, el número de votos requerido ascendía a cinco votos conformes, pero que tratándose de una resolución o auto que resuelve un pedido de ejecución, como en el presente caso, sólo se requiere mayoría simple de votos emitidos*".

[890] RER-2, Hundskopf, para. 69.
[891] RER-2, Hundskopf, para. 76.
[892] Doc. R-1100, p. 34.
[893] Doc. R-1101, p. 2.

1139. The majority of the Justices of the *Tribunal Constitucional* thus considered that the *Resolución TC Julio 2013* did not amount to a "*sentencia manipulativa*".

1140. The minutes of the plenary session of 16 July 2013 – signed by all six Justices – also confirm that none of them raised any objection with respect to the voting procedures that took place in the session and its final result. The minutes record that[894]:

> "[…] *el Magistrado Mesía Ramírez expresó sus discrepancias con esta nueva ponencia* [the Resolución TC Julio 2013]*, ratificándose en el voto que ya había presentado para esta sesión del pleno* [the First Draft]*, manifestando que no iba a variar su voto, pues este ya había sido emitido.*
>
> […]
>
> *El resultado al final de la votación, fue cuatro votos a favor de la ponencia del magistrado Eto Cruz* [the Resolución TC Julio 2013]*, en virtud del voto decisorio del magistrado Urviola Hani, al haber ocurrido un empate tal como lo señala el art. 10-A del Reglamento Normativo del Tribunal Constitucional. Como consecuencia de ello, el voto del magistrado Mesía Ramírez quedó en minoría, pasando a ser voto singular, junto con los votos singulares de los magistrados Vergara Gotelli y Calle Hayen*".

1141. The evidence shows that the *Tribunal Constitucional* was perfectly aware of the differences between a *resolución ejecutoria* and a *sentencia manipulativa* and that, after obtaining legal advice from its legal advisor, the *Tribunal Constitucional* decided that the *Resolución TC Julio 2013* constituted a *resolución ejecutoria,* and that it could be approved by simple majority.

1142. It is not the role of this Tribunal to second-guess the considered decision of the *Tribunal Constitucional* regarding the procedural rules governing its decision-making. In any case, Claimants have failed to prove that either the approval or the content of *Resolución TC Julio 2013* were so egregiously wrong or manifestly unjust as to give rise to a denial of justice.

1143. Contrary to Claimants' allegation, the *Resolución TC Julio 2013* did not contradict, but complemented *Sentencia TC 2001*; that judgement had failed to specify the methodology to be used for the revaluation of the *Bonos*, and the *Resolución TC Julio 2013* now selected, among the various methodologies for the revaluation of debts accepted in Peruvian law, dollarization using the parity exchange rate, plus accrual of interest at the U.S. Treasury Bonds rate.

1144. The *Tribunal Constitucional* having determined that *Resolución TC Julio 2013* was a *resolución ejecutoria* and not a *sentencia manipulativa*, the *Resolución TC Julio 2013* was properly approved by a simple majority of Justices, with the casting vote of the President solving the tie within three justices in favor and three contrary to the *Resolución TC Julio 2013* – a casting vote foreseen in the regulations of the *Tribunal*

[894] Doc. R-1101, p. 2.

Constitucional and which is of frequent use in collegiate bodies with even number of members.

1145. In conclusion, the Tribunal is convinced that the *Tribunal Constitucional* lawfully complied with the procedures for adopting its decisions: after careful consideration by all the Justices involved in the decision, and with the opinion of the legal adviser to the institution, the *Tribunal Constitucional* concluded that the *Resolución* was not a *sentencia manipulativa*, and therefore, could be passed with simple majority of votes, as permitted by its own *Reglamento Normativo del Tribunal Constitucional*.

D. The *Voto Singular* did not contaminate the *Resolución TC Julio 2013*

1146. Claimants have devoted great attention to the procedure which led to the issuance by Justice Mesía of his *Voto Singular*. In Gramercy's submission, the *Voto Singular* is the product of a deliberate forgery that nullifies *Resolución TC Julio 2013*. On Claimants' account, President Urviola ordered the manipulation of the First Draft into the *Voto Singular* to artificially secure a tie of votes that would trigger the rule of the casting vote of the President, thereby facilitating the issuance of *Resolución TC Julio 2013.*

1147. The Tribunal dismisses this allegation for lack of sufficient evidentiary support.

The *plenario* of 16 July 2013

1148. During the *plenario* held on 16 July 2013, it is undisputed that the *Tribunal Constitucional* reached a situation of stalemate: three Justices were in favor, three against adopting *Resolución TC Julio 2013.* In light of that tie – and regardless of the content of each of the three *votos singulares* that were issued – Art. 10-A of the *Reglamento Normativo del Tribunal Constitucional* becomes applicable, triggering the casting vote of the President[895]:

> "***Voto decisorio***
>
> ***Artículo 10-A.-*** *El Presidente del Tribunal Constitucional cuenta con el voto decisorio para las causas que son competencia especial del Pleno en la que se produzca un empate de ponencias*".

1149. The testimony rendered before the Congressional Committee by three of the Justices explained that the use of corrections with white-out was a *bona fide* practice followed by the Court. When the Justices have signed a project, but afterwards change their position and withdraw their vote, it is sometimes more efficient to simply remove the signature with white-out, than circulate a new document to collect all the signatures[896]. Justice Álvarez Miranda offered the following explanation[897]:

[895] Doc. CE-108, Art. 10-A.
[896] Doc. R-1100, pp. 25-26, 33, 44, 46.
[897] Doc. R-1100, pp. 25-26.

> "*Entiendo que es una práctica regular en el tribunal que cuando un proyecto tiene rúbricas a favor va corriendo, continúan los debates tanto en pleno como las conversaciones entre los mismos asesores, etcétera. Ha habido varias ocasiones, no podría precisar el número, pero ha habido varias ocasiones en las cuales incluso en mi caso hemos retirado la rúbrica porque nos ha parecido o alguien nos ha llamado la atención en torno a distintos detalles y ya consideramos que hay que firmar por el otro proyecto o hay que hacer un nuevo proyecto.*
>
> *Entonces sí se borra con Liquid Paper esa rúbrica. ¿Por qué? Porque lo que prefiere es no malograr las rúbricas que ya ha obtenido ese proyecto, porque si hiciéramos otro de nuevo, recuerden ustedes que un alto tribunal generalmente está compuesto por personalidades a veces mayores, y con un nivel de ego académico muy fuerte, entonces muchas veces si se vuelve a correr el proyecto porque alguien se apartó, posiblemente no se logre la misma cantidad de rúbricas; por tanto se usa el Liquid Paper".* (Emphasis added)

1150. President Urviola further clarified that, in the session of 16 July 2013, Justice Mesía ratified his position, as reflected in the First Draft, and therefore – following the practice of amending formal aspects of the *votos singulares* – the First Draft was issued as Mesía's *Voto Singular*[898].

1151. The clerk of the *Tribunal Constitucional* also acknowledged that corrections had been made with white-out, to modify the First Draft and convert it into Justice Mesía's *Voto Singular*[899]; but he explained that this reflected the voting results of the plenary session of 16 July 2013. Justice Mesía had voiced his opposition to the new draft that opted for the dollarization method, stating that he "ratified" his vote in favor of the First Draft[900]. The clerk understood that the voting procedure had concluded, and that none of the Justices required additional time to issue their *votos singulars*; accordingly, the signature of Justice Eto was removed from the First Draft, leaving only the signature of Justice Mesía, to reflect the position he continued to defend[901].

The reaction of Justice Mesía

1152. Justice Mesía did not immediately raise an issue with respect to the publication of the *Voto Singular*. The day following the publication of the *Resolución TC Julio 2013* and the *Voto Singular*, he offered a televised interview commenting on the decision, without bringing up his unauthorized *Voto Singular*[902]:

> "*no han habido presiones, pero más bien, lo que yo creo en el caso, es que lo que el Tribunal ha querido decir, es que en este país hay seguridad jurídica, se respeta la propiedad privada y el Estado honra sus deudas*".

[898] Doc. R-1100, pp. 15, 19.
[899] Doc. CE-310, p. 3.
[900] Doc. CE-310, p. 2.
[901] Doc. CE-310, pp. 2-3.
[902] Doc. CE-310, p. 3.

1153. A few days later, on 22 July 2013, Justice Mesía transmitted to President Urviola his complaint that the *Voto Singular* had been published with alterations that he had not authorized and requested that this *Voto Singular* be annulled (not the entire *Resolución TC Julio 2013*), and that he be allowed to issue an alternative version[903].

1154. On 9 August 2013, Justice Urviola answered that he could not attend to this extemporaneous petition, because the *Resolución TC Julio 2013*, including all the *votos singulares*, had already been published and it had *res judicata* effect.[904]

1155. Four days later, in the plenary session of 13 August 2013, all of the Justices of the *Tribunal Constitucional* addressed the matter. The minutes of that session record that, after an open discussion, the Justices decided to consider the file closed[905]:

> "*El magistrado Mesía Ramírez se refirió al Exp. No. 00022-1996-PI/TC* [within which Resolución TC Julio 2013 had been issued] *y a la controversia que como consecuencia de este fallo se ha suscitado en los medios de comunicación y al interior de nuestra institución como resultado de los votos en mayoría, singulares y dirimencias. Luego de amplio debate en el que intervinieron todos los magistrados, se convino en que este es un caso cerrado y acordaron, atendiendo a la propuesta del magistrado Calle Hayen que cualquier respuesta a solicitudes y aclaraciones que pudieren plantearse, deberá ser resuelta por los que hicieron mayoría en la resolución*". (Emphasis added)

Discussion

1156. In the Tribunal's view, although the use of white-out to delete signatures in the final resolution of a Court can be regarded as an unconventional practice, it does not necessarily amount to forgery of court documents, as Claimants submit. This conclusion is supported by the evidence of the apparent practice of the *Tribunal Constitucional*, that had issued a number of *sentencias* with formal amendments made with white-out[906].

1157. In the Tribunal's view, the most plausible explanation is that – in the urgency that the *Tribunal Constitucional* had in issuing its decision prior to the renewal of its members, as acknowledged by President Urviola[907] – the officer in charge of publication understood, as the minutes of the plenary session of 16 July 2013 recorded, that[908]

> "[…] *el Magistrado Mesía Ramírez expresó sus discrepancias con esta nueva ponencia, ratificándose en el voto que ya había presentado para esta sesión del pleno* [the First Draft]*, manifestando que no iba a variar su voto, pues éste ya había sido emitido*". (Emphasis added)

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[903] Doc. CE-24.
[904] Doc. R-1100, p. 16; Doc. CE-31, para. 8.
[905] Doc. R-1072, ROP 033122, p. 2.
[906] Doc. R-1100, p. 44.
[907] Doc. R-1100, p. 19.
[908] Doc. R-1101, p. 2.

and, accordingly, moved to make the necessary corrections in the First Draft to reflect Justice Mesía's position, resorting to the unconventional but not unprecedented practice of using white-out.

1158. Be that as it may, the *voto singular* of any of the Justices, including that of Justice Mesía, had no practical impact on the approval and legal effects of *Resolución TC Julio 2013*. As Justices Álvarez Miranda, Urviola and Eto confirmed before the Congressional Committee, the content of a *voto singular*, or the absence thereof, does not alter the substance of the *Resolución* or its validity[909].

> JUSTICE URVIOLA: "*Y le voy a decir, que aun en el supuesto negado caso, señor presidente, señores congresistas, que hubiese habido alguna irregularidad en el voto singular del señor Mesía, esa irregularidad o ese voto singular, no fue determinante en la expedición de una resolución que contaba con los cuatro votos, los tres de los magistrados más el voto decisorio del presidente*"[910].
>
> JUSTICE ETO: "*De tal manera que insisto, el fallo sea como hubiere sido la postura del doctor Mesía siempre iba a ser el mismo*"[911].
>
> JUSTICE ÁLVAREZ MIRANDA: "[…] *la sentencia está compuesta esencialmente por las firmas a favor que la hacen sentencia. Los votos singulares son informaciones para los ciudadanos de la otra posición perdedora. Por ejemplo si Carlos Mesía no hubiera presentado o si se hubiera perdido ese proyecto inicial o lo hubieran roto, y Carlos Mesía se negaba a presentar su voto singular, igual se podía publicar la sentencia con la anotación de Relatoría indicando que 'a la fecha no se ha recibido el voto singular de Carlos Mesía', eso no alteraba la sentencia"*[912]. (Emphasis added)

* * *

1159. Summing up, given the evidentiary record and on a balance of probabilities, the Tribunal is of the view that what is likely to have occurred is a lack of coordination between the Justices and clerks when recording and publishing the reasons underlying Justice Mesía's dissenting opinion: President Urviola and the clerks understood that these reasons were already detailed in the First Draft, and that Justice Mesía did not wish to modify them; Justice Mesía, on the other hand, expressed days later that he had preferred to issue an alternative *voto singular* with a different text.

1160. Claimants have not sufficiently proven that Peru engaged in a denial of justice. Three Justices voted in favor of the *Resolución TC Julio 2013*, and three against, and the tie was solved by the casting vote of the President – as the internal regulation of the *Tribunal Constitucional* foresaw. It may well have happened that Justice Mesía would have intended to issue a dissenting opinion with a different drafting, but even in that

[909] Doc. R-1100, p. 18.
[910] Doc. R-1100, p. 18.
[911] Doc. R-1100, p. 33.
[912] Doc. R-1100, pp. 27-28.

scenario, the material result would have been the same: that the *Tribunal Constitucional* would have adopted by the prescribed majority *Resolución TC Julio 2013*.

E. Conclusion

1161. In this section the Tribunal has addressed Claimants' allegations that Peru incurred in denial of justice because:

- the MEF unlawfully pressured the *Tribunal Constitucional* to adopt the valuation method prescribed by *Resolución TC Julio 2013*;
- the *Resolución TC Julio 2013* lacked sufficient reasoning;
- the *Resolución TC Julio 2013* modified the conclusions of the *Sentencia TC 2001* without the necessary qualified majority;
- the *Voto Singular* was issued in such an irregular manner that casts a shadow of unlawfulness over the *Resolución TC Julio 2013*.

1162. The Tribunal has analyzed the allegations extensively and has come to the following conclusions:

Whether the MEF unlawfully influenced the *Tribunal Constitucional*

1163. When a Government exercises undue influence on the judiciary in order to secure a judgement which favors the State's interests to the detriment of the foreign investor, such conduct does represent an egregious violation of the proper administration of justice amounting to a denial of justice. The relevant question in this case is not whether the Constitutional Judges met with the Government in inter-institutional summits, but rather whether, as a consequence of those meetings, the *Resolución TC Julio 2013* was issued under undue pressure from the Peruvian Government.

1164. The Tribunal tends to agree with Respondent that the decision of the *Tribunal Constitucional* was not contaminated by undue pressure from the MEF. What the evidence seems to show is that the *Tribunal Constitucional,* after hearing the MEF's arguments and weighing several countervailing factors, in good faith concluded that the financial solution finally adopted in the *Resolución TC Julio 2013* was the one which best reflected the opposing principles enshrined in the Peruvian Constitution.

Whether the *Resolución* was ghostwritten by the Government

1165. Claimants also submit that the *Resolución TC Julio 2013* was based on "an alternate draft" prepared by Justice Urviola, after receiving instructions and documentation handed to him by officers of the Government.

1166. Justice Eto cannot dismiss the possibility that President Urviola received a paper from the MEF, but he says that even if this occurred, such paper had no influence on the draft *Resolución* which he eventually prepared and submitted to his colleagues. The evidence

on record on balance suggests that the authorship of *Resolución TC Julio 2013* is solely attributable to Justice Eto, upon a process of deliberation between the Justices of the *Tribunal Constitucional*.

1167. The evidence does not show that the *Resolución* was ghostwritten by the Government, although it is possible that President Urviola, during the deliberations, made use of a paper prepared by the Government, which was not included in the record, and which Justice Eto denies having taken into consideration during the preparation of his draft. In the Tribunal's opinion, these procedural irregularities, although troubling, are not of such weight as to prove a denial of justice to the detriment of Claimants.

Whether *Resolución TC Julio 2013* lacks evidentiary support and reasoning

1168. Claimants say that the *Tribunal Constitucional* adopted the dollarization methodology without providing sufficient reasoning.

1169. The Tribunal has found that the *Resolución TC Julio 2013* is sufficiently motivated: it explains the legal grounds that justify the adoption of the valuation methodology and offers reasonable legal and economic explanations for each of the specific parameters chosen by the *Tribunal Constitucional*.

Whether the *Resolución TC Julio 2013* implies a breach of due process

1170. Claimants say that the *Tribunal Constitucional* opted for the dollarization methodology, the parity exchange rate and the accrual of interest at the U.S. Treasury Bonds rate *sua sponte*, without hearing the parties involved, resulting in a decision lacking in evidentiary support and in a breach of due process.

1171. The Tribunal agrees with Claimants that the ordinary principle of due process would have required that the *Tribunal Constitucional* share the information received from the MEF with the *Colegio de Ingenieros* and the other parties to the constitutional procedure, giving them the possibility to marshal counter-evidence and to plead. But the Tribunal is loath to find that this breach of due process confers Gramercy the right to claim a denial of justice because, in a *proceso de inconstitucionalidad*, the Constitutional Court acts as a *legislador negativo,* and in this role, it may take into account broader considerations of constitutional relevance, even if doing so entails that the interests of the parties are postponed.

Whether the *Tribunal Constitucional* complied with its internal procedures

1172. Claimants say that the *Tribunal Constitucional* was not empowered to revert the conclusions of the *Sentencia TC 2001* through a *resolución ejecutoria*; the only possibility to modify the conclusions of the *Sentencia TC 2001* was through the issuance of a "*sentencia manipulativa*", that required a qualified majority of the members of the *Tribunal Constitucional*. In this case, there was no such majority

1173. Under Peruvian law, there is room for a debate concerning the scope of a *resolución ejecutoria* in the context of a *proceso de constitucionalidad* – the issue being how far

the *Tribunal Constitucional* can go by issuing successive *Resoluciones ejecutorias*, and when does a new *sentencia manipulativa* become mandatory.

1174. But, in this case, the Tribunal is convinced that the *Tribunal Constitucional* complied with the procedures for adopting its decisions: after careful consideration by all of the Justices, and with the opinion of the legal adviser to the institution, the *Tribunal Constitucional* concluded that the *Resolución* was not a *sentencia manipulativa*, and therefore, could be passed with simple majority of votes, as permitted by its own *Reglamento Normativo del Tribunal Constitucional*.

Whether the *Voto Singular* contaminated the Resolución TC Julio 2013

1175. In Gramercy's submission, the *Voto Singular* is the product of a deliberate forgery, that nullifies *Resolución TC Julio 2013*. On Claimants' account, President Urviola ordered the manipulation of the First Draft into the *Voto Singular* to artificially secure a tie of votes, that would trigger the rule of the casting vote of the President, thereby facilitating the issuance of *Resolución TC Julio 2013.*

1176. In the Tribunal's view, although the use of white-out to delete signatures in the final resolution of a court can be regarded as an unconventional practice, it does not necessarily amount to forgery of court documents, as Claimants submit.

1177. The record shows that there was no malicious intent or alternative motive behind the issuance of the *Voto Singular*. President Urviola and the clerk in charge of publishing the *Resolución* understood that the text of the *Voto Singular* fairly represented the position which Justice Mesía had expressed during *plenario* of 16 July 2013; and accordingly, they published the *Resolución* with the *Voto Singular*, making the necessary formal amendments with white-out – a practice not unheard of in the publication procedure of the *Tribunal Constitucional*.

1178. In any event, the *Voto Singular* did not affect the content of the *Resolución* or its validity, and its practical consequences would have been the same, had Justice Mesía submitted a different *voto singular*.

Demanding test for denial of justice

1179. The Tribunal has established that findings of denial of justice under customary international law are subject to a high threshold, reserved only to improper and egregious violations of due process, which violate basic internationally accepted standards of administration of justice and shock or surprise the sense of judicial propriety[913].

1180. Does the *Resolución TC Julio 2013* constitute a denial of justice?

[913] See para. 1018 *supra*.

1181. With hindsight, there are various aspects of the *Resolución TC 2013* which due process required to be handled differently. The Judges of the Constitutional Court should have shared any information provided by the MEF with the *Colegio de Ingenieros* and the other parties to the constitutional procedure; and the clerk to the *Tribunal Constitucional* should not have used white out to convert a draft decision into a *Voto Singular.*

1182. But when judging these deficiencies, they must be put into context: the *Tribunal Constitucional* is not an ordinary Court, but rather a Constitutional Court, entitled to declare the nullity of laws which contravene the Constitution, by promulgating *erga omnes* decisions, which bind all citizens, and are capable of producing significant effects on the Government and its budget. The task of a Constitutional Court is akin to that of a negative legislator. And a legislator has the duty, before adopting a decision, to ascertain its effects, including on the State budget.

1183. The Tribunal is further convinced of the propriety of the *Resolución TC Julio 2013* because its content and the procedure for its approval have been subject to exhaustive scrutiny: a criminal investigation and a congressional inquiry have not brought to light credible indicia of any manifest contravention of the Peruvian legal order, let alone of an irregularity of such magnitude as to constitute a denial of justice.

1184. Additionally, the *Tribunal Constitucional*, this time composed by Justices different from those that issued *Resolución TC Julio* 2013, had the opportunity to revisit the legality of that decision: in two additional *Resoluciones* issued in 2015 and 2019[914] the new Justices dismissed successive challenges against the *Resolución TC Julio 2013* and confirmed that it is the law of the land.

1185. The Tribunal has already reached the conclusion that the *Decretos Supremos* are arbitrary, and as such imply that Peru has breached the MST of aliens required by customary international law, guaranteed in Art. 10.5 of the FTA. A finding that Peru has incurred in a denial of justice would have no impact on the compensation to be awarded to Claimants.

