

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*

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**DISSENTING OPINION OF  
PROFESSOR BRIGITTE STERN**

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## 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 dealt 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. There was a GENERAL ONGOING DISPUTE concerning the Bonds when Gramercy acquired them**

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")*.<sup>1</sup>
- 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.<sup>2</sup>
- 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.<sup>3</sup>
- 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.<sup>4</sup>

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

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<sup>1</sup> Para. 113 of the Award.

<sup>2</sup> Para. 117 of the Award.

<sup>3</sup> Para. 121 of the Award.

<sup>4</sup> Para. 122 of the Award.

here to refer to the often-quoted definition of a dispute by the PCIJ in *Mavrommatis Palestine Concessions*:<sup>5</sup>

[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**.<sup>6</sup>

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.<sup>7</sup>
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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<sup>5</sup> *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.

<sup>6</sup> Respondent's Statement of Rejoinder, paras. 24 and 27. Emphasis in italics in the original, emphasis in bold added.

<sup>7</sup> 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  
...<sup>8</sup>

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.<sup>9</sup>

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<sup>8</sup> Paras. 358 and 360 of the Award.

<sup>9</sup> 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”*.<sup>10</sup>

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**.<sup>11</sup>

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.<sup>12</sup>

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: 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 [...]<sup>13</sup>

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<sup>10</sup> Contract Number 1, 20 October 2006, Doc. R-701, Clause 3.2.

<sup>11</sup> Paras. 402-403 of the Award. Emphasis added.

<sup>12</sup> Para. 415 of the Award.

<sup>13</sup> 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).<sup>14</sup>
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.<sup>15</sup>
22. Using the words of a well-known arbitrator: “This is argument by labelling – not by analysis.”<sup>16</sup>
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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<sup>14</sup> Para. 422 of the Award.

<sup>15</sup> 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.

<sup>16</sup> *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.<sup>17</sup>

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*.

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<sup>17</sup> *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.<sup>18</sup>

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.<sup>19</sup>

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.

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<sup>18</sup> Page 91 of the Award.

<sup>19</sup> 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.<sup>20</sup>

**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.<sup>21</sup>

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:<sup>22</sup>

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**.”<sup>23</sup> 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.<sup>24</sup>

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...<sup>25</sup>

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<sup>20</sup> In paras. 358 and 360 of the Award, cited above.

<sup>21</sup> Respondent’s Statement of Defense, para. 33.

<sup>22</sup> Gramercy Memorandum, 24 January 2006, Doc. CE-114, p. 1. Emphasis added.

<sup>23</sup> CWS-2, Koenigsberger, para. 21. Emphasis added.

<sup>24</sup> Respondent’s PHB on Jurisdiction, para. 15.

<sup>25</sup> 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 acápite 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.<sup>26</sup>*

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”<sup>27</sup>, Gramercy itself referred to the “purchase [of] claims.”

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<sup>26</sup> Gramercy’s Bond Packages, Doc. CE-339.001, Clauses 1.7 and 3.2. Emphasis added.

<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup>

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

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<sup>28</sup> Para. 364 of the Award, referring to the Respondent's Statement of Defense, para. 194 and the Respondent's PHB on Jurisdiction, para. 60.

<sup>29</sup> Para. 295 of the Award.

Gramercy acquired an “expectative right” to possible payment – “a gamble,” as Dr. Hundskopf explained.<sup>30</sup>

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.<sup>31</sup> 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.**”<sup>32</sup>

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.”<sup>33</sup> 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. Gramercy had no intention to develop an economic activity in Peru**

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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<sup>30</sup> Respondent’s PHB on Merits and Quantum, para. 83. Emphasis in bold in the original, emphasis in italics added.

<sup>31</sup> 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.”).

<sup>32</sup> *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.

<sup>33</sup> 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.<sup>34</sup>

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 be 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.<sup>35</sup>

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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<sup>34</sup> Para. 282 of the Award.

<sup>35</sup> *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."<sup>36</sup>

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**."<sup>37</sup>

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.<sup>38</sup>

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<sup>36</sup> *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.

<sup>37</sup> 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.

<sup>38</sup> 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.<sup>39</sup>

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**.<sup>40</sup>

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.”<sup>41</sup>

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**.<sup>42</sup>

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

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<sup>39</sup> Respondent's PHB on Merits and Quantum, para. 39. Emphasis added.

<sup>40</sup> Claimant's Statement of Reply, paras. 212 and 557. Emphasis added.

<sup>41</sup> Claimants' PHB on Jurisdiction, para. 83. Emphasis added.

<sup>42</sup> 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;<sup>12, 13</sup>
- (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;<sup>43</sup>

<sup>12</sup> 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.

<sup>13</sup> Loans issued by one Party to another Party are not investments.<sup>44</sup>

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<sup>43</sup> FTA, Doc. RA-1, Art. 10.28. Emphasis added.

<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup>

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*

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<sup>45</sup> FTA, Doc RA-1, Annex 10-F. Emphasis added.

<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup>

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<sup>49</sup>, the ICSID Convention<sup>50</sup> or the UNCITRAL Rules.<sup>51</sup>

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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<sup>47</sup> Respondent’s PHB on Jurisdiction, paras. 80 and 81. Emphasis in the original.

<sup>48</sup> Submission of the USA, para. 18.

<sup>49</sup> *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.

<sup>50</sup> *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.

<sup>51</sup> *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.”<sup>52</sup>; 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.”<sup>53</sup>; 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.**”<sup>54</sup>

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*<sup>55</sup>, *Ambiente*<sup>56</sup>, *Abaclat*<sup>57</sup>, and *Poštová*<sup>58</sup>, but as can be seen in the extracts of the decisions quoted in the Annex, *Fedax* and *Poštová* say the

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<sup>52</sup> *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.

<sup>53</sup> *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, para. 84. Emphasis added.

<sup>54</sup> *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.

<sup>55</sup> *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.

<sup>56</sup> *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.

<sup>57</sup> *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, Doc. RA-171.

<sup>58</sup> *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”,<sup>59</sup> *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**”<sup>60</sup> 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<sup>61</sup> 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.”<sup>62</sup> 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.<sup>63</sup>
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

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<sup>59</sup> *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.

<sup>60</sup> *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.

<sup>61</sup> 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.