1186. For the above reasons, not without some hesitation, the Tribunal feels that the deference owed by an international arbitration panel to Peru's Highest Court should prevail, and that Gramercy's claim that the Republic incurred in a denial of justice in breach of Art. 10.5 should be dismissed.

[914] Doc. CE-40; Doc. CE-781.

XI.2. WHETHER THE IMPUGNED MEASURES WERE EXPROPRIATORY

1187. Gramercy's third claim on the merits is that the *Resolución TC Julio 2013* and the *Decretos Supremos* amount to measures equivalent to expropriation, in breach of Art. 10.7 of the Treaty, while Respondent counters that Claimants have failed to establish the basic requirements of the Treaty to prove the indirect expropriation claim.

1188. To adjudicate this matter the Tribunal will first analyze the standard for indirect expropriation under Article 10.7 of the FTA (**1.**) and then adopt a decision (**2.**).

1. THE PROHIBITION OF EXPROPRIATION IN THE FTA

1189. Art. 10.7 of the Treaty governs the conditions under which a State may expropriate a covered investment:

> "Article 10.7: Expropriation and Compensation
>
> 1. 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.
>
> 2. The compensation referred to in paragraph 1(c) shall:
>
> (a) be paid without delay;
>
> (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");
>
> (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
>
> (d) be fully realizable and freely transferable […]".

1190. Annex 10-B of the Treaty offers interpretative assistance with regard to equivalent measures, *i.e.*, measures which do not result in a formal transfer of title or outright seizure of the investment, but which nevertheless produce on the investor an effect equivalent to an expropriation:

> "3. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.
>
> (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations". (Emphasis added)

1191. In Annex 10-B, the Contracting Parties provide guidance to help tribunals decide whether an action or a series of actions adopted by the host State gives rise to an indirect expropriation. The second paragraph refers to regulations issued by the host State to protect legitimate public welfare objectives and establishes the general principle that "except in rare circumstances" no indirect expropriation occurs. Additionally, the first paragraph defines certain "factors", which tribunals must take into consideration to establish whether a certain measure adopted by the host State constitutes an indirect expropriation.

Economic impact

1192. The first factor is the economic impact provoked by the measure on the value of the investment; this reference mirrors the classic conception of international investment law that an indirect expropriation requires that the investor suffers a "substantial deprivation" of its investment[915]. Neither the Treaty nor the explanatory note of Annex 10-B refer explicitly to the term "substantial deprivation"; but Annex 10-B implicitly

[915] R. Dolzer & C. Schreuer, "Principles of International Investment Law", Second Edition OUP (2012), p. 104, citing to *Société Générale v. Dominican Republic*, LCIA Case No. UN 7929 (UNCITRAL), Award on Preliminary Objections to Jurisdiction, 19 September 2008, Doc. CA-183 ["***Société Générale***"], para. 64; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, Doc. RA-109 ["***Alpha Projectholding***"], para. 408. See also Y. Fortier & S. Drymer: "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor", *ICSID Review - Foreign Investment Law Journal*, Volume 19, Issue 2, pp. 305-306.

incorporates the requirement by making a negative statement: measures that adversely affect the investment are by themselves insufficient to cause an indirect expropriation.

1193. In its submission, the U.S. confirms that the terms "economic impact" in Annex 10-B must be interpreted in line with the

> "[…] fundamental principle of international law that, for an expropriation claim to succeed a claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as 'to support a conclusion that the property has been 'taken' from the owner'"[916]. (Emphasis added)

1194. The Tribunal also concurs with the U.S. that in order to measure the "economic impact", a comparison must be made between[917]:

- The economic value of the investment immediately before the expropriation, based on the facts and circumstances known to exist at the time; and

- The economic value of the investment immediately thereafter (excluding any adverse economic impact caused by other circumstances not attributable to the alleged breach).

The interference with reasonable investment-backed expectations

1195. The second factor referred to in Annex 10-B is whether the measure interferes with distinct, reasonable investment-backed expectations.

1196. Investment tribunals have consistently analyzed allegations of indirect expropriation by reference to the investor's legitimate expectations. In *Metalclad*, the investor was found to have placed legitimate reliance on the government's assurances that the investment complied with local regulations; and, in light of these expectations, the subsequent denial of the construction permits was deemed a measure equivalent to expropriation[918].

1197. As Fortier and Drymer say, in relation to indirect expropriations[919]:

> "At least as important as the effect of a governmental measure on private property is its effect on *the investor*, that is, the extent to which the measure may undermine the investor's reasonable and legitimate expectations represented by the investment. Indeed, legitimate expectations are inseparable from the concept of private property

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[916] USS, para. 24, citing to *Pope & Talbot, Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, Doc. RA-56 ["***Pope & Talbot***"], para. 102.
[917] USS, para. 25.
[918] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, Doc. CA-33 ["***Metalclad***"], paras. 103-107.
[919] Y. Fortier & S. Drymer: "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor", *ICSID Review - Foreign Investment Law Journal*, Volume 19, Issue 2, p. 306.

> rights – essentially the rights to use, enjoy the fruits of, and alienate one's property – and are part and parcel of the legal order" (Emphasis in the original)

The character of the government action

1198. Finally, Annex 10-B requires an assessment of the character of the government measure. The U.S. submission distinguishes between acts that imply the physical taking of the investment (more likely to amount to an indirect expropriation), versus *bona fide* regulatory measures seeking to promote the common good, where the claimant has a higher burden to prove the illegality[920].

Judicial expropriation

1199. A related question is whether a judicial decision can lead to a finding of indirect expropriation.

1200. The U.S. submits that the proper interpretation of the Treaty is that[921]:

> "Judicial measures applying domestic law may give rise to a claim for denial of justice under Article 10.5 of the Agreement […]. Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not, however, give rise to a claim for expropriation under Article 10.7". (Emphasis added)

1201. The U.S. says that the only exception to this rule occurs when the executive or legislative "direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation". In these cases, and depending on the circumstances, there may be a basis of a separate claim for expropriation[922].

1202. Prior tribunals have assessed the relation between the two standards. In *Loewen* the tribunal addressed a judicial expropriation claim presented as an alternative to the denial of justice claim. The tribunal reaffirmed the primacy of the denial of justice standard when assessing the domestic court's conduct and said that a judicial expropriation was contingent on a finding of denial of justice[923]:

> "Claimants' reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105".

1203. A similar view has been expressed by legal scholars, *inter alia*, by Paparinskis, who has opined that

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[920] USS, para. 27.
[921] USS, para. 28.
[922] USS, para. 29.
[923] *Loewen*, para. 141.

> "while taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice"[924].

1204. The Tribunal coincides with the above views:

- the primary cause of action established in the Treaty to challenge a judicial measure is denial of justice under Article 10.5;

- the domestic Court's conduct may only form the basis of an expropriation claim where it is established that the executive or legislative branches interfered with court rulings so as to effectively cause an expropriation;

- a conclusion that a domestic Court caused a wrongful expropriation (in conjunction with the legislative or executive branches) requires a prior finding of denial of justice.

2. THE TRIBUNAL'S DECISION

1205. Claimants say the Republic is liable for an indirect expropriation under Art. 10.7 of the Treaty as a result of the Impugned Measures, *i.e.*, the *Resolución TC Julio 2013* and the *Decretos Supremos*. Claimants' position is that its claim for indirect expropriation of the *Bonos* through the Impugned Measures fulfill the cumulative requirements of Annex 10-B, namely:

- That the DS 242/2017 had the economic impact on Gramercy's *Bonos* of reducing their value from USD 1.8 billion to USD 33.57 million;

- That, at the time that Gramercy acquired the *Bonos* (between 2006 and 2008), Claimants had a reasonable expectation that the Peruvian State would recognize their updated valuation according to the CPI methodology;

- That the *Decretos Supremos* were measures divested of any legitimate public objective, exclusively targeted at reducing the value of the *Bonos*.

1206. The Treaty establishes three cumulative factors that must be analyzed when addressing a claim for indirect expropriation:

- The economic impact;

- The investor's reasonable investment-backed expectations; and

- The character of the government action.

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[924] M. Paparinskis, "The International Minimum Standard and Fair and Equitable Treatment", Oxford Monographies in International Law (2013), p. 208.

1207. The Tribunal finds that, in this case, the first requirement is not met, and therefore, that Gramercy's claim that it suffered an indirect expropriation (be it at the hand of the Government, through the issuance of the *Decretos Supremos*, or at the hand of the *Tribunal Constitucional*, by delivering the *Resolución TC Julio 2013*) must be dismissed.

The economic impact of the Impugned Measures

1208. Gramercy argues that when it acquired the *Bonos* the legal framework governing their valuation – including *Sentencia TC 2001* and the Peruvian lower courts' decisions – made clear that the Government was required to pay the *Bonos* at current value, using the CPI method[925]. On Claimants' own calculations, the current value of the *Bonos* using the CPI method amounts to USD 1.8 billion. Claimants aver that the Impugned Measures radically modified the legal framework, implementing a deeply flawed dollarization method that interfered with Gramercy's reasonable investment-backed expectations and deprived it of virtually all the value of their investment. Gramercy says that by applying the valuation method of DS 242/2017 the value of the *Bonos* is reduced by 98%, to USD 33.57 million[926].

1209. The Republic, on the other hand, submits that the Impugned Measures actually established the value of the *Bonos,* which before that had been worthless: their legal status had been uncertain for decades and the *Sentencia TC 2001* did not afford Gramercy the right to obtain an updated value of the Bonos applying the CPI method[927].

1210. The Tribunal sides with the Republic.

1211. The Tribunal has already established that, in order to assess a claim for indirect expropriation, the first factor to consider is the economic impact that the impugned measure had on the value of the investment, such impact is to be measured by establishing the fair market price of the investment immediately prior and immediately after the adoption of the measure.

1212. The economic impact of the Impugned Measures is easy to establish:

- Between 2006 and 2008, Claimants invested USD 33.2 million to purchase the *Bonos* from the original bondholders – independent third parties unrelated to Gramercy[928]; the price paid by the unrelated purchaser is, by definition, the fair market price of an asset at the time of acquisition;

[925] C I, paras. 156-157; C II, paras. 226-232.
[926] C I, paras. 150-152; C II, para. 259.
[927] R I, para. 225; R II, para. 327.
[928] RER-5, Quantum I, para. 15 (d and e**);** CER-6, Edwards II, para. 128; Doc. CE-224A; RER-11, Quantum II, paras. 35 and 71.

- Claimants have not marshalled any evidence, showing that by 2013, when the *Resolución TC Julio 2013* was issued, the fair market price of the *Bonos* had suffered any modification;

- The valuation methodology formalized in the DS 242/2017 and in the other Impugned Measures leads to a value of Gramercy's *Bonos* as of 31 May 2018 of USD 33.57 million; this figure has been confirmed by the Parties' financial experts, Professor Edwards and Mr. Kaczmarek[929].

1213. In simple words: Claimants originally invested USD 33.2 million, after the adoption of the Impugned Measures Gramercy continued to be its rightful owner, and under the Impugned Measures its investment actually was worth slightly more than Gramercy had paid, *i.e.*, USD 33.57 million. The figures (confirmed by both financial experts) show that that the Impugned Measures evidently did not destroy all, or virtually all, of the economic value of the investment, leading to the necessary consequence that such Measures were incapable of producing effects equivalent to a direct expropriation.

1214. Furthermore, Gramercy continues to be the rightful owner of the securities, the Impugned Measures having changed nothing in this respect.

1215. Summing up, the Impugned Measures do not meet the first requirement to be considered as measures equivalent to expropriation: the investor has not suffered a substantial deprivation of its investment, and its ownership rights over the investment have not been affected.

1216. In light of these conclusions, the Tribunal does not need to analyze whether Gramercy's indirect expropriation claim meets the other additional requirements, *i.e.*, whether the *Decretos Supremos* interfered with Gramercy's reasonable investment-backed expectations and the character of these government actions. The conclusions exclude any possible finding of judicial expropriation: there simply has been no indirect expropriation, whether by the MEF or by the *Tribunal Constitucional.*

[929] CER-4, Edwards I, para. 271; RER-5, Quantum I, para. 110.

XI.3. WHETHER THE IMPUGNED MEASURES BREACHED THE EFFECTIVE MEANS CLAUSE

1217. Claimants also argue that the MFN clause set forth in Art. 10.4 of the FTA grants protected investors the same rights enjoyed by Italian investors under the Peru-Italy BIT of 1994. This BIT guarantees foreign investors the existence of effective means to bring claims and enforce their rights in Peru (the "**Effective Means Clause**"). The Republic breached this provision – and in turn the MFN clause of the FTA – because the Impugned Measures closed off Gramercy's possibility to access Peruvian Courts and obtain a fair revaluation of its *Bonos*.

1218. To adjudicate this claim, the Tribunal will first address the MFN and the Effective Means Clause (**1.**); and then will dismiss Gramercy's claim (**2.**).

1. THE MFN AND EFFECTIVE MEANS CLAUSES

1219. Art. 10.4 of the Treaty contains the Most-Favored Nation Treatment standard in the following terms:

> "**Article 10.4: Most-Favored Nation Treatment**
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party 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 investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments[2]".

1220. Footnote "2" provides that:

> "For greater certainty, treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements". (Emphasis added)

The Peru-Italy BIT

1221. The Effective Means Clause of the Peru-Italy BIT of 1994 that Claimants seek to apply is found in the "*Protocolo*" annexed to the Peru-Italy BIT that includes a series of clauses "*que fomarán parte integrante del convenio*". In Section 2, the *Protocolo* states:

> "*2. Con referencia al artículo 2* (that contains the FET standard)
>
> […]

> (c) *Proporcionará medios efectivos para interponer demandas y hacer valer derechos con respecto a inversiones y autorizaciones relacionadas a ellas y acuerdos de inversión*".

1222. The FET clause in the Peru-Italy BIT is very different from that of the U.S.-Peru FTA, because it makes no reference to the minimum standard of treatment or to the prohibition of denial of justice:

> "***Artículo 2 – Promoción y protección de inversiones***
>
> […]
>
> *3. Ambas partes contratantes asegurarán en todo momento un trato justo y equitativo a las inversiones de los inversionistas de la otra parte contratante. Ambas Partes Contratantes asegurarán que la administración, mantenimiento, uso, transformación, goce o asignación de las inversiones efectuadas en sus territorios por inversionistas de la otra Parte Contratante, así como las compañías o empresas en las que estas inversiones han sido efectuadas, no sean en manera alguna sujetas a medidas injustas o discriminatorias*".

1223. No reference is made in the Peru-Italy BIT to the denial of justice standard or the contracting State's commitments towards the foreign investors with respect to the administration of justice.

* * *

1224. The 1984 U.S. Model BIT included an Effective Means Clause within the article governing FET:

> "Article II
>
> 2. Investments shall at all times be accorded fair and equitable treatment […].
>
> […]
>
> 6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties". (Emphasis added)

1225. The 2004 U.S. Model BIT (on which the FTA is based, and which shares the same MST formulation) removed the Effective Means Clause, but for the first time included an express reference to the MST and to denial of justice. In its submission, the U.S. explained this change, saying that the denial of justice clause encompasses the same guarantees as the Effective Means Provisions found in earlier U.S. treaty practice; the customary international law principle prohibiting denial of justice rendered a separate treaty obligation unnecessary[930].

[930] USS, para. 36.

2. THE TRIBUNAL'S DECISION

1226. Claimants seek to incorporate – through the MFN clause – the Effective Means Clause of the Peru-Italy BIT of 1994, as an additional commitment assumed by the Republic towards U.S. investors under the FTA[931]. The Republic – in line with the U.S. – says that such standard is not available, because it overlaps with the protection granted to U.S investors under Art. 10.5.2 of the FTA regarding denial of justice and that, in any case, the investor was not deprived of effective means to defends its interests[932].

1227. The Tribunal tends to agree with the Contracting Parties' common interpretation of the Treaty.

1228. The Effective Means Clause represents a historic formulation of the denial of justice standard. The U.S. excluded such Clause from its treaty practice and replaced it with the current denial of justice provision. An Effective Means Clause does not create an additional layer of protection, further to the MST of aliens under customary international law, including denial of justice, already found in the FTA. Under these circumstances, if the Tribunal were to allow the incorporation of the Effective Means Clause of another treaty through the MFN clause, it would be permitting Claimants to challenge the Impugned Measures twice on the same ground.

1229. Be that as it may, the facts do not support Claimants' argument that Peru has breached the Effective Means Clause contained in the Peru-Italy BIT. Under that clause, Peru undertook to offer "*medios efectivos para interponer demandas y hacer valer derechos con respecto a inversiones".* Neither the *Texto Único* approved by DS 242/2017 nor the other Impugned Measures deprive bondholders of their right to impugn before the Peruvian Courts the decisions adopted by the MEF within the bondholder process; to the contrary, the *Texto Único* allows for two administrative challenges – the *recurso de reconsideración* and the *recurso de apelación* – that may subsequently by subject to judicially impeachment before the Peruvian Courts. And these multiple remedies are provided in at least three separate opportunities following the decisions adopted by the Peruvian Government within the bondholder process:

- The MEF's decision to deny registration of the *Bonos* can be impugned through a "*recurso contencioso-administrativo*" before the Courts[933];

- The MEF's decision regarding the revaluation of the *Bonos* is also subject to a "*recurso contencioso-administrativo*" before the Courts[934];

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[931] C I, paras. 225-227; C II, paras. 459-467.
[932] R I, paras. 294-296; R II, paras. 387-392.
[933] RER-8, García-Godos, para. 107; Doc. RA-282, Art. 218. Following the filing of the administrative remedies, *i.e.*, the *recurso de reconsideración* and *recurso de apelación* provided for in Arts. 208-209 of the *Ley Nº 27444 del Procedimiento Administrativo General* (Doc. RA-282). See CE-275, Art. 9.2.
[934] RER-8, García-Godos, para. 107; Doc. RA-282, Art. 218. Following the filing of the administrative remedies *i.e.*, the *recurso de reconsideración* and *recurso de apelación* provided for in Arts. 208-209 of the *Ley Nº 27444 del Procedimiento Administrativo General* (Doc. RA-282). See Doc. CE-275, Art. 14.2.

- Finally, the MEF's decision to establish the payment option, if no agreement is reached with the bondholder, can also be impeached by the bondholder filing a "*recurso contencioso-administrativo*" before the Courts[935].

1230. In conclusion, the Tribunal dismisses Claimants' Effective Means Claim, because the *Texto Único* does not deprive Gramercy of its right to impugn the MEF's decisions within the bondholder process. The *Texto Único* explicitly grants Gramercy, in at least three separate situations, the right to impeach the Government's administrative decisions, by filing a *recurso contencioso-administrativo* before the Courts.

[935] RER-8, García-Godos, para. 107; Doc. RA-282, Art. 218. Following the filing of the administrative remedies, *i.e.*, the *recurso de reconsideración* and *recurso de apelación* provided for in Art. 209 and Art. 208 of the *Ley Nº 27444 del Procedimiento Administrativo General* (Doc. RA-282). See Doc. CE-275, Art. 17.7.

XI.4. WHETHER THE *DECRETOS SUPREMOS* BREACHED THE NATIONAL TREATMENT STANDARD

1231. Gramercy last Ancillary Claim is that the Republic breached its obligations (under Art. 10.3 of the Treaty) to accord it no less favorable treatment than to local investors, when the Government established through the *Decretos Supremos* that "speculative investors" are to be paid after all other bondholders.

1232. To adjudicate this claim, the Tribunal will first summarize the applicable standard (**1.**) and then adopt a decision (**2.**).

1. THE NATIONAL TREATMENT STANDARD

1233. Art. 10.3 of the Treaty reads as follows:

> "Article 10.3: National Treatment
>
> 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".

1234. The Parties and the Non-Disputing Party agree that a breach of the National Treatment Standard ("**NTS**") requires two conditions[936]:

- That the State treats the foreign investor less favorably than it treats local investors;
- That the foreign investor is in "like circumstances" to local investors.

1235. The NTS does not prohibit differential treatment between the foreign investor and the nationals; what it prohibits is that, on the basis of nationality, the host State discriminates between local and foreign investors that are in "like circumstances". As the tribunal in *Loewen* stated[937]:

> "Article 1102 [NTS] is direct[ed] only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality […]".

2. THE TRIBUNAL'S DECISION

1236. In Art. 18 of the *Texto Único* there is a final, seventh category in priority of payment, which is defined as:

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[936] USS, para. 49; C I, para. 218; R I, para. 283.
[937] *Loewen*, para. 139.

> "[*p*]*ersonas jurídicas que sean tenedores no originales de los bonos de la deuda agraria, que fueron adquiridos con fines especulativos*". (Emphasis added)

1237. The Tribunal has already determined in Section **X.3.3.C.** above that the inclusion of a category of bondholders who purchased "*con fines especulativos*" is in fact regulation *ad hominem,* directly aimed at Gramercy, the only known investor who could arguably fall within that category, with the purpose of deterring Gramercy from requesting payment under the *Texto Único.* If Gramercy were to follow that route, the MEF would be entitled to label Gramercy as a bondholder "*con fines especulativos*" and, at its discretion, postpone any cash payment until all other bondholders had been fully paid. In the Tribunal's opinion, such an unfettered reservation of rights is arbitrary and in breach of the FTA.

1238. Gramercy now requests a declaration that this provision also breached the NTS under Art. 10.3 of the Treaty, *i.e.*, that Art. 18 of the *Texto Único* is a nationality-based discriminatory measure, aimed at treating Gramercy less favorably than other local bondholders.

1239. The Tribunal does not agree with Claimants, because the difference in treatment accorded to bondholders under Art. 18 of the *Texto Único* is not based on nationality, but rather, on the subjective motivation which caused the bondholder to purchase the securities. To indefinitely postpone payment to bondholders who acted with "*fines especulativos*" is arbitrary – but the arbitrariness affects both Peruvian and U.S. investors equally.

XII. QUANTUM

1240. After having concluded that Peru has breached the Minimum Standard of Treatment of aliens in breach of Art. 10.5 of the Treaty, the Tribunal will now address the question of compensation. It will briefly summarize the Parties' positions (**1.** and **2.**) and then will adopt a decision (**3.**).

1. CLAIMANTS' POSITION

1241. Claimants invoke the full reparation principle under customary international law articulated in the *Chorzów Factory* case[938], as codified in Art. 36 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"). The full reparation standard does not only apply to unlawful expropriations, but also to any other unlawful acts of the State, included breaches of the FET standard[939].

1242. Gramercy proposes five methodologies for the calculation of compensation (1.1. through 1.5.).

1.1 FIRST CPI VALUATION

1243. Claimants say that they are entitled to a compensation equal to the "current value" of the *Bonos*. Prof. Edwards calculated such current value to be USD 1.8 billion[940].

1244. Professor Edwards' primary damages valuation is based on an updating methodology implemented by using the CPI indexation as follows[941]:

- He multiplies the face value of the unclipped coupons of the *Bonos* by the change in Peruvian CPI[942] from the issuance date to the present;

- To that amount, he applies the interest rate to account for the foregone opportunity to invest the money that was promised but never paid; the appropriate rate is the real rate of interest in Peru, which he determines at 7.22%[943], applied on a compound basis[944], from the date of the last clipped coupon through the present.

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[938] C I, para. 239, citing to *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Merits, P.C.I.J. Series A – No. 17, Judgment, 13 September 1928, Doc. CA-23 ["***Chorzów***"], para. 125; C II, paras. 506, 514.
[939] C I, paras. 241-242, citing to *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, Doc. CA-30 ["***Lemire (Award)***"], para. 149.
[940] C I, paras. 243-244; CER-4, Edwards I, para. 272; C II, para. 515; C PHB-M, para. 104.
[941] CER-4, Edwards I, paras. 71-72; C PHB-M, para. 107.
[942] As calculated by the Peruvian Central Bank.
[943] CER-4, Edwards I, paras. 139-165; CER-6, Edwards II, para. 32; C PHB-M, para. 111.
[944] CER-4, Edwards I, paras. 52-53.

1245. Professor Edwards justifies the adoption of the CPI indexation and the chosen parameters as follows:

- Indexation method: the CPI indexation is the most appropriate method for updating the value of the Bonos[945]; the CPI measures the change in price of a constructed basket of goods, relative to a set point in time. Multiplying the nominal amount by the relative change of the CPI between two points in time results in the updated value. It is a straightforward, simple and commonly used approach used to preserve economic value of assets and obligations in times of inflation[946].

- Reference date: inflation must be taken into account from the date of issuance of the *Bonos*, in order to appropriately update their full value; any other reference date fails to capture fully the erosive effect of inflation[947];

- Interest rate from last clipped coupon: an appropriate interest rate is necessary to compensate the bondholder because it was deprived of the opportunity to reinvest the unpaid principal of the *Bonos* and obtain a return; in this case, compound interest more effectively achieves this purpose[948].

- Professor Edwards considers that the appropriate interest rate is the real rate of return in Peru, which he estimates at 7.22%, by a combination of estimates of the real return of capital and debt across the Peruvian economy[949].

Dies ad quem: Claimants say that Gramercy is entitled to the full intrinsic value of the *Bonos*, which continue to increase by the application of the compound annual interest rate of 7.22% and must be applied until payment is made; this is not a pre-award interest rate; it forms part of the value of the *Bonos* themselves[950]; in the alternative, if the Tribunal considers the valuation date to be the time of Peru's Treaty breach, then the Tribunal should apply pre-award interest at an annually compounding real rate of 7.22%. Post-award interest at the same rate would then apply from the date of the award until full payment is received[951].

1246. The result of this updating revaluation is that Gramercy's *Bonos* are worth USD 1.8 billion as of 31 May 2018[952].

1.2 DOLLARIZATION VALUATION

1247. Professor Edwards says that, although CPI is more appropriate, a well implemented dollarization method also allows to accurately update the value of nominal amounts to

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[945] CER-4, Edwards I, para. 57.
[946] CER-4, Edwards I, paras. 58-65.
[947] CER-4, Edwards I, para. 50.
[948] CER-4, Edwards I, paras. 51-53.
[949] CER-4, Edwards I, paras. 126-170.
[950] C II, para. 594; CER-6, Edwards II, para. 36.
[951] C II, para. 597.
[952] CER-4, Edwards I, para. 14, 77; H-8, p. 41.

discount inflation[953]. He thus provides his own revaluation using the dollarization method, that renders a "current value" of the Bonds in the amount of USD 1.72 billion, close to its First CPI Valuation[954].

1248. This approach, adopts the same parameters as the First CPI Valuation with the following adaptations[955]:

- First, he converts the outstanding nominal amount of *Bonos*, denominated in Soles Oro, into USD, at the date of issuance, by applying his own calculated parity exchange rate.

- Second, the outstanding face value denominated in USD is updated to account for inflation experienced in the U.S., using the U.S. CPI;

- Third, he applies Peru's real interest rate to the inflation-adjusted amount in USD;

- Finally, the conversion of the total USD back into Soles, at the official exchange rate, which, around 2018, can be assumed to be close to parity.

1249. The result of this methodology renders a total value of Gramercy's *Bonos* of USD 1.72 billion[956].

1.3 SECOND CPI VALUATION (OR *POMALCA* VALUATION)

1250. Gramercy says that, in the alternative to the "current value" methodologies detailed above, it is entitled to the compensation that it would have secured, on a "balance of the probabilities" in Peruvian court proceedings – a path that would have been available but for the Republic's breach of the Treaty[957]. This approach yields the same results as if Peru had applied the updating methodology foreseen in the First Draft of *Resolución TC Julio 2013*[958].

1251. Claimants refer to the *Pomalca* local proceeding, where Claimants had submitted 27% of its *Bonos*[959], and the Court- appointed expert applied the same methodology employed by Professor Edwards in his First CPI Valuation (CPI to update the principal amount of the *Bonos* from the issuance date), except that it awarded compound interest at the rate of each *Bono*, instead of the 7.22% used by Professor Edwards[960].

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[953] CER-4, Edwards I, para. 81 and 83-107.
[954] CER-4, Edwards I, para. 125.
[955] CER-4, Edwards I, para. 79; 119-125.
[956] CER-4, Edwards I, para. 125.
[957] C II, para. 510, 528-533.
[958] C II, paras. 537-538; CER-6, Edwards II, para. 62.
[959] C PHB-M, para. 122.
[960] C II, para. 535, citing to Doc. CE-342; CER-6, Edwards II, para. 61.

1252. Professor Edwards applied this methodology to all of Gramercy's *Bonos*, which resulted in a value of USD 842 million as of 31 May 2018[961].

1253. Claimants add that other local Court cases and expert reports unequivocally established CPI revaluation plus interest; some of the cases applied interest on a simple, rather than compound basis; under this approach, Gramercy's Bonos would be updated to USD 330 million[962].

1.4 EDWARDS/MEF UPDATING VALUATION

1254. Another alternative valuation offered by Prof. Edwards assumes all the parameters of *Resolución TC Julio 2013* but corrects what he considers to be the arbitrary aspects of the MEF Updating Formula: the parity exchange rate and the lack of compensatory interests[963].

Parity exchange rate

1255. Professor Edwards offers two alternatives to correct the effects of what he considers a non-sensical application of the MEF's parity exchange rate:

1256. The first option is to discard the MEF rate completely and use Edwards' parity exchange rate; in such case, it is appropriate to convert the inflation-adjusted USD amount back to Soles using the currently prevailing official exchange rate[964]. This is because Edwards' parity exchange rate tends to converge with the official exchange rate at the end of the Base Period (2018), where the official exchange rate can be assumed to be at parity[965].

1257. The second option is to maintain the MEF parity exchange rate, but to use it consistently: applying this same rate to convert the nominal amount of Soles Oro to USD as well as the inflation-adjusted USD amount back to Soles (instead of using in the last conversion the official exchange rate, as the MEF updating formula does) [966].

Compensatory interest

1258. Claimants say that the MEF updating formula fails to take into account compensatory interest in breach of the *Resolución TC Julio 2013*[967]:

- Claimants say that the U.S. Treasury Bonds interest mandated in *Resolución TC Julio 2013* can only be explained as a proxy for inflation updating and not a compensation for lost opportunities, because it does track inflation closely, but only

[961] C II, para. 536; CER-6, Edwards II, paras. 64-65; C PHB-M, para. 105, 119.
[962] C II, para. 540; CER-6, Edwards II, paras. 68-69.
[963] C PHB-M, paras. 124 *et seq*.
[964] C PHB-M, para. 125. HT(ENG), Day 5 (Edwards), p. 1831, ll. 3-22; H-8, p. 25.
[965] CER-4, Edwards I, para. 17.
[966] C PHB-M, para. 126. HT(ENG), Day 5 (Edwards), p. 1832, ll. 3-6; H-8, p. 34.
[967] C PHB-M, para. 127.

includes a negligible real component[968]; from 1988 to 2018, the average real return on U.S. Treasury Bonds was 0.77%, *i.e.*, 14 times lower than the average real rate of return on capital in Peru from 1950 to 2011[969], or 10 times lower than the rate of return of 7.22% calculated by Professor Edwards.

- Vice-Minister Sotelo and Peru's experts conceded that the coupon rates were effective rates[970];

- Respondent's legal expert, Dr. Hundskopf, acknowledged that under the *Resolución TC Julio 2013*, bondholders are entitled to interest at the stated coupon rates on top of the updated principal using U.S. Treasury Bonds rates[971].

1259. Therefore, if the Tribunal considers that *Resolución TC Julio 2013* does not amount to a breach of the Treaty, but the *Decretos Supremos* do, Gramercy is entitled to compensatory interest at the stated coupon rate of each *Bono* – on top of the adjusted principal updated through the U.S. Treasury Bonds interest[972]:

* * *

1260. Professor Edwards provided his calculations with these two adjustments to the MEF Updating Formula, that yields a compensation of[973]:

- USD 845 million, applying Professor Edwards parity exchange rates, plus interest at the stated coupon rates;

- USD 885 million, applying the MEF's parity exchange rate consistently (at the time of conversion to USD and back to Soles), plus interest at the stated coupon rates.

1.5 FAIR MARKET VALUATION

1261. Gramercy says that, under the full reparation standard, a tribunal is not necessarily limited to an award of the fair market value of the asset – understood as the price that a willing buyer would pay to a willing seller – on the date of the taking[974].

1262. Claimants disagree with the Republic's proposition that Gramercy is limited to recovering the fair market value of the Bonos on the date prior to the Treaty breaches,

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[968] C PHB-M, para. 128; HT(ENG), Day 5 (Edwards), p. 1595, ll. 5-22; See also CER-4, Edwards I, Section VII.E; CER-6, Edwards II, Section III.C.
[969] C PHB-M, para. 128.
[970] C PHB-M, para. 129; HT(ESP), Day 3 (Sotelo), p. 1035, l. 20 – p. 1036, l. 7; HT(ENG), Day 7 (Kunsman), p. 2449, l. 16 – p. 2450, l. 12.
[971] C PHB-M, para. 130-131; citing to RER-7, Hundskopf II, para. 59.
[972] C PHB-M, para. 132.
[973] C PHB-M, para. 133; C PHB-M, Appendix.
[974] C II, para. 553-554.

which the Republic says is equivalent to the amount Gramercy paid to acquire the *Bonos*, *i.e.*, USD 33.2 million[975].

1263. Gramercy says that the fair market value standard does not apply in this case, because the *Bonos* embody unconditional claims to payment. In case of default, the bondholder is entitled to claim payment of the terms agreed or imposed by law – which in this case is the revaluation according to the CPI method, which Claimants consider applicable under Peruvian constitutional and statutory law[976].

1264. Further, the intrinsic value of a bond does not typically coincide with the price under which it trades in a market. The creditor faces the debtor's default risk, as well as litigation and enforcement risks. A risk-averse operator will usually demand a discount of the intrinsic value of the bond in order to assume those risks[977]. In this case, the price at which Gramercy acquired the *Bonos* was lower than their intrinsic value, because the selling bondholders perceived the risk that Peru would delay payment or otherwise impair bondholder's' rights to payment[978].

1265. Claimants cite to the *Serbian Loans Case*, where the PCIJ decided that French bondholders who had acquired bonds issued by the Kingdom of the Serbs, Croats and Slovenes had a right to obtain payment on those bonds in "gold francs", a standard of value established by reference to a certain weight and fineness of gold, rather than "paper francs", whose value had been eroded by inflation[979].

1266. If the Tribunal would consider fair market value to be the appropriate standard, the acquisition price would not reflect the fair market value on July 2013, because:

- from the time of acquisition (between 2006 and 2008) and the date immediately prior to the breach, the intrinsic value of the *Bonos* continued to increase due to current-value updating and interest; under Professor Edwards' update methodology the *Bonos'* intrinsic value at the time of purchase was USD 758 million; and ten years later, USD 1.8 billion[980];

- reference to the acquisition price ignores inflation on nominal value: the USD 33.2 million paid in 2006-2008 was worth more in real terms than that same amount in 2013[981]; in fact, even the amount of USD 33.57 million in nominal USD that Gramercy would have obtained under the *Decretos Supremos* in 2018 would be in real terms less than USD 33.2 million in 2006-2008 nominal USD[982];

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[975] C II, para. 511, 542-543
[976] C II, paras. 512, 545, 550.
[977] C II, paras. 545-546.
[978] C II, para. 559.
[979] C II, para. 548, citing to *Case Concerning the Payment of Various Serbian Loans Issued in France*, P.C.I.J. Series A – Nos. 20-21, Judgment No. 14, 12 July 1929, Doc. CA-95.
[980] C II, para. 572; CER-6, Edwards II, para. 134.
[981] C II, para. 573.
[982] C II, para. 574.

- The default risk was further reduced between 2008 and 2014, as reflected in upgrades to Peru's credit ratings and corresponding decreases in the interest rates that the market demanded from Peruvian sovereign debt[983].

1267. The best evidence of the fair market value at around the time of the Republic's breach is Gramercy's internal valuations and contemporaneous transactions prior to Peru's breaches, which amount to around USD 550 million[984].

1268. That value was allegedly used as the basis for real-world arm's length transactions, when Gramercy needed "to calculate the entry or exit price for [its] investors, or to make capital calls"[985]. [redacted][986].

2. RESPONDENT'S POSITION

1269. The Republic says that the full reparation standard enunciated in *Chorzów* requires Claimants to proves their damage with reasonable certainty and that such damage was caused by Respondent's actions[987]:

1270. Respondent says that, in this case, Gramercy has failed to prove its damages claim because:

- At the time Gramercy acquired the *Bonos*, there was high uncertainty regarding their value, because there was no clarity on how the outstanding *Cupones* should be updated; Claimant's expectations could not exceed the circumstances of the *Bonos* at the time of their purchase, *i.e.*, compensation based on an undetermined methodology, in Peruvian currency, subject to Peruvian law[988];

- Respondent says that all of Professor Edwards' calculation are speculative, because he undertakes a personal and wrong interpretation of the *Sentencia TC 2001* and rewrites the terms of the *Bonos*, adding adjustments and guarantees not provided for in the *Bonos* nor in the *Sentencia TC 2001*[989];

[983] C II, para. 582-586.
[984] C II, para. 588; CWS-6, Joannou, para. 26.
[985] C II, para. 589, citing to CWS-6, Joannou, para. 30.
[986] C II, para. 589; C PHB-M, para. 145-147.
[987] R I, para. 299; R II, para. 401.
[988] R I, paras. 303-304; R II, para. 405.
[989] R I, paras. 306-309; RER-5-Quantum I, paras. 16(a), 127, 133; R II, paras. 405-407; R PHB-M, para. 110.

- There is no proximate cause between the alleged breach and Gramercy's damages calculation; the calculation is based on what Gramercy believes should be a different calculation of the outstanding *Cupones*[990];

- No mitigation: even assuming *arguendo* that Gramercy was impacted by the Impugned Measures, it failed to mitigate damages by submitting to the bondholder process, where – as Claimants acknowledge – they would have recovered USD 34 million[991].

1271. If compensation is due, the Republic proposes two alternative methodologies for its determination (2.1**.** and 2.2**.**); and it further argues why the valuations that Claimants suggest are not reliable in the present case (**2.3.A.** through **2.3.E.**).

2.1 HISTORIC COST

1272. Respondent's expert says that, if compensation is owed, it should be measured with reference to the acquisition price of USD 33.2 million[992] that Gramercy paid to purchase the Bonos between 2006 and 2008. In his opinion, this measure is the best contemporaneous assessment of the value of Claimants' investment prior to the alleged treaty breaches[993].

2.2 MEF UPDATING FORMULA

1273. Alternatively, Respondent says that another reasonable measure of compensation can be determined by reference to the final MEF Updating Formula of the DS 242/2017. Under this formula, Gramercy would have been entitled to receive USD 33.57 million, which is a reasonable outcome, considering the amount Claimants invested and the uncertainties that existed prior to 2013[994]. Respondent's expert said in the Hearing that the MEF formula

> "has no mathematical, economic, or theoretical flaws and provides a reasonable, in fact, favorable, outcome for bondholders with unclipped/unpaid coupons that were worthless when the Agrarian Bank closed"[995].

[990] R I, para. 305; R II, para. 413; R PHB-M, para. 112.
[991] R II, para. 419.
[992] The exact amount being USD 33,222,630.29. See RER-11, Quantum II, para. 213; CWS-6, Joannou, para. 7; CE-711.
[993] RER-5, Quantum I, paras. 113-124; See also R PHB-M, para. 104; RER-11, Quantum II, paras. 35 and 71.
[994] R I, para. 311.
[995] H-14, p. 53; HT(ENG), Day 7 (Kaczmarek), p. 2431, l. 16 – p. 2432, l. 12.

2.3 COUNTERARGUMENTS AGAINST CLAIMANTS' METHODOLOGIES

A. First CPI Valuation

1274. The Republic says that Professor Edwards' First CPI Valuation is based on unreliable assumptions, that yield unsound economic results[996]:

- The methodology is based on the wrong assumption that Gramercy had entitlement to CPI valuation as a result of *Sentencia TC 2001*; to grant damages on this basis would require establishing a but for scenario in which Peru had implemented the update methodology Gramercy believes should have been applied[997];

- It adjusts inflation from the issuance date, rather than from the moment of actual non-payment or date of the last clipped *Cupón*; under this approach, Gramercy would receive more than what the original bondholders would have received, when they were paid for their clipped *Cupones*, because these coupons did not include an adjustment for inflation[998].

- In essence, Professor Edwards simulates a non-payment event in 1992 on *Cupones* that never existed[999];

- Professor Edwards also re-writes the terms of the *Bonos* without the legal basis to do so, by applying a real interest rate of 7.22%, that is unrealistic for tradable securities in Peru[1000]; further, the manner in which Professor Edwards applies this interest rate assumes that Gramercy would have obtained compensation as of the date of the last clipped coupon (or in some cases, from the date of issuance), even though Gramercy did not acquire the *Bonos* until 2006-2008[1001].

B. Dollarization Valuation

1275. Respondent says that Professor Edwards builds his parity exchange rate using information that was not available to the original bondholders; on the other hand, the MEF's parity exchange rate is perfectly valid and economically justifiable, because it is built with the data around the time when the *Reforma Agraria* took place[1002].

C. Second CPI Valuation (or *Pomalca* Valuation)

1276. Respondent adds that Gramercy's alternative claim for an award of the value it likely would have achieved in Court proceedings in Peru is also speculative, because it assumes that Gramercy would have obtained a revaluation according to the criteria

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[996] RER-11, Quantum II, paras. 28 and 106-111.
[997] R II, para. 414; RER-5, Quantum I, para. 16.
[998] R PHB-M, para. 116.
[999] R PHB-M, para. 116; RER-11, Quantum II, para. 32.
[1000] R PHB-M, para. 116; RER-5, Quantum I, paras. 145-153.
[1001] RER-5, Quantum I, para. 16.e.
[1002] R PHB-M, para. 117.

proposed by Professor Edwards. There is, however, no evidence on how the Peruvian Courts would have revalued the *Bonos*. The only available evidence is the report by Gramercy's own chosen expert, that was applied to a limited number of *Bonos*[1003]. Gramercy only participated in seven proceedings involving around 2% of its *Bonos*[1004]. Peru has established that the local Courts applied different methodologies, and therefore, it is uncertain how the Courts would have decided[1005].

1277. Furthermore, the *Pomalca* Valuation involved *Bonos* with no clipped *Cupones*; it is uncertain what the Court would have decided with Gramercy's clipped coupons[1006].

1278. Claimants' second claim is equally remote, because it assumes that bondholders would have universally prevailed in Peruvian courts. Further, Gramercy never submitted the vast majority of its *Bonos* to local proceedings, and even if it had done so, there is no reason to assume that Gramercy would have prevailed[1007].

1279. The Second CPI Valuation also assumes that the *Tribunal Constitucional* would have adopted the First Draft. It is premised on a speculative assumption on how the MEF would have implemented that First Draft. The First Draft would have ordered the application of CPI "during the period of suspension of the debt" "insofar as the State expresses the validity of CPI as a factor of updating the debt". Accordingly, even under the First Draft, the CPI was one of the applicable methodologies, but not the only one[1008].

1280. Further, Professor Edwards' own calculation under this scenario also suffers from two problems already referred to: inappropriate retroactive CPI adjustment and unrealistic interest rate[1009].

D. Edwards/MEF Updating Valuation

1281. With respect to Gramercy's alternative valuation – assuming the mandate of *Resolución TC Julio 2013*, but for the alleged misapplication by the MEF – Respondent says that the adjustments performed by Professor Edwards are not appropriate:

1282. First, the *Tribunal Constitucional* mandated no specific manner to calculate the parity exchange rate. Claimants' own expert confirmed that "it is very difficult to choose the base that you have to apply, and when you do it, it is complex"[1010]. The Edwards' parity exchange rate uses ex-post information, that was not available at the time of the non-payment of the coupons.

[1003] R II, para. 411; R PHB-M, para. 118.
[1004] R PHB-M, para. 119.
[1005] R PHB-M, para. 120.
[1006] R PHB-M, para. 121.
[1007] R II, paras. 415-417.
[1008] R PHB-M, para. 130.
[1009] R PHB-M, para. 130.
[1010] R PHB-M, para. 132, citing to HT(ENG), Day 5 (Edwards), p. 1822, ll. 13-15.

1283. Second, the approach of adding compensatory interest, in the form of the stated coupon rates on top of the U.S. Treasury Bonds rate, is contradictory with Edwards' original updating formula, where he does not include compensatory interest; moreover, it results in double-counting inflation, which is inconsistent with basic economic principles[1011].

1284. Peru's expert confirmed that compensatory interest is complementary to current value adjustment; and, in his opinion, the U.S. Treasury Bonds rate already compensates for the time value of money[1012].

E. Fair Market Value

1285. With respect to Gramercy's Fair Market Valuation, Respondent says it is not reliable because it is solely based on Gramercy's own financial statements and not supported by additional evidence[1013]. Gramercy has not disclosed the model underlying the figure of USD 550 million in its financial statements, neither to its auditors nor to Professor Edwards[1014].

1286. As Peru's expert said, this figure does not represent fair market value, because it uses significant unobservable market inputs, it incorporates Claimants' litigation claims (including this ICSID claim), political strategies and negotiation tactics and it takes into account the benefit of the insurance policy subscribed by Gramercy in the amount of USD 500 million[1015].

3. THE TRIBUNAL'S DECISION

1287. Claimants, who have invested a total of USD 33.2 million in the purchase of the *Bonos,* are seeking compensation in a range of between USD 550 million and USD 1.8 billion, while the Republic says that any compensation must be based on the amount original invested, USD 33.2 million, brought forward to present date, or, alternatively, on the amount which Claimants would have collected under DS 242/2017, USD 33.57 million.

1288. Before establishing the Tribunal's calculation of the compensation to which Respondent is entitled, it is convenient to briefly summarize the Tribunal's main findings on the merits, to the extent that they are relevant for the decision on quantum:

DS 242/2017

1289. The first finding is that DS 242/2017, a *Decreto Supremo,* uses a methodology to calculate the parity exchange rate, which the Republic has been unable to explain, which contradicts the mandate received from the *Tribunal Constitucional,* and which

[1011] R PHB-M, para. 134.
[1012] R PHB-M, para. 134.
[1013] R II, para. 412.
[1014] R PHB-M, paras. 123, 125; HT(ENG), Day 2 (Joannou), p. 839, ll. 16-17; HT(ENG), Day 5 (Edwards), p. 1654, l. 21 – p. 1655, l. 4.
[1015] R PHB-M, para. 124; RER-11, Quantum II, paras. 236, 240.

incurs in arbitrariness to minimize the amounts payable by the Republic to the holders of *Bonos Agrarios.*

1290. Second, the arbitrariness was compounded, because, under DS 242/2017, the (higher) parity exchange is only used when converting into USD; however, to convert the USD amount back to Soles, the *Decreto Supremo* applies the (lower) market exchange rate at the date of revaluation; this methodology is contrary to the mandate received from the *Tribunal Constitucional*, and its purpose is to arbitrarily further reduce the amount due to bondholders.

1291. Third, under the DS 242/2017 formula, interest ceases to accrue on the date when the MEF calculates the revaluation. This definition is also arbitrary, because the MEF, without any reason or justification, deprives bondholders of the interest accruing between the date of revaluation and the date of actual payment by the State (which can occur up to eight years after the acknowledgement by the MEF). The conversion back into Soles of the outstanding principal in USD should occur on the date of actual payment, and the accrual of interest at the rate of one-year U.S. Treasury Bills, should continue until such date.

1292. In sum, these measures adopted by the Republic in the DS 242/2017 (together with other, which are irrelevant for the calculation of quantum) constitute a breach of the MST of aliens required by customary international law including the FET standard, guaranteed in Art. 10.5 of the FTA.

The *Resolución TC Julio 2013*

1293. The Tribunal has also found that the *Resolución TC Julio 2013* does not constitute a denial of justice, and that the *Sentencia TC 2001* plus the *Resoluciones* of the *Tribunal Constitucional* constitute the law of the land as regards revaluation and payment of the *Bonos Agrarios.* In accordance with these decisions of the *Tribunal Constitucional*:

- The principal of the *Bonos* must be revalued by converting the outstanding amount in Soles into USD[1016];
- Such revaluation must be done as of the date of the earliest unpaid *Cupón*[1017];
- The conversion of the outstanding principal must be done using the parity exchange rate between the Peruvian currency and the USD[1018];
- The principal, thus converted into USD, must accrue interest at the rate applicable to U.S. Treasury Bonds[1019];

[1016] Doc. CE-17, para. 25.
[1017] Doc. CE-17, para. 25.
[1018] Doc. CE-17, para. 24.
[1019] Doc. CE-17, para. 25.

- If the principal plus interest is to be paid in Soles, the corresponding amount in USD must be converted into Peruvian currency again using the parity exchange rate.

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1294. The Tribunal will first define the legal standard for the determination of compensation (**3.1.**), it will then apply it to the present case (**3.2.**) and finalize with its conclusions (**3.3.**).

3.1 THE STANDARD OF COMPENSATION

1295. The Treaty offers certain guidance on the compensation due, when the affected investment are "bonds" which constitute "Public Debt". Annex 10-F of the Treaty states that:

> "For greater certainty, no award may be made in favor of a claimant for a claim under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A) with respect to default or non-payment of debt issued by a Party unless the claimant meets its burden of proving that such default or non-payment constitutes an uncompensated expropriation for purposes of Article 10.7.1 or a breach of any other obligation under Section A". (Emphasis added)

1296. Under Annex 10-F, any award in favor of an investor who holds Public Debt requires that such investor prove that the non-payment of the Public Debt constitutes a breach of an obligation assumed by the host State in Section A of the FTA – a burden which Claimants have met in the present case, since they have proven, to the Tribunal's satisfaction, that Peru has indeed breached the MST of aliens under Art. 10.5 - a provision within Section A of the FTA. Consequently, under Annex 10-F, Claimants are entitled to an award which compensates for the non-payment of the *Bonos.*

1297. What Annex 10-F does not clarify is the methodology for establishing the compensation. When agreeing to this provision, the Contracting Parties plainly had in mind Public Debt with readily ascertainable value, *e.g.*, contemporary sovereign bonds. In those cases, provided the claimant proves that the default or non-payment constitutes a breach of the Treaty, the compensation to be awarded is the value of the outstanding debt, an amount which can be readily established. In the present case, however, the investment consists of antique *Bonos Agrarios*, whose value has been unascertainable for many years – this value is at the core of the dispute between the Parties, and thus cannot serve as a direct reference to determine the compensation due.

1298. Arts. 10.5 of the FTA, the provision which Peru has breached, also does not provide any rule regarding the appropriate redress. This is in contrast to Art. 10.7 of the BIT,

which prohibits expropriation without "prompt, adequate and effective compensation" and sets out precise rules for the calculation of such compensation[1020].

Standard of full reparation

1299. The silence of Annex 10-F and Art. 10.5 regarding the relief which an aggrieved investor can seek does not imply that a violation of the MST of aliens is to be left without redress: a wrong committed by a State against an investor gives rise to a right to reparation of the economic harm sustained, in accordance with principles of international law. As stated by the Permanent Court of International Justice in the *Case Concerning the Factory at Chorzów*[1021]:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself".

1300. The *quaestio vexata* is how the economic harm sustained by the investor is to be measured[1022].

1301. The FTA specifically provides that, in case of expropriation, compensation will be equal to the "fair market value" of the affected investment[1023]. However, this provision is of little use in the present case, since the Tribunal has found that Art. 10.7 on expropriation has not been breached (see Section **XI.2.** above). Thus, compensation cannot be based on the fair market value of the *Bonos*.

1302. The Treaty being silent, recourse must be had to principles of general (customary) international law[1024]. It is well established that, in situations where the breach does not lead to the total loss of the investment, the purpose of compensation must be to place the investor in the same pecuniary position in which it would have been if the State had

[1020] Treaty, Art. 10.7.2: "The compensation referred to in paragraph 1(c) shall: […] be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation')".
[1021] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Merits, P.C.I.J. Series A – No. 9, Judgment, 26 July 1927, p. 21. See also Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095, Final Award, 23 December 2018 ["***Greentech***"], para. 548: "The Tribunal agrees with Claimants that, absent an applicable treaty provision on damages, the *Chorzów Factory* 'full compensation' standard is the appropriate starting point for quantum assessment. The Tribunal finds that this general standard applies to FET, umbrella clause, and other treaty violations, and is therefore not limited to cases of expropriation".
[1022] *Lemire (Award)*, para. 147.
[1023] Treaty, Art. 10.7.2.
[1024] S. Ripinsky & K. Williams: "Damages in International Investment Law", British Institute of International and Comparative Law (2008), p. 89.

not violated its obligations under the BIT[1025]. In the *Case Concerning the Factory at Chorzów* the PCIJ found that[1026]:

> "[…] reparation must, as far as possible wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. […]" (Emphasis added)

1303. This principle has been reflected in the ILC Articles, which state, in Art. 31(1), that[1027]:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".

1304. The standard is thus that of full reparation ("wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed"), through payment of a sum of money which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, "but for" the State's breach[1028]. The Tribunal has a degree of flexibility to define the appropriate methodology[1029].

3.2 APPLICATION

1305. Both Claimants and Respondent have submitted different methodologies for the calculation of the compensation owed. The Tribunal will analyze these methodologies in turn.

A. Calculations proposed by Claimants

1306. Claimants have presented five different alternatives:

1307. (i) First, Claimants say that the current value of their *Bonos*, applying CPI indexation plus interest accruing at a compounded rate of 7.22% (the real rate of return in Peru, as calculated by Prof. Edwards) is USD 1.8 billion[1030]. The methodology is inapposite,

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[1025] *Lemire (Award)*, para. 149; S. Ripinsky & K. Williams: "Damages in International Investment Law", British Institute of International and Comparative Law (2008), p. 89.
[1026] *Chorzów*, para. 125.
[1027] ILC Articles, Art. 31(1).
[1028] S. Ripinsky & K. Williams: "Damages in International Investment Law", British Institute of International and Comparative Law (2008), pp. 90-91: "The customary rule of full compensation is of a very general nature and it does not offer a conceptual framework for the recovery of damages that would be comparable in specificity to the 'value' approach generally applicable in expropriation cases. […] The generality of the customary rule provides tribunals with flexibility as to what the precise methodology for assessing damages should be in a specific case".
[1029] *Lemire (Award)*, para. 152; S. Ripinsky & K. Williams: "Damages in International Investment Law", British Institute of International and Comparative Law (2008), p. 117.
[1030] CER-4, Edwards I, para. 77.

since the Tribunal has found that the law of the land is that the *Bonos* must be revalued applying the *Resolución TC Julio 2013,* and this decision of Peru's Highest Court mandates revaluation through dollarization – not by applying CPI.

1308. (ii) Alternatively, Claimants say that the current value of their *Bonos*, applying revaluation through dollarization, is USD 1.72 billion[1031]. The calculation is also inappropriate, because it does not adopt the dollarization methodology provided for in the *Resolución TC Julio 2013,* but a different one, which Prof. Edwards suggests is more appropriate (parity exchange rate developed by Prof. Edwards, adjustment since the date of issuance of the *Bonos*, accrual of interest not at the rate of U.S. Treasury Bonds, but at the rate of 7.22%). Prof. Edwards' methodology may be financially more appropriate, but it is not the law of the land in Peru.

1309. (iii) As a further alternative, Claimants submit that they are entitled to the compensation that they would have secured, on a balance of probabilities, in the Peruvian Courts, which, if petitioned by Gramercy, would have applied a CPI methodology plus the interest set forth in the securities; this would have resulted in a value of USD 842 million using compound interest, and USD 330 million with simple interest[1032]. As the Republic rightly says, these values are purely speculative, because Claimants have waived their actions before the Peruvian Courts, and because they assume that Peruvian Courts could award amounts which are in contradiction with Peruvian law. The law of the land is that revaluation must be done using the dollarization methodology of the *Resolución Julio 2013* – and not any other.

1310. (iv) As a different alternative, Claimants propose two separate calculations, assuming the formula established in DS 242/2017, but introducing certain modifications:

- If the formula established in the DS 242/2017 is adopted, except that Professor Edwards' parity exchange rate is introduced, and interest accrues at the stated coupon rate, the value is USD 845 million;

- If the change consists in using the MEF's parity exchange rate consistently (at the time of conversion to USD and back to Soles), plus interest at the stated coupon rates, the resulting compensation is even higher: USD 885 million.

Both calculations are inapposite, because they disregard an essential element established by the *Tribunal Constitucional* in its *Resolución:* that interest on the converted USD amount should not accrue at the rate for Soles set forth in the *Cupones*, but at the U.S. Treasury Bond rate.

1311. (v) Finally, Claimants say that Gramercy's internal valuations and contemporaneous transactions prior to Peru's breaches, give a compensation of around USD 550 million[1033]. That value was allegedly used as the basis for real-world arm's length

[1031] CER-4, Edwards I, para. 125.
[1032] CER-6, Edwards II, para. 64-68.
[1033] C II, para. 513; C PHB-M, para. 142.

transactions, when Gramercy calculated the entry or exit price for its investors, or to make capital calls[1034]. [redacted][1035].

1312. Gramercy's in-house valuation cannot serve as a reliable benchmark for setting the compensation owed by the Republic: it is solely based on Gramercy's own financial statements, it is not supported by additional evidence, and Gramercy has not disclosed the methodology that explains how it arrived at these figures. The Tribunal agrees with Peru's expert that this figure uses significant unobservable market inputs, it incorporates Claimants' litigation claims (including this ICSID claim), political strategies and negotiation tactics and it apparently takes into account the benefit of the insurance policy subscribed by Gramercy in the amount of USD 500 million[1036].

1313. In sum, the Tribunal does not agree with any of the methodologies for the calculation of compensation put forward by Claimants, because none properly reflects the findings in this award.

B. Calculations proposed by Respondent

1314. Respondent has submitted two different methodologies for the calculation of compensation, one based on the historic price, brought forward to the present day (**a.**), and an alternative which assumes application of DS 242/2017 (**b.**)

a. The historic price brought forward to the present day

1315. The Republic's first proposal is that compensation should be based on the price actually paid by Claimants when they bought the *Bonos*, "brought forward to the present day"[1037].

1316. The Tribunal agrees with this proposal.

1317. In situations where the breach does not lead to the total loss of the investment, the purpose of compensation must be full reparation, *i.e.*, to place the investor in the same pecuniary position in which it would have been if the State had not violated its obligations under the BIT. In the present case, the investor bought the *Bonos* in 2006-2008 and paid a total of USD 33,222,630 at a time when the *Sentencia TC 2001* had established that the principal of the securities had to be revalued to compensate for

[1034] C II, para. 589, citing to CWS-6, Joannou, para. 30.
[1035] C II, para. 589; C PHB-M, para. 145-147.
[1036] R PHB-M, para. 124; RER-11, Quantum II, paras. 236, 240.
[1037] R I para. 310.

inflation, but the methodology to be applied was still unsettled. Today, the situation of the investor is untenable:

- It is true that, in 2013, the *Tribunal Constitucional* finally ordered that the revaluation be made by applying dollarization at the parity exchange rate, and, in 2017, the MEF (after two previous unsuccessful attempts) finally issued DS 242/2017,

- but this regulation did not comply with the instructions given by the *Tribunal Constitucional,* and the Tribunal has established that certain of its rules were arbitrary and breached of the MST of aliens required by Art. 10.5 of the FTA, and

- as of now the bondholder process is closed, and Claimants cannot resort to that process to collect.

1318. In this situation, the alternative which Peru is proposing does offer full reparation to the investor: under this alternative, Respondent would repay to the investor the investment made in full, USD 33,222,630, and the Republic would additionally remunerate the investor for the time value of money, and for the financial risk of having maintained an investment in Peru between 2006-2008 and the date of payment of the compensation.

1319. The Republic has accepted the principle that the amount invested must be brought forward[1038], but has not made any proposal, regarding the appropriate rate to be applied. This *lacuna* has been filled by Prof. Edwards, Claimants' expert, who has proposed the average real return on debt in Peru during the relevant period, which he calculated at 7.22% p.a., and he submits that this is the appropriate rate to apply[1039].

Prof. Edwards' calculation

1320. Prof. Edwards proposes the following calculation:

- His starting point is the determination of the real return on capital in Peru, during a long period which goes from 1950 through 2011; using data from the Penn World table, and the methodology developed by Arnold Harberger, his estimate is that the long-term real return on capital in Peru is 10.97%[1040];

- With this result, he calculates the real return on equity and debt in Peru, assuming a 50-50 split[1041] and concludes that the real return on debt is 7.22%, while the real return on equity, incorporating the appropriate risk premium, equals 14.72%[1042].

[1038] See R I, para. 310.
[1039] CER-4 Edwards I, para. 164.
[1040] CER-4 Edwards I, para. 137.
[1041] CER-4 Edwards I, para. 145.
[1042] CER-4 Edwards I, paras. 164-165.

1321. Prof. Edwards cites to supporting evidence, which confirm the robustness of his estimates:

- Using U.S. real lending rates provided by the World Bank plus a spread to compensate for the increased risk of default in Peru, the result is 7.39%[1043];

- The estimates from the World Bank between 1993 and 2011, a period when the Peruvian economy and prices stabilized, give an estimation of real lending rates within a range of 11.3% and 32.1% - proving that his estimate is both reasonable and conservative[1044].

Mr. Kaczmarek's comments

1322. Mr. Kaczmarek, Respondent's financial expert, makes a number of specific criticisms to the methodology which Prof. Edwards has adopted. Mr. Kaczmarek says that Prof. Edwards should have calculated the real rate of return for each year, that his calculations are based on an amalgamation of data, on randomly selected fixed averages from different countries and periods, and on wrong CDS spreads[1045]. The comments made by Mr. Kaczmarek refer to the data input used to perform the calculation, but they do not call into question the nature or relevance of Prof. Edwards' estimate. Mr. Kaczmarek, in any case, has failed to provide the Tribunal with an alternative calculation, using what in his opinion would be, more appropriate data.

1323. In his reply report, Prof. Edwards extensively commented on Mr. Kaczmarek's reproaches: he defends that applying a single long-term average real rate of return, as he had done on purpose, avoided false precision and in fact was more conservative than Mr. Kaczmarek's alternative[1046]. He also convincingly defended the use of data from different sources and periods, because of the scarcity of reliable sources of clean and straightforward data in Peru[1047]

1324. All in all, the Tribunal is satisfied with Prof. Edwards calculation, and finds that a rate of 7.22% p.a. represents the average real return on debt in Peru and the fair remuneration to which Gramercy is entitled for the time value of money, and for the financial risk of having maintained an investment in Peru for almost two decades.

1325. The annual rate of 7.22% p.a. should be applied on the actual amount of Gramercy's investment, USD 33,222,630, with accrual starting on 1 January 2009, at which point Gramercy had made its investment in full and continuing until the date of actual payment by the Republic of Peru. Interest shall be compounded, because Gramercy, a professional investor, must be assumed to be able to reinvest the annual interest

[1043] CER-4 Edwards I, para. 167.
[1044] CER-4 Edwards I, para. 168.
[1045] RER-5, Quantum I, paras.146-153.
[1046] CER-6, Edwards II, paras.37-39.
[1047] CER-6, Edwards II, paras. 40-47.

payments at a rate equal to or higher than 7.22%. Furthermore, compound interest is now the rule in international investment arbitration[1048].

b. The result of applying DS 242/2017

1326. Respondent submits a second alternative: under DS 242/2017, Gramercy would have been entitled to receive USD 33.57 million, which is a reasonable outcome, considering the amount Claimants invested in acquiring the *Bonos* and the uncertainties that existed prior to 2013[1049].

1327. The Tribunal agrees with the principle, but not with its implementation.

1328. The Tribunal has already found that certain parts of DS 242/2017 are arbitrary and breach the MST of aliens guaranteed by the FTA. An alternative way to grant full reparation to the investor could consist in awarding the price which would have resulted from applying DS 242/2017 – but not as it was promulgated, but rather as it should have been promulgated to the exclusion of its arbitrary elements.

1329. The arbitrariness in the *Decreto Supremo,* in essence, refers to the parity exchange rate: the formula used was designed, not to comply with the instructions of Peru's Highest Court, but to achieve an unreasonably low revaluation of the *Bonos.* This arbitrariness was compounded, because the (higher) parity exchange is only used when converting into USD; however, to convert the USD amount back to Soles, the *Decreto Supremo* applies the (lower) market exchange rate at the date of revaluation.

1330. The relevant question is whether Gramercy's entitlement under DS 242/2017 would increase above USD 33.57 million if the arbitrary parity exchange rate developed by the MEF was substituted by a financially correct calculation (and all other financial conditions of the *Decreto Supremo,* which the Tribunal has not labelled as arbitrary, remain in place).

1331. Mr. Kaczmarek, Peru's expert, has performed precisely this calculation, using Prof. Edwards' own determination of the parity exchange rate. Under this calculation, the pay-out owed to Gramercy would increase to USD 74.33 million (from USD 33.57 million), as of 31 May 2018.

1332. Mr. Kaczmarek's calculation still applies the market exchange rate for the conversion of the USD back into Soles – contrary to the Tribunal's decision that such second conversion should also be done applying the parity exchange rate. But Prof. Edward's calculation renders this contradiction irrelevant. His parity exchange rate is designed in such a way, that, at the present time, it coincides with the market exchange rate making the discussion moot[1050]:

[1048] *Lion*, para. 882.
[1049] R I, para. 311.
[1050] HT(ENG), Day 5 (Edwards), p. 1623, ll. 18-21.

> "And we can use a Parity Exchange Rate on the back end, at the end, unless we prove that our parity rate is equal to, at the back end, is equal to the market rate".

1333. The Tribunal asked Prof. Edwards to review the figures submitted by Mr. Kaczmarek, and he did so in a letter dated 21 February 2020 and agreed with Mr. Kaczmarek's calculations[1051].

1334. This result of USD 74.33 million is reasonably close to the calculation under the first methodology proposed by the Republic, and accepted by the Tribunal (that methodology, as of 31 May 2018, renders an amount which is close to USD 70 million).

1335. In the Tribunal's opinion, both methodologies lead to a fair result and to a full reparation of Claimants' damage. Between the two, the Tribunal, not without some hesitation, gives preference to the first one, because it seems more robust, being based on only two pillars:

- the amount initially invested, a number not disputed,

- which is brought forward at a rate of interest equal to the average real return on debt in Peru, a concept convincingly developed by Prof. Edwards, which is not called into question by Mr. Kaczmarek, the discussion among experts being centered on the selection and quality of the data used.

1336. The second alternative, in contrast, requires that the Tribunal effectively rerun the bondholder process, that it substitutes the MEF as legislator and that it develops and applies parameters different from those established in DS 242/2017.

1337. All in all, the Tribunal feels more comfortable with what it considers to be the more robust and objective first alternative proposed by the Republic, and it is this one which it will adopt.

3.3 CONCLUSION

1338. The Tribunal finds that the standard for the calculation of compensation that it must apply is that of full reparation, through payment of a sum of money which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, "but for" the State's breach[1052]. The Tribunal has a degree of flexibility to define the appropriate methodology[1053].

[1051] Letter from Prof. Sebastian Edwards of 21 February 2020.
[1052] S. Ripinsky & K. Williams: "Damages in International Investment Law", British Institute of International and Comparative Law (2008), pp. 90-91: "The customary rule of full compensation is of a very general nature and it does not offer a conceptual framework for the recovery of damages that would be comparable in specificity to the 'value' approach generally applicable in expropriation cases. […] The generality of the customary rule provides tribunals with flexibility as to what the precise methodology for assessing damages should be in a specific case".
[1053] *Lemire (Award)*, para. 152; S. Ripinsky & K. Williams: "Damages in International Investment Law", British Institute of International and Comparative Law (2008), p. 117.

1339. Applying this standard, the Tribunal finds that the Republic of Peru must pay to GPH, the purchaser and owner of the *Bonos,*

- USD 33,222,630, the purchase price of the *Bonos,* plus

- Interest on this amount, at a rate of 7.22% p.a., with accrual starting on 1 January 2009 and continuing until the date of full payment by the Republic of Peru,

- The interest to be compounded annually.

The beneficiary of the compensation

1340. In its request for relief, Gramercy has not specified which of the two Claimant entities – GPH and GFM – should receive the compensation determined by the Tribunal.

1341. In this case GPH is the direct owner of 100% of the *Bonos Agrarios*, while GFM only has a [redacted]% indirect ownership interest in the *Bonos* through its indirect shareholding in GPH. In order to avoid double recovery, the compensation owed by the Republic should be entirely and solely paid to GPH.

Preliminary objection

1342. The Republic has presented a procedural objection, averring that Claimants presented extemporaneously four alternative damages claims, two in its Reply and two in its Post-Hearing Brief on Merits[1054]. Respondent says that the Tribunal should dismiss these damages claims *a limine*; otherwise, Peru's fundamental right of due process to present a defense and be heard would be breached[1055].

1343. The Tribunal has rejected all damage calculations submitted by Claimants, so that Respondent's preliminary objection has become moot.

3.4 AUTHENTICATION UNDER DS 242/2017

1344. Respondent has submitted, as a preliminary objection, that Claimants have failed to prove the authenticity of the *Bonos* pursuant to the authentication procedure set forth in *Texto Único* approved by DS 242/2017[1056].

1345. The Tribunal disagrees.

1346. The Republic is not entitled to request that an investment, in order to benefit from the protection of the FTA, be vetted through a unilateral procedure, established in the very

[1054] R PHB-M, para. 106-107. Respondent refers to five alternative claims, incorrectly assuming that the *Pomalca* Valuation is different from Claimants' valuation in a scenario where *Resolución TC Julio 2013* had been issued as it was envisaged in the First Draft. The Tribunal confirms that the *Pomalca* Valuation, referenced in C II, para. 536 and CER-6, Edwards II, para. 64, is the same as the one referenced in C PHB-M, paras. 118-119.
[1055] R PHB-M, para. 108.
[1056] R I, para. 68; R PHB-J, para. 100; R-197.

municipal legislation which the Tribunal has found to be arbitrary and to constitute a breach of the Treaty. Claimants' decision not to submit their *Bonos* for authentication under the bondholder process – which they have impugned through this international arbitration – cannot be a bar to exclude the compensation owed by the Republic for its international delinquency.

Due diligence

1347. What the host State is entitled to request is that an investor, to benefit from international investment protection, performs an appropriate due diligence before making the investment. In this case, the evidence proves that Gramercy complied with this obligation:

- Gramercy engaged Peruvian counsel to review the authenticity of the bond certificates, the judgments declaring the transfer of land of the original bondholder to Peru, the sales contracts between the original bondholder, and the notarized transfer to Gramercy[1057];

- Additionally, Claimants engaged an external consultant to furnish electronic copies of the front and back of the over 9600 *Bonos*[1058].

1348. Peru had the opportunity to review these documents, and only detected one anomaly related to six stray clipped *Cupones*, which Gramercy has withdrawn from its claim[1059].

1349. In para. 44 of PO 1 the Tribunal created an authentication process for documents:

> "Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a Party, in which case the Tribunal will determine whether authentication is necessary".

1350. Peru never raised an objection under this paragraph to impeach the authenticity of the *Bonos* purchased by Gramercy and requesting that the Tribunal determine whether authentication is necessary.

Irrelevance

1351. There is a second argument, which makes the Republic's argument that the *Bonos* should have been authenticated under DS 242/2017 irrelevant.

1352. The Tribunal has determined that the compensation that the Republic owes to Gramercy is based on the cost of the investment incurred by Gramercy – a figure which the Parties and their experts do not dispute[1060]. Given the methodology chosen by the Tribunal, the

[1057] CWS-5, Lavana, paras. 9-12.
[1058] Doc. CE-224A.
[1059] HT(ENG), Day 2 (Lanava), p. 686, l. 18 – p. 687, l. 2.
[1060] See CE-711; CWS-5, Lanava, para. 12; CWS-6, Joannou, para. 7; RER-5, Quantum I, para. 124; R PHB-M, para. 104; RER-11, Quantum II, paras. 35, 72.

question whether each single *Bono* has been authenticated by the MEF applying the procedure required by DS 242/2017 is moot – the relevant factual findings being that Gramercy invested USD 33.2 million in purchasing a certain investment, that it performed the appropriate due diligence, and that Respondent has not submitted any evidence disproving that Gramercy is the rightful owner of the *Bonos* and that the *Bonos* constitute valid obligations issued by the Peruvian Republic.

Delivery of the paper securities

1353. That said, the *Bonos* are paper securities, where the issuer is entitled to request from the beneficiary delivery of the original document, simultaneously with the payment of the outstanding amount[1061]. Upon request of the Republic, GPH shall, simultaneously with the receipt of payment, deliver to the Republic the original documents formalizing the *Bonos* in as is conditions. Whether delivery is requested or not, after payment by Peru of the totality of the compensation and interest awarded in this procedure, the *Bonos* owned by GPH will cease to have any validity.

[1061] See Doc. RA-187, Art. 17.

XIII. COSTS

1354. In this section of the Award the Tribunal will establish and allocate the costs of this arbitration. Arts. 40 to 42 of the UNCITRAL Rules govern the determination and allocation of costs.

1355. Art. 40.1 of the UNCITRAL Rules provides that

> "[t]he arbitral tribunal shall fix the costs of arbitration in the final award […]".

1356. Art. 40.2 of the UNCITRAL Rules specifies that the notion of costs of arbitration covers the following expenses:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with Art. 41 (the "**Arbitrators' Fees**");

(b) The reasonable travel and other expenses incurred by the arbitrators (the "**Arbitrators' Expenses**");

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal (the "**Tribunal's Other Costs**");

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the Parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable (the "**Reasonable Legal Costs**");

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA ("**Administering Authority's Fees**").

1. THE PARTIES' LEGAL COSTS

1357. On 11 January 2021, each Party submitted its statement on costs[1062].

1358. Counsel for Claimant declared the following legal and other costs:

[1062] Claimants' communication C-93; Respondent's communication R-99. On 13 April 2021, Claimants presented an amended schedule of costs with its communication C-94.

	(USD)
Lawyers' fees and expenses	21,210,413.85
Expert reports and other costs and expenses	5,020,875.78
Total	**26,231,289.63**

1359. Counsel for the Republic has submitted the following breakdown of its legal and other costs:

	(USD)
Lawyers' fees and expenses	6,830,817.94
Expert reports and other costs and expenses	1,940,153.04
Total	**8,770,970.98**

1360. Arts. 40.1 and 40.2 of the UNCITRAL Rules say that the Tribunal shall determine, as part of the arbitration costs

> "The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable". (Emphasis added)

1361. In the present case, taking into consideration the complexity of the case, the amount in dispute, and the work performed by legal counsel and experts, in particular the work performed by the legal counsel and experts of the successful party (as discussed below), the Tribunal considers that the Reasonable Legal Costs subject to potential apportionment amount to a maximum of USD 17 million, being approximately the mid-range between the total legal and other costs incurred by each Party.

2. ARBITRATORS' FEES AND EXPENSES, THE TRIBUNAL'S OTHER COSTS AND THE ADMINISTERING AUTHORITY'S FEES

1362. Art. 41.1 of the UNCITRAL Rules prescribes the following:

> "The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case".

1363. Thus, Art. 41.4(a) of the UNCITRAL Rules provides that, when informing the Parties of the Arbitrators' Fees and Expenses, "the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated".

1364. In accordance with the Terms of Appointment[1063] approved by the Parties, the fees and expenses of the members of the Tribunal shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses were incurred. In addition, the Parties agreed to cover the reasonable travel and transportation expenses of the Assistant to the President[1064].

1365. Likewise, ICSID's services as Administering Authority were agreed to be billed annually in accordance with the ICSID Schedule of Fees in force at the time the fees were incurred[1065].

1366. The Arbitrators' Fees and Expenses are the following:

	Fees (USD)	**Expenses (USD)**
Stephen L. Drymer	231,937.50	6,664.09
Brigitte Stern	302,375.00	11,057.26
Juan Fernández-Armesto	499,500.00	8,972.00
Total	1,033,812.50	26,693.35

1367. The Tribunal's Other Costs include the Assistant to the President's reasonable travel expenses and Hearing and other related expenses as follows:

	Expenses (USD)
Krystle Baptista Serna	7,851.72
Hearing and Other Related expenses	264,420.27

1368. Finally, ICSID's fees as Administering Authority are:

	Fees (USD)
ICSID	210,000.00

1369. In summary, the Arbitrators' Fees and Expenses, the Tribunal's Other Costs, and the Administering Authority's fees under Art. 40.2(a) to (c) and (f) of the UNCITRAL Rules, total **USD 1,542,777.84**.

3. DEPOSITS MADE BY THE PARTIES

1370. As set out in the Terms of Appointment, ICSID has managed the funds deposited by the Parties as advances for the Tribunal's costs and administration fees under Art. 40.2(a) to (c) and (f) of the UNCITRAL Rules. During the course of these proceedings,

[1063] Terms of Appointment, para. 76.
[1064] Terms of Appointment, para. 80.
[1065] Terms of Appointment, para. 14.

the Parties have made deposits totaling USD 1,550,000. This amount was paid in equal shares by the Parties, in accordance with Art. 43 of the UNCITRAL Rules (*i.e.*, USD 775,000 from Claimants and USD 775,000 from Respondent).

1371. The unexpended balance of the deposit shall be returned to the Parties in equal shares in accordance with Art. 43.5 of the UNCITRAL Rules.

4. RULES ON ALLOCATION OF COSTS

1372. Each Party seeks that the counterparty be ordered to bear all costs and expenses of the present arbitral proceedings[1066].

1373. The allocation of costs is governed by Art. 42 of the UNCITRAL Rules, which provides as follows:

> "1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs".

1374. This provision gives the Tribunal broad discretion to allocate the costs between the Parties, the principal guideline being that the costs should be borne by the "unsuccessful […] parties". Otherwise, the provision directs the Tribunal to allocate the costs as it deems "reasonable, taking into account the circumstances of the case".

Success of the Parties' claims

1375. As for the principal guideline, the Tribunal considers that, *prima face*, Claimants are the successful party in this arbitration. Claimants have convinced the Tribunal that it has jurisdiction and that the Republic breached Art. 10.5 of the Treaty.

1376. However, Claimants sought damages in the amount of USD 1.8 billion. The Tribunal has concluded that the damage suffered by Claimants for Peru's breach of the Treaty is a significantly lower amount of USD 33.2 million plus interest at a rate of 7.22% p.a., with accrual starting on 1 January 2009 and continuing until the date of full payment. Without prejudice to a formal, precise, and binding calculation, and only for addressing the costs decision, the compensation due at the date of issuance of this Award equals approximately USD 88 million.

[1066] Claimants' communication C-92; Respondent's communication R-99. See also Relief sought by the Parties in Section **IV.** *supra*.

1377. The Tribunal will take into account Claimants' relative success with respect to the issues and claims discussed in this arbitration.

Reasonability under the circumstances

1378. Turning to the other guidelines for apportioning of costs, Art. 42.1 of the UNCITRAL Rules permits the Tribunal to apportion costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. Typically, arbitral tribunals consider under this category aspects such as the conduct of each party throughout the proceedings or the complexity and novelty of the questions raised.

1379. As for the conduct of the Parties, the Tribunal is pleased to state that neither Claimants nor Respondent failed to comply with any procedural orders, fallen into unreasonable, obtrusive behavior, or acted in bad faith.

1380. As to the other criterion – the complexity and novelty of the questions raised – the Parties have brought and argued complex matters of fact and law, which have consumed much of the Parties and the Tribunal's time, effort and resources over many years.

5. DISCUSSION

1381. All things considered, the Tribunal thus finds it reasonable under the circumstances that the costs be divided in the following way:

Reasonable Legal Costs

1382. Claimant has provided an estimate of the legal and other costs attributable to each of the phases of the proceeding, with 25% relating to the jurisdictional objections, 55% to merits and quantum and 20% to document disclosure[1067]. The Tribunal has established that the Parties' Reasonable Legal Costs amount to a maximum of USD 17 million, which in light of Claimants' estimate, can be broken down to:

- USD 4.25 million for jurisdictional objections;
- USD 9.35 million for merits and quantum;
- USD 3.4 million for document production.

1383. Based on Claimants' relative success in each of the phases of the proceeding, the Tribunal considers that Respondent should bear Gramercy's costs as follows:

1384. First, Claimants have succeeded in the seven jurisdictional objections raised by the Republic, since the Tribunal has dismissed them all. In this case, Claimants are entitled

[1067] Communication C-94, fn. 1.

to reimbursement for 100% of its Reasonable Legal Costs incurred in the jurisdictional phase, *i.e.*, USD 4.25 million.

1385. Second, as to merits, Gramercy was also successful on its Main Claim, *i.e.*, that the Republic breached its international obligations under Art. 10.5 of the FTA. It is true that Claimants did not prevail on every argument in support of that Claim, but they prevailed sufficiently to prove the Main Claim and to be considered successful in that regard.

1386. With respect to *quantum*, the Tribunal upheld the general claim that Claimants were entitled to compensation for Peru's wrongful conduct; however, Claimants sought compensation in the amount of USD 1.8 billion and the Republic has been successful in significantly reducing the compensation finally determined by the Tribunal, resulting in approximately 5% of the amount claimed[1068].

1387. Considering this outcome, the Tribunal decides that Claimants are entitled to reimbursement for 60% of its Reasonable Legal Costs incurred in the merits and quantum phase, *i.e.*, USD 5.61 million[1069].

1388. Third, the Tribunal does not find that one of the Parties was more successful than the other in the document production phase. Therefore, each Party shall bear its own Reasonable Legal Costs related to the document production phase.

1389. Finally, as for the Arbitrators' Fees and Expenses, the Tribunal's Other Costs and the Administering Authority's Fees, the Tribunal finds that these costs should be assumed by the Republic, given that Claimants have generally prevailed in the overall outcome of this arbitration.

1390. In sum, Peru must reimburse Claimants USD 9.86 million[1070] for Reasonable Legal Costs, plus Claimants' share of the Arbitrators' Fees and Expenses, Tribunal's Other Costs, and Administering Authority's Fees, in the amount of USD 771,388.92[1071].

6. INTEREST

1391. Gramercy has requested that interest be awarded over the costs award[1072]

> "[…] at commercial, annually compounding rates, such as the rate of the real return on debt in Peru".

1392. The Tribunal agrees.

[1068] (USD 88 million / USD 1.8 billion) * 100 = 4.8%
[1069] USD 9,350,000 * 60% = 5,610,000
[1070] USD 4,250,000 + 5,610,000 = 9,860,000
[1071] Amount in para. 1369 divided by 2.
[1072] See Relief sought by the Parties in Section **IV.** *supra*.

1393. The Tribunal has already decided that the compensation awarded to Claimant shall accrue at the average real return on debt in Peru, *i.e.*, 7.22% p.a., compounded annually[1073]. The same shall be applied to the amounts that Respondent is ordered to reimburse as costs.

1394. The *dies a quo* shall be the date of issuance of this Award.

1395. The *dies ad quem* shall be the date of effective payment.

[1073] See para. 1339 *supra*.

XIV. AWARD

1396. For the reasons set forth above, the Arbitral Tribunal decides by majority as follows:

(i) Dismisses the Republic of Peru's jurisdictional and admissibility objections.

(ii) Declares that it has jurisdiction over Claimants' claims and that such claims are admissible.

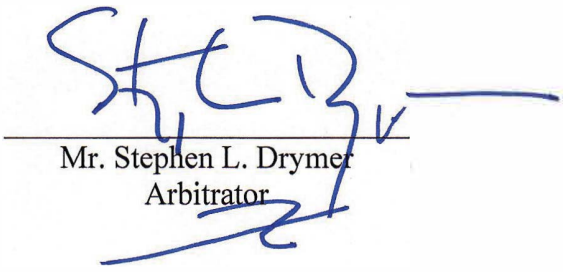
(iii) Declares that the Republic of Peru breached Art. 10.5 of the Treaty through the issuance of DS 242/2017 by imposing an arbitrary method for the revaluation and payment of the *Bonos*.

(iv) Orders the Republic of Peru to pay Gramercy Peru Holdings LLC USD 33,222,630, plus interest at a rate of 7.22% p.a., with accrual starting on 1 January 2009, compounded annually, and continuing until the date of full payment.

(v) Orders the Republic of Peru to pay (a.) Claimants' share of the Arbitrators' Fees and Expenses, Tribunal's Other Costs and Administering Authority's Fees in the amount of USD 771,388.92, (b.) USD 9,860,000 of Claimants' Reasonable Legal Costs, plus (c.) interest on the amounts awarded in (a.) and (b.) at a rate of 7.22% p.a., compounded annually, from the date of this Award until the date of full payment.

(vi) Dismisses all other claims and requests.

Arbitrator Stern's reasoning for dissent is formalized in her Dissenting Opinion.



Mr. Stephen L. Drymer
Arbitrator

Prof. Brigitte Stern
Arbitrator

(*subject to the attached dissenting opinion*)

Prof. Juan Fernández-Armesto
President of the Tribunal

Brigitte Stern.

Mr. Stephen L. Drymer
Arbitrator

Prof. Brigitte Stern
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(*subject to the attached dissenting opinion*)

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President of the Tribunal

Mr. Stephen L. Drymer
Arbitrator

Prof. Brigitte Stern
Arbitrator

(*subject to the attached dissenting opinion*)

Prof. Juan Fernández-Armesto
President of the Tribunal

In the matter of an arbitration under the UNCITRAL Arbitration Rules

between

1. GRAMERCY FUNDS MANAGEMENT LLC
2. GRAMERCY PERU HOLDINGS LLC

Claimants

v.

THE REPUBLIC OF PERU

Respondent

DISSENTING OPINION OF PROFESSOR BRIGITTE STERN

Table of Contents

A. INTRODUCTION

1. Although the majority is composed of highly distinguished colleagues, I am compelled to say that I consider the Final Award (the "**Award**") adopted by the majority utterly wrong both in law and in justice.

2. In law, I am convinced that the Tribunal has no jurisdiction to deal with this decade long dispute, essentially because the whole case is an abuse of the system of international arbitration protection, in all its aspects. As I consider that there is no jurisdiction, I will not opine on the developments on the merits, quantum and costs. This does not mean that I am in full agreement with the way the majority has delt with the other jurisdictional objections or with the merits, quantum, and costs.

3. In justice, I think it is very unfair to give to foreign Claimants a windfall on the token price Gramercy paid to the Peruvian bondholders, when the Claimants disregarded the internal process created by Peru to compensate the bondholders; moreover, I fear that all the Peruvians will feel cheated as foreigners will receive more than what they have obtained or can obtain; last but not least, Gramercy will certainly claim, from another international tribunal, an equivalent undue profit on the bonds not at stake in this case which it bought in 2017 (without informing the Tribunal) by reference to the Award adopted by the majority.

4. I will concentrate my analysis on two of the jurisdictional objections raised by the Republic of Peru, which I consider fundamental: the first objection on the abuse of process and the fifth objection on the absence of an investment. Each of these objections alone, if accepted by the Tribunal, as they should have been, is sufficient to conclude that the Tribunal has no jurisdiction. In fact, this Dissenting Opinion will not deal with these two objections separately but will concentrate essentially on the abuse of process objection, as I consider that the absence of an investment is part of the abuse, if things are analyzed holistically.

B. THIS INTERNATIONAL ARBITRATION IS AN ABUSE OF PROCESS

5. The abuse of process results from the whole record, and I will point to the most important elements constituting, according to me, such abuse.

    1. There was a general ongoing dispute concerning the bonds when Gramercy acquired them;
    2. No new dispute has arisen after the entry into force of the FTA;
    3. The damage had already occurred before the so-called investment;
    4. Gramercy was buying a claim against the Peruvian Government, and
    5. Gramercy had no intention to develop an economic activity in Peru.

1. <u>There was a GENERAL ONGOING DISPUTE concerning the Bonds when Gramercy acquired them</u>

6. The objective facts are the following, as stated in the Award:

    - The *Bonos Agrarios* were issued in the 1970s as a deferred payment to landowners as compensation for the land expropriations implemented by the Peruvian Government through *Decreto-Ley 17716* ("***Ley de Reforma Agraria 1969***").[1]

    - The *Ley de Reforma Agraria 1969* established that the expropriated landowners would receive a substantial part of the compensation for their lands not in cash but in *Bonos*, paper securities issued by the Peruvian State formalizing an acknowledgement of debt.[2]

    - The *Bonos Agrarios* did not include any protection against inflation and by the middle of the 1980's their value had been eroded and had become worthless, to the point that bondholders ceased submitting their *Cupones* for payment.[3]

    - In 1992 the paying agent on behalf of the State, the *Banco de Fomento Agropecuario del Perú*, was extinguished. From that moment on, the Republic has made no payment.[4]

7. In the 70's, Peru proceeded to an Agrarian reform, implying the expropriation of landowners. The expropriation can be considered as a forced sale and, as the Government did not have enough cash, it offered a deferred payment to the expropriated landowners in the form of Bonds, which represent the purchase price for the lands. At the end of the 90's, there was thus a situation where the Peruvian Government had not paid some of the compensation due to his national landowners, in accordance with the *Ley de Reforma Agraria 1969*. This can undoubtedly be characterized as a domestic dispute. Suffices it

[1] Para. 113 of the Award.
[2] Para. 117 of the Award.
[3] Para. 121 of the Award.
[4] Para. 122 of the Award.

here to refer to the often-quoted definition of a dispute by the PCIJ in *Mavrommatis Palestine Concessions*:[5]

> [A] disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.

8. The Government of Peru mentions the fact of the existence of such dispute as precluding the Tribunal's jurisdiction over the claim of Gramercy, as developed, for example, in the *Statement of Rejoinder*:

> As Professor Reisman concluded in his First Opinion, following an assessment of *Phoenix Action v. Czech Republic* and other cases dismissed on abuse grounds, Gramercy abused the Treaty because it acquired the Bonds "**decades after the dispute as to payment of the Bonds already had arisen**, in order to avail itself of the avenue of international arbitration to profit, by means of a modality foreclosed to the original bondholders and other domestic bondholders." This requires dismissal on either jurisdictional or admissibility grounds.
>
> …
>
> Indeed, Gramercy's entire investment was *expressly predicated* on the idea that it could **profit from a longstanding dispute among Peruvians** over facially worthless Bonds which were the subject of ongoing debate in the political branches and **ongoing litigation in the courts**.[6]

9. It seems indeed that Gramercy was fully aware, at the time of the acquisition of the *Bonos*, of the existence of such a dispute, as it appears from the reading of a Memorandum analyzing the situation in Peru, prepared shortly before the signing of the Peru-US Free Trade Agreement ("**FTA**"). The Memorandum stated, for example, that the Bonds which were offered as part of Peru's Agrarian Reform and "issued in the currency of the 1970s"; had been "in default for a period of 18 years"; were "now worthless"; Peruvian bondholders were "fighting" in Peruvian courts; and the "long and hard-fought legal battles" by Peruvians in Peruvian court purportedly had "helped pave the road for some form of resolution." Any such resolution, however, remained elusive, and the domestic dispute continued: the bondholder organization ADAEPRA, for example, was "pursuing a parallel strategy" that involved "negotiating a settlement," along with a "judicial track demanding payment" in Peruvian courts.[7]

10. Faced with these undeniable objective facts, the majority elaborates a strange strategy, both recognizing that if an investment is acquired when there was already an existing dispute, it is an abuse of process to bring a claim before an international tribunal and concluding – in contradiction with all evidence – that, in the present case, there was no dispute when Gramercy acquired the bonds. I thus agree with the first part of the majority's position and of course strongly disagree with the second part.

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[5] *The Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. Series A – No. 2, Objections to the Jurisdiction of the Court, Judgement, 30 August 1924, Doc. CA-138, p. 4, Section I, para. 19.

[6] Respondent's Statement of Rejoinder, paras. 24 and 27. Emphasis in italics in the original, emphasis in bold added.

[7] Gramercy Memorandum, 24 January 2006, Doc. CE-114, pp. 1-3.

11. First, I agree with the presentation in the Award of the case law in the following statements:

> Situations which have been considered abusive
>
> Under international investment case law,
>
> - if an investment is made (or restructured) with the sole purpose to transform a pre-existing domestic dispute into an international dispute; or
>
> - if an investment is made (or restructured) and the asset is already burdened with a pre-existing dispute with the host-State; or
>
> - if an investment is made (or restructured) in anticipation of treaty protection for a specific foreseeable dispute; or
>
> - if an asset is acquired for a nominal price, which does not represent an arm's length transaction; or
>
> - if an investment is made in violation of the international principle of good faith,
>
> tribunals, after considering all circumstances of the case, have concluded that the investor's conduct indeed is abusive, with the result that the claim is inadmissible and the tribunal lacks jurisdiction.
>
> …
>
> The case law indicates that the dividing line between a legitimate investment (or a legitimate restructuring of an existing investment) and abuse occurs when the investor, at the relevant time,
>
> - is aware that the asset is burdened by an existing dispute with the host State …[8]

12. Although it does not apply this clear law to the facts of the case, the majority reiterates this position and adopts it as proper law – in paragraph 441 of the Award, which states:

> Abuse of process can arise when a claimant acquires an asset, which is already burdened with a domestic dispute, and thereafter files an investment arbitration against the host State, with the same dispute elevated to an international level.

13. Second, as mentioned, I strongly disagree with the conclusion of the majority that there was no existing dispute. In order to avoid the inescapable conclusion stemming from this well settled jurisprudence mentioned in the Award itself, the majority collapsed two concepts, the one of "dispute" and the one of "judicial claims" as can be seen in the following statement found in the Award:

> … the evidence marshalled or invoked by Respondent does not prove, in the Tribunal's considered opinion that the selling bondholders had indeed submitted claims against the Republic or that any of the *Bonos* acquired by Gramercy were the subject of such claims.[9]

[8] Paras. 358 and 360 of the Award.
[9] Para. 400 of the Award.

14. Needless to say, a dispute always pre-exists a judicial claim or indeed can exist even if no judicial claim is presented. In other words, **pre-existing dispute and pre-existing litigation are two different concepts** which the majority merged, in a surprising presentation. Of course, there was a dispute, because the selling bondholders were still in want of payment which Peru did not provide, as the Claimants themselves recognized.

15. This confusion between the existence of a dispute and the existence of judicial proceedings is elaborated further as follows:

> In the representations and warranties text of the *Contrato* each selling bondholder specifically represented that with respect to the *Bonos* being sold
>
> "*[m]antiene todos los derechos de acreedor expropiado materia de indemnización por parte del Estado Peruano*"
>
> and that the securities
>
> "*pueden y podrán ser opuestos y/o ejercidos plena y válidamente y sin limitación alguna […] frente al Estado Peruano*".[10]
>
> The selling bondholders thus represented in writing to Gramercy that, before the sale, they had not filed any claim against the State in relation to the *Bonos* and that the securities were not burdened by any **pre-existing litigation**.[11]

16. But even the conclusion that there were no pre-existing judicial claims, *i.e.*, no pre-existing litigations, does not hold water and is a pure speculation of the majority, contradicted by one of Claimants' major witnesses. This is how the Award refers to the witness statement of Mr. Koenigsberger, Gramercy's CEO:

> … Respondent draws the Tribunal's attention to a statement made by Mr. Koenigsberger during the hearing, in which he allegedly stated that Gramercy "took over" claims already pending in Peruvian Courts.[12]

17. During the hearing, Mr. Koenigsberger has been examined in redirect by Claimants' counsel. The questions were referring to the changes which had occurred in Peru between "2008 and 2013". Counsel put the following question to the witness:

> Q: What – do you recall whether during this period that is 2010 to '11, Gramercy also took some efforts with respect to local courts?
>
> A: I do.
>
> Q: Can you tell us about that?
>
> A: <u>We had a subset of the position that **we took over the existing litigations**</u>. Prior to those litigations, we tried to, again, come to a consensual resolution with Perú under a conciliation process, and we – without being able to get that consensual resolution, **we continued** to advance those in the court […][13]

[10] Contract Number 1, 20 October 2006, Doc. R-701, Clause 3.2.
[11] Paras. 402-403 of the Award. Emphasis added.
[12] Para. 415 of the Award.
[13] Para. 419 of the Award.

18. Peru says that Mr. Koenigsberger's words: "we had a subset of the position that we took over the existing litigations" are quite clear and prove that certain *Bonos* purchased by Gramercy were burdened with existing litigation against the State, when Gramercy purchased these securities, which Gramercy continued.

19. Again, to avoid the inescapable conclusion of such an acknowledgment, the members of majority interpreted the words of the witness in order to fit their theory of the absence of pre-existing litigations. It might be worth reproducing here the convoluted interpretation of the clear witness statement of Mr. Koenigsberger:

> … there are other possible interpretations, different from that advanced by Peru, for Mr. Koenigsberger's obscure phrase. The context of his statement is the period 2010-2011 and he may be referring to the seven sets of *Bonos* (which he calls a "subset") which Gramercy took to the Peruvian Courts, claiming full payment (the claims were eventually waived as a requirement for the filing of this arbitration).[14]

20. I leave it to the sagacity of the reader to try to understand this obscure interpretation of what appears on its face as a very clear statement of Mr. Koenigsberger.

21. This brings the majority to conclude that there was no abuse of process, based on the mere **alleged absence of claims** by the selling shareholders, before the entry into force of the FTA, and not the absence of a dispute, when the latter is the relevant factor:

> Whatever the correct interpretation of Mr. Koenigsberger's words the Tribunal's findings remain unaffected: the Tribunal finds that the evidentiary record, weighed in its totality, proves beyond any reasonable doubt, that the selling bondholders had never submitted a claim before the municipal Courts with regard to the Bonos which they sold to Gramercy; and that the only claims brought before the Peruvian Courts with respect to those Bonos were filed by GPH itself, *sua sponte* and on its own behalf, in 2012 – four years after the original purchases.[15]

22. Using the words of a well-known arbitrator: "This is argument by labelling – not by analysis."[16]

23. In other words, the majority finds that the argument that Claimants engaged in an abuse of process would have some support if the selling bondholders had actually filed claims against the Republic relating to their *Bonos* before the entry into force of the FTA.

24. Independently of the fact that bondholders have filed claims before the acquisition of *Bonos* by Gramercy, as acknowledged by Gramercy itself in the Memorandum of 24 January 2006, mentioned above, it must be noted that even if there were no legal litigations, as alleged by the majority – *quod non* – I find that the analysis of the majority completely disregards the objective realities: if a State refuses to pay a fair price and the

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[14] Para. 422 of the Award.

[15] Para. 424 of the Award. It can be noted that if Gramercy started indeed claims before the Peruvian courts in 2012, it reinforces the position developed in this Dissenting Opinion, that there was a dispute relating to the valuation and the payments of the Bonds before the so-called new dispute relating to the valuation and payment of the Bonds allegedly resulting from the *Resoluciones TC 2013* and the *Decretos 2013* and *2017* adopted after 2012.

[16] *Pantechniki S.A. Contractors & Engineers (Greece)* v. *The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 61.

bondholders have no way to receive payment and, therefore, do not continue to fight to obtain their rights, does it really mean that there is no unresolved dispute? Independently of the fact that the view of the majority is contrary to common sense, the existence of litigations is in fact acknowledged by Gramercy itself in the Memorandum of 24 January 2006, mentioned above. When a situation is blocked – no more agency existing since 1992 to make the due payments on the bonds – the fact that the situation looks desperate and that the victims of the situation do not continue to fight, does not mean that the dispute has been resolved.

25. The fact that a dispute can stem from the existence of an objective opposition of interests, without the need of a subjective express statement of opposing views, has been recently confirmed by the judgment issued by the International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. In that judgment, the Court considered the situation where one party remains silent in the face of the other party's legal claims:

> With regard to Myanmar's argument that the existence of a dispute requires what Myanmar refers to as "mutual awareness" by both parties of their respective positively opposed positions … , **the conclusion that the parties hold clearly opposite views concerning the performance or non-performance of legal obligations does not require that the respondent must expressly oppose the claims of the applicant**. If that were the case, a respondent could prevent a finding that a dispute exists by remaining silent in the face of an applicant's legal claims. Such a consequence would be unacceptable. It is for this reason that the Court considers that, in case the respondent has failed to reply to the applicant's claims, **it may be inferred from this silence, in certain circumstances, that it rejects those claims and that, therefore, a dispute exists** at the time of the application. Consequently, the Court is of the view that the requirement of "mutual awareness" based on two explicitly opposed positions, as put forward by Myanmar, has no basis in law.[17]

26. One more layer of inconsistent reasoning is the implicit distinction made by the majority in the Award between a direct dispute with the selling bondholders in particular, and a dispute with the bondholders in general. There is however ample evidence in the record that the Peruvian bondholders in general were unsatisfied with the measures adopted by the Republic over the years, rendering the securities worthless. From this general perspective, **there was indeed a dispute in Peru regarding the proper valuation and the payment of the *Bonos*, which started in the 1980's and remained unsolved.**

27. It appears to me that the majority attempted to solve this long-standing dispute, through the fiction that a new dispute appeared, thus disregarding the strong objections to jurisdiction.

28. **In conclusion**, I consider it quite unbelievable to argue, as does the majority, that there was no ongoing dispute, when Gramercy acquired the *Bonos.*

[17] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, ICJ Judgment, 22 July 2022, para. 71. Emphasis added.

2. NO NEW DISPUTE has arisen after the entering into force of the FTA

29. I consider that the present dispute shares the same subject matter as the historical dispute. The Award states indeed – wrongly in my view – the contrary:

> The subject matter of the present dispute is different from the historic dispute by bondholders.[18]

30. In a way, this statement belies all the efforts made by the majority, presented above, to argue that there was no dispute pre-existing the FTA entry into force, as it acknowledges the existence of an "historic dispute"! This being noted, the question raised here is whether the dispute submitted to the Tribunal is a new dispute or is the same dispute or, at least, is deeply rooted in the historical dispute.

31. The Claimants argue that a totally new dispute appeared when what they call the Impugned Measures were adopted, as noted in the Award:

> Gramercy made its investments in Peru between 2008 and 2009. On 1 February 2009 the FTA came into force. The Impugned Measures against which Claimants now rally are the *Resoluciones TC 2013* and the *Decretos 2014* and *2017*, which occurred four, five and eight years after the entry into force of the Treaty.[19]

32. The Claimants rely heavily on the existence of these specific "measures." But they omit to draw any consequence from the fact that the term "measure", as defined in the FTA, includes "practice." Indeed, among the measures which can trigger the application of the Chapter on Investment of the FTA, practice is mentioned. Chapter One of the Treaty, on Initial Provisions and General Definitions, provides a definition of the term "measure", which

> "includes any law, regulation, procedure, requirement, or practice."

33. It cannot be denied that the Peruvian State adopted **a constant practice of not fulfilling its payment obligations as defined by its own laws**. Whether the content of the legal order did change or not, the practice has always been the same, and I really do not find it credible to consider that suddenly a new dispute has arisen after the coming into force of the Treaty.

34. In my view, the real source of the dispute was the incorrect valuation of the *Bonos* and the fact of the non-payment of the interests and principal due under the *Bonos* in 1992, long before the cut-off date of the entry into force of the FTA in 2006. The so-called Impugned Measures criticized by Gramercy did not change the former situation. The subsequent failure of the State to redress that situation of incorrect valuation and non-payment was a mere confirmation of the previous situation. Since the 80's, it is common ground that there was a dispute relating to the valuation and the payment of the Bonds, and according to the majority, in 2013, a so-called new dispute emerged relating to the valuation and the payment of the Bonds. In my understanding, the fundamental basis of the dispute has remained the same at all times.

[18] Page 91 of the Award.
[19] Para. 343 of the Award. Emphasis in the original.

35. **In conclusion**, the same dispute exists since 1987, when default was declared, and the fact to have bought *Bonos*, which were "already burdened with a pre-existing dispute", is an abuse, in accordance with the applicable rules presented in the Award itself.[20]

3. The damage had already occurred BEFORE the so-called investment by Gramercy

36. The damage, *i.e.*, the non-payment of the debt, had already occurred when Gramercy bought the Bonds. The default was declared in 1987, the Agrarian Development Bank closed in 1992, and, for example, the Bonds bought by sale contract CE 339.001 had matured in 2002 without having been paid.

37. Both Parties agree that **the Bonds had no value** when they were acquired by Gramercy. This has been mentioned by the Respondent in its *Statement of Defense*:

> The Quantum Expert concludes, "Because the Agrarian Bonds' coupons were not protected from inflation, subsequent hyper-inflation in Peru left the Coupons worthless as of 1992." In this context, the Agrarian Development Bank, the entity previously in charge of paying the Bonds, was liquidated.[21]

38. But, the same position has been adopted by the Claimants themselves from 2006, before the acquisition of the *Bonos* by Gramercy, until today in the context of the arbitration. This was already clearly acknowledged back in the Memorandum of 24 January 2006:[22]

> Most of the originally issued Land Reform Bonds carried coupons of 4%, 5%, or 6% and had a maturity of 25 or 30 years. … The Peruvian government serviced these bonds until **1987** when President Alan Garcia declared a **default on all of Peru's obligations.**

39. This was confirmed in the course of the arbitration in *Koenigsberger Second Amended Witness Statement*: "The face value of the Land Bonds as denominated in *Soles de Oro* was **worthless** even in **2005**."[23] And the Claimants' witness, Mr. Koenigsberger, confirmed this fact during the hearing, as acknowledged by the Respondent in its *Post-Hearing Brief on Jurisdiction*:

> At the hearing, Mr. Koenigsberger confirmed his written testimony that Peru had purportedly "defaulted" on the Bonds "long before [he] learned about them"; that the Bonds "had been issued in an outdated and massively devalued currency"; and that the face value of the Bonds was "worthless" before Gramercy acquired them.[24]

40. The Award itself recognizes the fact that, when Gramercy bought the *Bonos*, they had no value:

> The *Bonos Agrarios* did not include any protection against inflation and by the middle of the 1980's their value had been eroded and had become worthless…[25]

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[20] In paras. 358 and 360 of the Award, cited above.
[21] Respondent's Statement of Defense, para. 33.
[22] Gramercy Memorandum, 24 January 2006, Doc. CE-114, p. 1. Emphasis added.
[23] CWS-2, Koenigsberger, para. 21. Emphasis added.
[24] Respondent's PHB on Jurisdiction, para. 15.
[25] Para. 121 of the Award.

41. **In conclusion**, nobody contests that Gramercy bought *Bonos* that had no value.

42. The question thus arises: why did Gramercy pay to the sellers approximately USD 33.2 million to buy *Bonos* having no value? In fact, Gramercy's business was to develop legal activity and lobbying in order to pressure the Government to **resuscitate dead Bonds**, as will be developed below.

4. Gramercy was BUYING A CLAIM against the Peruvian Government

43. The fact that the focus of Gramercy was on the claims attached to the Bonds and the possible profit it could draw from them can be seen in the contracts through which Gramercy bought the Bonds, **where it is specified that the assets acquired include the claim against the Peruvian State**. As an example, the *Contract* CE 339.001, relating to a purchase of Bonds dated 28 December 2008 from Mr. and Mrs. Zegarra, can be cited here:

> *1.7. EL CEDENTE manifiesta ser el único y legítimo titular de:*
>
> *(i) Diez (10) Bonos …*
>
> *(ii)* ***El derecho de crédito frente al Estado Peruano*** *reconocido en la notificación del Decreto Supremo de Afectación y en la Resolución Judicial de Expropiación, determina la obligación de pago que el Estado Peruano tiene a favor de EL CEDENTE como consecuencia de la expropiación del fundo materia de expropiación al amparo de la Ley de Reforma Agraria y sus normas relacionadas.*
>
> *A* ***los Bonos y derechos de crédito*** *identificados en los acápites precedentes del numeral 1.7 del presente Contrato, incluyendo,* ***los derechos*** *accesorios, vinculados,* ***litigiosos*** *y/o expectaticios que pudieran corresponder a dichos Bonos, los derechos de crédito y/o aquellos que pudieran corresponder a EL CEDENTE respecto de éstos, se les denominará e identificará conjunta e indistintamente como los "BIENES".*
>
> …
>
> *3.2. EL CEDENTE reconoce, declara y garantiza que, a la fecha de suscripción del presente Contrato:*
>
> …
>
> *(vi) La posibilidad de cobro efectivo de la indemnización derivada de los BIENES constituye un* ***derecho expectaticio*** *cuya materialización es de cuenta y riesgo de El CESIONARIO.*[26]

44. In my understanding, this indicates that Gramercy was buying a claim linked to the *Bonos,* while, at the same time, clearly mentioning that this claim was a "*derecho expectativo*"; an "expectative right", in other words, a speculative right. In fact, in an internal document, prepared by Gramercy, entitled "Check list of Items to Cover in our Due Diligence"[27], Gramercy itself referred to the "purchase [of] claims."

[26] Gramercy's Bond Packages, Doc. CE-339.001, Clauses 1.7 and 3.2. Emphasis added.
[27] Gramercy's "Check list of Items to Cover in our Due Diligence", Doc. R-1095.

45. The idea behind this acquisition was to transform, if necessary, this domestic claim into an international claim. Indeed, in my opinion, the timing of the acquisition of the *Bonos* is quite relevant in the analysis of the abuse of process. As mentioned in the Award:

> Respondent says that Gramercy incorporated GPH specifically and solely for the purpose of bond acquisitions, only five days after the signing of the Treaty, and made its investment through GPH with the unique goal of transforming a pre-existing domestic dispute into an international dispute subject to ICSID arbitration.[28]

46. The Claimants contest this allegation of the Respondent State, as also mentioned in the Award, as follows:

> Gramercy did not purchase the *Bonos* in order to bring a Treaty claim for damages, but rather because it had the legitimate expectation, based on the existing legal framework, that Peru would pay their current value, or at least that Gramercy would be able to initiate Peruvian Court proceedings like so many other bondholders.[29]

47. It should be recalled here that the FTA was signed on 12 April 2006 and that Gramercy Peru Holding was incorporated 5 days later, on 17 April 2006. Also, the first acquisition of Bonds took place on 19 June 2006.

48. The majority considers this timing irrelevant, insisting on the fact that the FTA, while signed in April 2006, only entered into force on 1 February 2009. Personally, I consider that the fact that the incorporation of GPH happened just 5 days after the signature of the Treaty, is a very strong indication that the possibility of an international dispute was clearly envisioned by Gramercy.

49. It is interesting to note that, unless I am mistaken, the date of the incorporation of the Claimants cannot be found in the Claimants' Third Amended Notice of Arbitration and Statement of Claim, nor in the Claimants' Reply. It seems that Gramercy wanted to hide the fact that it was incorporated shortly after the signature of the FTA.

50. Gramercy acquired the *Bonos*, with the view to pursue a Treaty claim or at least to threaten Peru with such a Treaty claim, in order to obtain a windfall, *i.e.*, the difference between what it paid and what it expected to obtain, either by lobbying in order to modify the national law, or by court proceedings or through international litigation. As will be developed below, this was the main focus of all the operation executed by Gramercy.

51. Additionally, not only were the Claimants buying a domestic claim, they were also presenting a **totally abusive international claim** to the Tribunal, when we know that only USD 33.2 million were poured into Peru in order to try to obtain much more, *i.e.*, USD 1.80 billion as of 31 May 2018, which should be compounded at an interest rate of 7.22%, to be further updated as of the date of the Award. This can only be qualified as a speculative operation.

52. As indicated in the *Post-Hearing Brief on Merits and Quantum of the Republic of Peru*:

> Gramercy acquired "expectative rights" at a "steep discount." Its own purchase contracts highlighted the prevailing uncertainty, including by specifying that

[28] Para. 364 of the Award, referring to the Respondent's Statement of Defense, para. 194 and the Respondent's PHB on Jurisdiction, para. 60.
[29] Para. 295 of the Award.

> Gramercy acquired an "expectative right" to possible payment – "a gamble," as Dr. Hundskopf explained.[30]

53. It can be noted that it is well known that speculative economic operations are not protected under international law, as underscored in the *NDP Submission* of the USA.[31] A case, not cited in the Award, is particularly relevant to this issue. Indeed, in *Antaris v. Czech Republic*, the tribunal held with respect to a speculative investment:

> [Claimant] was essentially an opportunistic investor who saw a window of opportunity and who was aware, or should have been aware, that [he was] dealing with … [a] controversial political issue. … [H]e was also aware that the Czech Government had been deeply concerned about the [sector] and should have been aware that other legislative changes … were in the air. … The Tribunal considers that [his] actions were essentially opportunistic, and that **the investment protection regime was never intended to promote and safeguard** those who … "pile in" to take advantage of laws which they must know may be in a state of flux … [He] had "**a speculative hope – as opposed to an internationally-protected expectation**."[32]

54. And it is not a minor speculation. As indicated in the *Statement of Rejoinder*, "Gramercy's own submissions demonstrate that it seeks a **5500% return on its speculative purchase** of uncertain instruments."[33] Thus, in addition of having bought a domestic claim, Gramercy has tried in this arbitration to "upgrade" this abusive claim in the outrageous percentage of 5500%, which, in my opinion, can only be qualified as an intrinsically abusive international claim, not to say a scandalous claim.

55. **In conclusion**, I consider that buying a domestic claim for a token price in order to present a grossly overblown international claim clearly participates in the overall abuse of process committed by Gramercy.

5. <u>Gramercy had no intention to develop an economic activity in Peru</u>

56. It should be noted, at the outset of the discussion of this point, that this element of the abuse of process largely overlaps with the objection relating to the absence of an investment, since the majority and myself disagree on the exigency of the development of an economic activity as a core element of a protected investment under international law. In general, when an international arbitration is started by an individual or a company having no investment, the consequence is that the Tribunal lacks jurisdiction *ratione materiae*. In the present case, I consider that, if analyzing the fifth jurisdictional objection on the absence of an investment separately from the first one on abuse of process, the Tribunal should have declared that it had no jurisdiction, even independently of the existence of an abuse of process. However, considering the overall configuration of the case and the way the issues were pleaded by the Parties, I will analyze the absence of an investment resulting from the inexistence of any economic activity, as participating in the abuse of process, as explained in the introduction of my Dissenting Opinion. It is therefore

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[30] Respondent's PHB on Merits and Quantum, para. 83. Emphasis in bold in the original, emphasis in italics added.
[31] Submission of the USA, footnote 41, *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran and others*, IUSCT Case No. 56, Partial Award No. 310-56-3, date 14 July 1987, para. 238 ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.").
[32] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, Doc. RA-364, paras. 431, 433, 435. Emphasis added.
[33] Respondent's Statement of Rejoinder, para. 7.

appropriate to first indicate that the uncontested **evidence of fact** is that Gramercy never intended to develop an economic activity in Peru, as its only focus was legal activity, before entering into the **legal analysis** of what constitutes a protected investment under the Treaty.

(i) Factual evidence

57. According to the Respondent, whose position is summarized in the part discussing the abuse of process in the Award, the lack of engagement in an economic activity is an important element of the abuse of process committed by Gramercy:

> First, Gramercy made its investment not in order to engage in national economic activity, but with the unique goal to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration.[34]

58. As indeed recognized in the Award, to organize an economic transaction with the sole purpose (according to Phoenix) or the main purpose (according to Mobil) to accede to international arbitration is considered as an abuse of right, as can been seen from the following citations.

59. First, the tribunal in *Phoenix* stated the following:

> The ICSID Convention/BIT system is not deemed to protect economic transactions undertaken and performed **with *the sole purpose* of taking advantage of the rights contained in such instruments, without any significant economic activity**, which is the fundamental prerequisite of any investor's protection. Such transactions must be considered as an abuse of the system. The Tribunal is of the view that if the sole purpose of an economic transaction is to pursue an ICSID claim, **without any intent to perform any economic activity** in the host country, such transaction cannot be considered as a protected investment.[35]

60. This is exactly what Gramercy wanted to do, to take advantage of the "**rights contained in such instruments**", *i.e.*, the claims against the Peruvian Government linked with the defaulted Bonds and pursue these claims without ever having any economic project. Their only goal was to obtain a maximum sum of money from the Peruvian Government and ultimately from the Peruvian people.

61. Although referring with approval to *Phoenix*, the tribunal in *Mobil* went even further, by alleviating the burden of proof of the Respondent relating to the purpose pursued by an economic operation, thus expanding the scope of *Phoenix*:

> It thus appears to the Tribunal that **the main, if not the sole purpose** of the restructuring was to protect Mobil investments from adverse Venezuelan measures **in getting access to ICSID arbitration** through the Dutch-Venezuela BIT.
>
> Such restructuring could be "legitimate corporate planning" as contended by the Claimants or an "abuse of right" as submitted by the Respondents. It depends upon the circumstances in which it happened.

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[34] Para. 282 of the Award.

[35] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Doc. RA-100, para. 93. Emphasis added.

…

> As recalled above, the restructuring of Mobil's investments through the Dutch entity occurred from October 2005 to November 2006. At that time, there were already pending disputes relating to royalties and income tax. However, nationalisation measures were taken by the Venezuelan authorities only from January 2007 on. Thus, the dispute over such nationalisation measures can only be deemed to have arisen after the measures were taken.
>
> As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned **future disputes**.
>
> With respect to **pre-existing disputes**, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the *Phoenix* Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.[36]

62. In fact, Gramercy does not hide its strategy, which has always been either to pressure the Peruvian Government in order to make a windfall on its Bonds' acquisition, obtained at a token price, as can be seen all along the submissions of the Claimants in this arbitration, or, if this part of the strategy failed, to go to international arbitration. It is indeed part of its core business as a vulture fund, as noted by the Respondent's *Statement of Defense*, based on Gramercy's own documentation:

> Gramercy is an asset management firm founded in 1998 by Robert S. Koenigsberger, and has a mission is [sic] "**to exploit distressed investment opportunities in emerging markets**."[37]

63. This analysis is again presented by the Respondent, in its *Statement of Rejoinder*:

> Gramercy claims to have acquired a number of Agrarian Reform Bonds, but has refused to seek payment through the Bondholder Process. Instead, Gramercy for years has stated it is seeking to effect changes in Peruvian law so as to increase the value of its supposed bondholding, and has engaged in lobbying and pressure tactics. Gramercy now seeks to use the Treaty to obtain a windfall.
>
> …
>
> Gramercy's own documents demonstrate that it repeatedly sought to change Peruvian law over years in an effort to enhance the legal certainty and value of the bonds.[38]

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[36] *Venezuela Holdings, B.V. and others (case formerly known as Mobil Corporation, Venezuela Holdings, B.V. and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, Doc. CA-207, paras. 190-191 and 203-205.

[37] Respondent's Statement of Defense, para. 55. Emphasis added. The description of Gramercy's business can be found in Gramercy Funds Management, *Overview*, 3 July 2016, Doc. R-399.

[38] Respondent's Statement of Rejoinder, paras. 3 and 7.

64. The same analysis is confirmed in the *Post-Hearing Brief on Merits and Quantum of the Republic of Peru*:

> Indeed, the record shows that, even before it acquired any Bonds, Gramercy designed a **strategy to monetize the Bonds that included lobbying** to influence changes in Peruvian law.[39]

65. This has, in fact, been confirmed by the Claimants, for example in the *Claimant's Statement of Reply*:

> Gramercy's contemporaneous documents, including its financial statements, show Gramercy's expectation as of 2012—years after it invested—that it could still settle the debt through a **negotiated solution**.
>
> …
>
> Here, Gramercy invested in the Land Bonds **with the purpose of bringing its unique expertise to the table to facilitate a global solution**.[40]

66. In other words, the strategy was to exercise its bargaining power to obtain money, not to make an investment. This clearly shows that the only purpose of the Claimants was to obtain money from Peru either through a settlement, through Court proceedings, or through arbitration. This is not "engaging in an economic activity."

67. The same purpose of the acquisition of the *Bonos* is presented in the *Claimants' Post-Hearing Brief on Jurisdiction*:

> In contrast to holdouts like Elliott, Gramercy's "preferred route" to monetization was "**engaging in a dialogue**, whether that be with the Legislative or Executive branches of Government **to try and implement some sort of solution** around the Land Bonds.[41]

68. This is well explained by Koenigsberger in his *Second Amended Witness Statement*:

> Yet, because of positive developments in Peru with regard to the resolution of outstanding debts, I thought the Land Bonds might be a good opportunity for Gramercy to act **as a catalyst for a constructive solution to this selective default**.[42]

69. **In conclusion**, there is no doubt about the fact that the only activity developed by Gramercy has been legal activity. Gramercy did not have the slightest intention to engage in an economic activity in Peru. Its only goal was lobbying as well as litigation in the national courts for a certain time and then through international arbitration.

(ii) Legal analysis

70. As indicated above, the first argument presented by Peru in support of its claim of an abuse of process was the fact that Gramercy did not engage in any economic activity. In fact, although not developed as such by the Respondent, the absence of an economic activity is also, according to me, a crucial element in the definition of investment. The

[39] Respondent's PHB on Merits and Quantum, para. 39. Emphasis added.
[40] Claimant's Statement of Reply, paras. 212 and 557. Emphasis added.
[41] Claimants' PHB on Jurisdiction, para. 83. Emphasis added.
[42] CWS-2, Koenigsberger, para. 22. Emphasis added.

purpose of the following legal analysis is therefore to show that one of the aspects of the abuse of process is the fact that no protected investment can be found in this case. The focus will therefore now be on the relation between the concept of "economic activity" as understood in international investment law, and the existence of a protected investment. As mentioned earlier, I consider that the absence of an investment, in the particular circumstances of this case, can be seen as one of the elements of the abuse of process.

a. The definition of investment

71. The question thus raised is whether the *Bonos* can be qualified as a protected investment, opening therefore for Gramercy the doors of international arbitration and giving them the protection of international law. To answer this question, reference must be made to the FTA and the case law on the definition of investment. The relevant articles of the FTA can be cited here:

> Article 10.28: Definitions
>
> For purposes of this Chapter:
>
> …
>
> investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) **bonds**, debentures, other debt instruments, and loans;[12, 13]
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
>
> (f) intellectual property rights;
>
> (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
>
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;[43]
>
> [12] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.
>
> [13] Loans issued by one Party to another Party are not investments.[44]

[43] FTA, Doc. RA-1, Art. 10.28. Emphasis added.
[44] FTA, Doc RA-1, footnotes 12 and 13. Emphasis added.

72. Annex 10-F is dedicated to "the purchase of debt issued by a Party" and states the following:

> 1. The Parties recognize that **the purchase of debt issued by a Party entails commercial risk**. For greater certainty, no award may be made in favor of a claimant for a claim under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A) with respect to default or non-payment of debt issued by a Party unless the claimant meets its burden of proving that such default or non-payment constitutes an uncompensated expropriation for purposes of Article 10.7.1 or a breach of any other obligation under Section A.
>
> 2. No claim that a restructuring of debt issued by a Party other than the United States breaches an obligation under Section A may be submitted to, or if already submitted continue in, arbitration under Section B if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article 10.3 or 10.4.
>
> 3. Notwithstanding Article 10.16.3, and subject to paragraph 2 of this Annex, an investor of another Party may not submit a claim under Section B that a restructuring of debt issued by a Party other than the United States breaches an obligation under Section A (other than Article 10.3 or 10.4) unless 270 days have elapsed from the date of the events giving rise to the claim.[45]

73. Of course, these Articles of an international treaty must be interpreted according to the rules of interpretation embodied in Article 31.1 of the VCLT, according to which, the Tribunal must interpret the Treaty

> in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[46]

74. Of particular importance is **the unusual definition of "investment" in Article 10.28 of the FTA**, as has been emphasized by an expert of the Respondent, Professor Reisman:

> Professor Reisman testified that he "was struck by this particular Treaty in its reiterated use of the word 'characteristics,' [in] the definition of 'investments.'"
>
> …
>
> Indeed, Professor Reisman emphasized:
>
> I found particularly compelling the United States' Submission as one of the State Parties to the Treaty indicating that *the enumeration of the type of an asset in Article 10.28,* however, is not dispositive as to whether a particular asset owned or controlled by an investor meets the definition of 'investment.' *It must still always possess the characteristics of an investment*, including such characteristics as the

[45] FTA, Doc RA-1, Annex 10-F. Emphasis added.

[46] Vienna Convention on the Law of Treaties ("**VCLT**"), Doc. CA-121, Art. 31.1. Strangely, the Award does not quote the full article, omitting the reference to good faith and to the object and purpose of the Treaty, as can be seen in paragraph 186 of the Award, stating: "Under Art. 31.1 of the VCLT the Tribunal must interpret the Treaty 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context.'"

> commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[47]

75. The same interpretation has indeed been given in the *NDP Submission* of the USA:

> The enumeration of a type of an asset in Article 10.28, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[48]

76. In other words, not all public bonds, as stated by the majority, are investments, the FTA itself being quite clear that some bonds are more likely to have the characteristics of an investment than other bonds. It is, therefore, necessary to ascertain whether the *Bonos* have the characteristics of an investment according to the specifications in the FTA, which embody broadly speaking what is to-day the well settled case law on the definition of investment, before they can be considered as protected investments.

77. The case law has now settled to the point that it is possible to speak of a *jurisprudence constante* relating to the inherent definition of an investment. In spite of some slightly different approaches by different tribunals, it appears that a common understanding has been developed based on an extensive and almost unanimous case law to the effect that some core elements characterize an investment, whether these are considered as a general framework or as jurisdictional requirements, and whether the arbitration is under the AF Rules[49], the ICSID Convention[50] or the UNCITRAL Rules.[51]

78. According to such case law, an investment requires a **contribution** of money or assets, **duration** and **risk**, elements which form part of the objective definition of the term "investment." There are so many cases adopting this approach that it would be burdensome to cite them all. Let me just refer to a few citations. In *Romak*, it is indicated that the "the term 'investments' under the BIT has **an inherent meaning** … entailing a

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[47] Respondent's PHB on Jurisdiction, paras. 80 and 81. Emphasis in the original.
[48] Submission of the USA, para. 18.
[49] *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, paras. 80-81 and 84; *Grupo Francisco Hernando Contreras, S.L. v. Republic of Equatorial Guinea*, ICSID Case No. ARB(AF)/12/2, Award on Jurisdiction, 4 December 2015, paras. 138-139. *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, para. 189.
[50] *Fedax N.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, Doc. RA-159, p. 1387, para. 43; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, Doc. RA-161, para. 52; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, Doc. RA-163, para. 53; *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 72(iv); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Doc. RA-100, para. 83; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 141; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, Doc. RA-122, paras. 294-295; *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, Doc. RA-179, para. 371; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No.ARB/14/32, Decision on Jurisdiction, 29 June 2018, Doc. CA-96, para. 187; *Professor Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, paras. 117-118.
[51] *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, Doc. RA-340, paras. 198-212; *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, paras. 239-241.

contribution that extends over a certain period of time and that involves some risk."[52]; in *Nova Scotia*, the tribunal indicated that "an investment requires ***contribution, duration and risk***. These well-established features have been recognized by many investment arbitration tribunals as the triad representing the minimum requirements for an investment."[53]; in *Professor Christian Doutremepuich and Antoine Doutremepuich*, the tribunal referred to the criteria of the existence of an investment as being "**(i) a contribution to the host State; (ii) of a certain duration; (iii) that entails participating in the risks of the operation**."[54]

79. The FTA refers for its part to the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, which can be considered as characteristics entirely coherent with the nowadays generally accepted objective definition of investment.

80. It was therefore the task of the Tribunal to ascertain whether the *Bonos* present the characteristics of an investment as now generally accepted, and referred to in the FTA.

b. The Bonds do not have the characteristic of an investment

81. Applying the approach just indicated, I will analyze the characteristics of the *Bonos* in order to ascertain whether or not they can qualify as a protected investment. I will not examine duration (as this is not contested) but will concentrate on contribution and risk (the expectation of profit being inherent in the notion of risk) as well as mentioning in a side note (because the Award has referred to it) the contribution to the economic development of the country.

Is there in the present case a contribution to an investment?

82. It appears to me **that the overwhelming case law considers financial instruments, like public bonds, as investments only if they are linked with an economic operation of investment**, as can be easily observed from the cases cited in the Annex to this Dissenting Opinion. In this Annex, I have presented a summary of cases relating to **bonds and other types of financial debts issued by a State**, showing that the overwhelming case-law contradicts the position adopted by the majority, to the effect that public bonds are an investment, regardless of whether they participate or not in an economic enterprise. The majority cites only 4 cases, *Fedax*[55], *Ambiente* [56], *Abaclat* [57], and *Poštová* [58], but as can be seen in the extracts of the decisions quoted in the Annex, *Fedax* and *Poštová* say the

[52] *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, Doc. RA-340, para. 207. Emphasis by underlining in the original, emphasis in bold added.
[53] *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, para. 84. Emphasis added.
[54] *Professor Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, para. 118. Emphasis added.
[55] *Fedax N.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July, Doc. RA-159.
[56] *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, Doc. RA-173.
[57] *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, Doc. RA-171.
[58] *Poštová banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, Doc. RA-179.

contrary of what the majority makes them say, as the majority presents only a truncated analysis of these cases.

83. In *Fedax*, before accepting to consider the promissory notes – issued by the Republic of Venezuela and acquired by Fedax – as a protected investment, the tribunal noted that the promissory notes were initially given to a Venezuelan company, for "the provision of services",[59] *i.e.*, an economic activity. It is this link with an economic operation that explains that the promissory notes were considered as an investment. Similarly, in *Poštová*, the majority completely ignores important developments adopted by a majority of the tribunal, contradicting its position, like the statement according to which an investment risk is "an operational risk and not a commercial risk" as well as the statement according to which, "**the element of contribution to an economic venture and the existence of the specific operational risk that characterizes an investment** are fundamental"[60] Reading this, it seems indeed difficult to consider that these cases support the position of the majority, which is left with only two cases to rely upon.

84. Indeed, international arbitration case law has only accepted to consider public bonds[61] as investments when they were part of an overall economic venture, to the notable well-known exception of the two similar decisions in *Abaclat* and *Ambiente*, both accompanied by strong and convincing dissents.

85. The question therefore is to understand the overall operation through which Gramercy acquired the *Bonos*. As will easily be seen, the *Bonos* came into the hands of Gramercy after two sales, whether forced or freely entered into.

86. It is important to look first at the origin of the *Bonos*. Issued in the 1970's, as already mentioned, the Bonds were a compensation in an operation of exchange of value between the lands and an amount of money representing their value, given not in cash but through a debt instrument. As noted in the Award, "Respondent's expert Dr. Guidotti says, [the Bonds] were not designed to attract investors and were not marketed on road shows."[62] At this stage, there was only a sum of money given by the Peruvian Government in exchange of lands. **The Bonds represent the payment for an expropriation, which can be analyzed as a forced sale.** As aptly stated in the *Statement of Rejoinder*:

> The Agrarian Reform Bonds were issued as compensation for the expropriation of land, not for raising funds to invest in Peru.[63]

87. When Gramercy acquired the Bonds, this was performed through sales contracts, an exchange of the Bonds against a sum of money. According to the record, as acknowledged in footnote 992 of the Award, the exact amount spent by Gramercy was

[59] *Fedax N.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July, Doc. RA-159, para. 37. See the Annex for more developments.
[60] *Poštová banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, Doc. RA-179, paras. 369 and 371. Emphasis added. See the Annex for more developments.
[61] The same is true for commercial bonds, but I did not develop these cases in order not to overburden this Annex. See however, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, Doc. RA-163, dealing with a bank guarantee and *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, dealing with receivables.
[62] Para. 197 of the Award, citing RER-10, Guidotti II, para. 4.
[63] Respondent's Statement of Rejoinder, para. 179.

USD 33,222,630.29.[64] Again this operation is a sale, and no other economic activity was developed after the acquisition of the *Bonos*.

88. It is worth mentioning here that one of the less contested positions in investment law is that **a sale is not an investment**, if it is not followed by any further economic activity.

89. In order to conclude that the *Bonos* are an investment, the majority interprets the words contribution and risk in a layman fashion and does not refer to the meaning they have acquired in the investment case law, as will be indicated now.

90. As far as the **contribution** is concerned, it is not contested that a payment – in the form of a sum of money – was made to owners of Land Bonds, who had received them from the Peruvian Government, and subsequently by Gramercy to the landowners. But such a payment in the framework of a sales contracts is different from the contribution required in order to find an investment, as was underscored in *Romak*:

> … there is a difference between a contribution in kind and a mere transfer of title over goods in exchange for full payment. Romak's delivery of wheat was a transfer of title in performance of a sale of goods contract. Romak did not deliver the wheat as **contribution in kind in furtherance of a venture**. Accordingly, the Arbitral Tribunal does not consider that Romak made a contribution in relation to the transaction in question.[65]

91. In other words, a mere payment is not a contribution. This is simply the ordinary meaning to be given to the terms: a payment refers to a closed operation, whereas a contribution is part of a larger endeavor. **In the absence of a contribution made in furtherance to an economic venture**, there can be no investment. An investment is linked with a **process of creation of value**[66], which distinguishes it clearly from a sale, which is a **process of exchange of values**. The acquisition of the Land Bonds resulted from a mere sale of Bonds by the original owner to Gramercy. Bonds which did not have the characteristics of an investment and which had been received as a compensation for their expropriated lands, *i.e.*, pieces of paper for a fixed price.

92. **In conclusion**, the successive operations having the form of sales – forced or not – cannot be considered as a contribution to an investment, as they did not participate in an economic venture.

Is there in the present case an investment risk?

93. Any economic transaction – it could even be said any human activity – entails some element of risk. Risk is inherent in life and cannot *per se* qualify what is an investment. The distinct features of the investment risk in comparison with other economic risks have been elaborated on in *Romak*:

> All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or,

[64] See RER-11, Quantum II, para. 213; CWS-6, Joannou, para. 7; CE-711.
[65] *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, Doc. RA-340, para. 222.
[66] To be entirely accurate, it should be said "a process of purported creation of value", in order to take into account failed investments which must still be considered as investments.

> otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.
>
> **An "investment risk" entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment**, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is "risk" of this sort, **the investor simply cannot predict the outcome of the transaction**.[67]

94. It follows that an investment risk is a risk depending on the expectation of a profit flowing from the economic operation. In other words, there is a distinction between **a risk inherent in the investment operation** in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the business operation constituting the investment – and **all the risks coming from outside the investment operation.** All risks coming from outside the investment operation do not qualify as investment risks. In the present case, the risks were coming from outside the economic operation of acquisition of the Bonds, as the risk was coming from the application and modifications of the Peruvian legal framework.

95. **In conclusion**, it is elementary to distinguish investment risk and non-investment risks in order to determine the contours of the protected investment. And, applying this crucial distinction to the present case, it is evident that the possession of the *Bonos* did not imply any investment risk.

Is there in the present case a participation to the economic development of Peru?

96. Although the current case law in general does not consider the participation in the economic development of the host country, suggested by *Salini*, to be a necessary characteristic of an investment, I mention it, because it was relied upon in the Award. The following is indeed stated in the Award in paragraphs 201 and 242:

> The Peruvian sellers held securities issued by the Republic, which had matured decades before, but still remained unpaid; by selling the securities to Gramercy, the bondholders were able to "reduce [their] poverty" and to improve their "living standards" – two of the stated purposes of the Treaty which undoubtedly concern the overall economic development of the State …
>
> The financial consequence of the purchase of the *Bonos Agrarios* was that USD 33.2 million were paid to Peruvian bondholders and, through them, injected into the Peruvian economy at large. The quantity of the investment may seem modest, but there can be little doubt that it contributed to Peru's economic development: the sellers of the *Bonos* exchanged matured and unpaid public bonds, which had become practically worthless, against a sum of cash, which could be expensed or reinvested in the Peruvian economy.[68]

97. The fact is that even if we consider that the Claimants participated in the reduction of poverty resulting from the token price offered to the landowners (USD 33.2 million), their ultimate goal was to ask from Peru USD 1.8 billion plus interests, which, unless I do not

[67] *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, Doc. RA-340, paras. 229-230. Emphasis added.
[68] Paras. 201 and 242 of the Award.

understand economics or mathematics, would result in a severe reduction of the Peruvian economic development.

98. **In conclusion**, none of the core elements characterizing a protected investment in international law, when correctly understood, is present in the *Bonos.* As a consequence, the absence of an investment can be considered as participating in the abuse of process in this case, considering all circumstances.

c. Some flaws in the majority's analysis

99. Having demonstrated so far that the *Bonos* do not qualify as a protected investment, I will now give some examples in the developments of the Award, to show that the majority completely errs and takes contradictory positions.

100. Firstly, faced with an unusual explicit reference to the characteristics of an investment in the FTA itself, it is quite puzzling to read how the majority has interpreted this definition of investment. Ignoring the principle of "*effet utile*" of the plain words of the FTA, the majority considers the text to be both tautological and not clear-cut. The term tautological appears as follows in the Award:

> The Treaty defines "investment" as an "asset" – a very wide concept which encompasses contracts or objects with value, represented as credits in the balance sheets of merchants. But the Treaty immediately adds a qualification: all investments are assets, but not all assets are investments. For an asset to qualify as an investment, it must share "the characteristics of an investment".
>
> After this tautological definition, the Treaty adds a list of eight categories of "[f]orms that an investment may take…" [69]

101. In fact, it is only allegedly tautological because the citation is truncated. If the description of the characteristics of an investment is fully quoted, it is no longer tautological, as the relevant Article mentions explicitly "the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".[70] In other words, it appears undoubtedly that the Peru-US FTA, contrary to most treaties, refers explicitly to what is to-day generally considered as being the characteristics of an investment, more or less paraphrasing the core of the *Salini* test.[71]

102. The term 'not clear-cut' appears shortly after in the Award:

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[69] Paras. 180 and 181 of the Award.

[70] FTA, Doc. RA-1, Art. 10.28.

[71] It might be useful to cite precisely what the tribunal in *Salini* said:
"The doctrine generally considers that investment infers: **contributions**, a certain **duration** of performance of the contract and a participation in the **risks** of the transaction (*cf commentary by E. Gaillard, cited above, p. 292*). In reading the Convention's preamble, **one may add** the contribution to the economic development of the host State of the investment as an additional condition.
In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, **these various criteria should be assessed globally** even if, for the sake of reasoning, the Tribunal considers them individually here." *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, Doc. RA-161, para. 52. Emphasis added.

> What are these intrinsic "characteristics of an investment", which distinguish an investment from a non-investment?
>
> The issue is one of the *quaestiones vexatae* of investment arbitration, and **the Peru-US FTA, like other investment treaties, does not provide a clear-cut answer**. …
>
> Faced with these difficulties, the Treaty does not establish a unitary definition of the characteristics with which all investments must comply; instead, the Treaty proposes a non-exhaustive list of **three alternative characteristics**, which are typical of investments …[72]

103. To escape from the alleged uncertainty of the text, the majority then jumps to Annex 10-F to declare that: "**Public debt is an investment protected by the Treaty and the *Bonos* constitute public debt**."[73]

104. This statement is however problematic, for at least three reasons: first, it would be strange that an Annex can modify the definition of investment, carefully explained in Article 1 of the FTA; second, this conclusion relies heavily on the fact that it is stated in Annex 10-F that "the purchase of debt issued by a Party entails commercial risk." As has been developed above, commercial risk is precisely different from investment risk and this Annex tends therefore in the opposite direction than the one in which the majority has engaged; third, this conclusion is reached before an examination of whether the *Bonos* have the characteristic of an investment, which is a reasoning putting the cart before the horses.

105. As a second example, I note that in spite of its apparently authoritative conclusion on public debt, the majority nevertheless purports, in a further step, to verify that the *Bonos* have the characteristics of an investment, an analysis which in, my view, shows a complete misunderstanding of what is an investment in international law, and concludes that: "**The *Bonos* meet the characteristics of an investment**."[74]

106. To support such finding, the majority elaborates on unheard "six characteristics which are typical of an investment": (i) Commitment of capital or other resources, (ii) Duration, (iii) the Assumption of risk, (iv) Expectation of gain or profit, (v) Non-commercial character, (vi) Securitization. To this, the majority adds an interrogation on the contribution to the development of the State, although this was not mentioned among the alleged six characteristics of a protected investment.[75]

107. For anyone familiar with the case law on the definition of what constitutes a protected investment, this whole presentation, especially of the six or seven characteristics of a protected investment is quite exotic!

108. This being said, it does not appear to be necessary to go through all the different statements of the majority concerning the 6 or 7 "characteristics" of an investment that need to be criticized. Rather, I only quote the definition of risk, put forward by the majority, which is completely at odds with the generally accepted definition of an

[72] Paras. 220-221 and 225 of the Award. Emphasis added.
[73] Page 56 of the Award
[74] Page 58 of the Award.
[75] Paras. 228-237 of the Award.

investment risk, as presented earlier. This is the risk considered sufficient by the majority for finding the existence of an investment:

> (iii) Assumption of risk: GPH assumed an economic or **commercial risk** of non-payment or default when it purchased the *Bonos*.
>
> This risk is different from that assumed by investors in direct investments, where the return depends on the success or failure of an enterprise; where an investor holds bonds formalizing public debt, the risk is effectively contractual and consists in the potential failure of the State to honor its commitments.[76]

109. This statement can be compared to another statement which I find quite contradictory. In its paragraph 263, the Award concludes that the *Bonos*:

> Meet the six characteristics which the Tribunal has identified as typical of investments under the FTA: commitment of capital, expectation of profit or gain, assumption of risk, long term duration, **non-commercial character** and contribution to the host State's economic development.[77]

110. It is quite difficult for me first to admit that a commercial risk is sufficient to qualify the existence of an investment and second to reconcile the statement that the Bonds do not result from a commercial transaction with the existence of a commercial risk.

111. As a final example, I cannot refrain from citing another holding of the majority suggesting that it is sufficient for someone to hope to make a profit to consider that she or he has made an investment:

> Because the Treaty explicitly provides for the protection of non-entrepreneurial investments such as the purchase of public debt, where an investor purchases public debt, the requirement that the investment consist of an operation "to develop an economic activity in the host State" obviously does not apply, because only entrepreneurial investments may result in an economic activity being performed in the host State. **The equivalent requirement for non-entrepreneurial investments is that the investor acts with the intent to obtain a profit**, and Art. 10.28 of the FTA specifically lists the "expectation of gain or profit" as one of the typical characteristics of investment.[78]

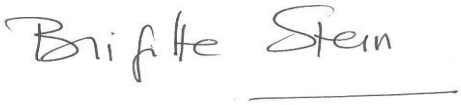
112. Here appears a new concept, "non-entrepreneurial investments", being an operation whose only goal is to make a profit. If such strange species as a non-entrepreneurial investment were to exist, any person buying a lottery ticket would be an investor!

113. To sum up, although public bonds in general can potentially be a protected investment, as elaborated on in many cases cited in the Annex to this Dissenting Opinion, the Bonos at stake in the present case clearly do not have the characteristic of an investment, and therefore cannot be considered as protected investments under the FTA and international law.

[76] Paras. 231 and 232 of the Award. Emphasis added.
[77] Para. 263 of the Award. Emphasis added.
[78] Para. 248 of the Award. Emphasis added.

C. GENERAL CONCLUSION

114. Each of the five points developed in this Dissenting Opinion is in my view sufficient to conclude that there is a clear abuse of process. Taken together, the conclusion is even more compelling. The Tribunal should have declared that it lacks jurisdiction over the present case.



Professor Brigitte Stern

Arbitrator

ANNEX

It appears to me **that the overwhelming case law considers financial instruments, like public bonds as investments only if they are linked with an economic operation of investment**. This holds true for old cases relating to public bonds, as well as for more recent investment arbitration cases.

1. Old arbitration cases: Companie Générale des Eaux de Caracas and Boccardo

Among the old cases, for example, two mixed-commission cases dealing with **sovereign bonds** should be mentioned. Jurisdiction was found only for those sovereign bonds used for public works or services rendered to the government, as opposed to those issued for general budgetary purposes of the issuing country. In *Companie Générale des Eaux de Caracas*, the commission accepted jurisdiction over Venezuelan bearer bonds, issued by the Venezuelan Government to the Belgian claimant CGE, to finance public works. The direct link between bonds issued as payment for services rendered to the Government for the development of public works overcame the presumption of no jurisdiction. In *Boccardo*, the commission accepted jurisdiction where the claimant had received public bonds from the Venezuelan Government in exchange for an economic global dealing implying the furniture of merchandise.[1]

2. *Fedax v. Venezuela*

The same approach has been adopted by ICSID, in relation with promissory notes in *Fedax.*[2] In this case, the promissory notes were acquired by Fedax by way of endorsement of **promissory notes issued by the Republic of Venezuela** in connection with the contract for the provision of services made with the Venezuelan corporation Industrias Metalúrgicas Van Dam C.A. The tribunal indeed verified that the promissory notes had the characteristics of an investment: this was due precisely to the fact that they participated in an economic operation of provision of services. The promissory notes were issued in connection with an economic operation to which the Government of Venezuela was a party.

> The Tribunal notes first that there is nothing in the nature of the foregoing transaction, namely **the provision of services** in return for promissory notes, that would prevent it from qualifying as an investment under the Convention and the Agreement.

Because **the promissory notes were linked with an underlying operation that qualified as an investment**, they were considered as an investment by the tribunal. Correctly interpreted, *Fedax*, according to me, does not support the majority's position.

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[1] *Compagnie Générale des Eaux de Caracas [Belgian Waterworks] v. Venezuela* (1903), in THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS, page 78; *Boccardo v. Venezuela* (1903), in THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS, page 80.

[2] *Fedax N.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, Doc. RA-159, para. 38. Emphasis added.

3. *CSOB v. Slovak Republic*

In the same way, in the case of *CSOB v. Slovak Republic*,[3] the CSOB **loan guaranteed by the State**, the repayment of which including interest thereof being secured by an obligation of the Ministry of Finance of the Slovak Republic, was considered as an investment, as the tribunal judged that it was **part of an overall economic operation** of restructuring of CSOB and development of the bank. But the tribunal was clear that not all loans, standing alone, could be qualified as investments:

> Loans as such are therefore not excluded from the notion of an investment under Article 1(1) of the BIT. It does not follow therefrom, however, that any loan and, in particular, the loan granted by CSOB to the Slovak Collection Company meets the requirements of an investment under Article 25(1) of the Convention or, for that matter, under Article 1(1) of the BIT, which speaks of an "asset invested or obtained by an investor of one Party in the territory of the other Party".
>
> …
>
> The contractual scheme embodied in the Consolidation Agreement shows, however, that the CSOB loan to the Slovak Collection Company is **closely related to and cannot be disassociated from all other transactions** involving the restructuring of CSOB.

Here again a loan guaranteed by a government was considered as an investment as it was part of global economic operation of development of the economy.

4. *Nations Energy v. Panama*

The case of *Nations Energy v. Panama*[4] goes in the same direction. According to the tribunal, "**fiscal credits**" (*creditos fiscales*) could not be considered as an investment in isolation, but were considered as such because they were linked with an underlying investment in the shares of a company. It was however clear for the tribunal that the "*creditos fiscales*" *per se* could not be considered as an investment:

> *Ciertamente, al aceptar que los Demandantes solamente invirtieron en **los créditos fiscales, esta operación no presentaría algunas de las características de una inversión** en el sentido del artículo 25 del Convenio CIADI.*
>
> *Al respecto, sin que sea necesario analizar de manera exhaustiva el debate acerca de la definición de los requisitos objetivos del articulo 25 y de su carácter necesario, el Tribunal Arbitral estima que la existencia de una cierta contribución a la economía del país y una toma de riesgos por parte del inversionista son elementos pertinentes – entre otros – para identificar una inversión. En efecto, difícilmente puede haber inversión protegida sin que el inversionista haya realizado aportes que tengan algún valor económico para el país, pues es precisamente la realización de dichos aportes la que justifica la protección otorgada por el Estado. Y la realización de semejantes aportes supone generalmente que el inversionista soporte algún riesgo.*

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[3] *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, paras 77 and 80. Emphasis added.

[4] *Nations Energy Inc., Electric Machinery Enterprises Inc., and Jamie Jurado v. Republic of Panama*, ICSID Case No. ARB/06/19, Award, 24 November 2010, paras 428-430. Emphasis added.

> *De ser identificada como inversión en los créditos fiscales en disputa, la operación ciertamente no cumpliría con dichos requisitos, pues no sería más que* ***una simple adquisición de créditos contra el Estado, la cual tendría un evidente carácter especulativo, no implicaría ninguna contribución a la economía del país y no comportaría ninguna toma de riesgos****.*

I think this last statement is quite relevant for the present case.

5. *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*

The case of *Poštová*,[5] relating to **Greek Government Bonds**, again does not support the majority position, which only cited part of the award and ostensibly did not quote the important statements of a majority of the tribunal undermining its position:

> In other words, under an "objective" approach, **an investment risk would be an operational risk and not a commercial risk or a sovereign risk**. A commercial risk covers, *inter alia*, the risk that one of the parties might default on its obligation, which risk exists in any economic relationship. A sovereign risk includes the risk of interference of the Government in a contract or any other relationship, which risk is not specific to public bonds.
>
> Under the objective approach, **commercial and sovereign risks are distinct from operational risk.** The distinction here would be between a risk inherent in the investment operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned – and all the other commercial and sovereign risks. This distinction has been underscored by Emmanuel Gaillard :
>
> > "*Trois éléments sont donc requis : l'apport, la durée et le fait que l'investisseur supporte, au moins en partie, les aléas de l'entreprise [...] Dans une telle conception, un simple prêt dont la rémunération ne dépend en rien du succès de l'entreprise ne peut être qualifié d'investissement.*"
>
> In sum, if "objective" criteria were to be applied, while it could be accepted that there was an intended duration of the possession by Poštová banka of the GGB interests, **the element of contribution to an economic venture and the existence of the specific operational risk that characterizes an investment under the objective approach are not present here**. In other words, under the objective approach of the definition of what constitutes **an investment, *i.e.* a contribution to an economic venture of a certain duration implying an operational risk**, the acquisition by Poštová banka of the interests in GGBs would not constitute an investment, and as a consequence, if that criteria were applied, the Tribunal could not assert jurisdiction.

Reading these important statements found in the *Poštová* award, it is difficult to assert, as did the majority, that it is a case which supports its position.

6. *Abaclat v. Argentina*: Dissenting Opinion of Georges Abi-Saab

The same idea that **public bonds** can only be considered as an investment if they are **linked with an economic operation creating value** is also at the root of the Dissenting Opinion of

[5] *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, Doc. RA-179, paras. 369-371. Emphasis added.

Abi-Saab in *Abaclat.* The latter first mentioned the fact that "(t)his is, to my knowledge, the first ICSID case that involves a sovereign debt bond (or a security entitlement therein), totally unrelated to a specific project or economic operation or enterprise in the borrowing State."[6] Looking at this debt and at the sums of money transferred to Greece, Abi-Saab, quite convincingly in my opinion, indicates that States can use their budget for ventures which have nothing to do with an investment venture:

> … not all funds made available to governments are necessarily used as "investment" in projects or activities contributing to the expansion of the productive capacities of the country. Such funds can be used to finance wars, even wars of aggression, or oppressive measures against restive populations, or even be diverted through corruption to private ends. This is why, for such loans to constitute investments under the ICSID Convention, they have to be concretely traced, even at several removes, **to a particular productive project or activity in the territory of the host country**…[7]

In other words, financial instruments like public bonds, can be considered as investments when they participate in an investment venture, but are not investments *per se*.

[6] *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, Dissenting Opinion, para. 35.

[7] *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, Dissenting Opinion, para. 113. Emphasis added.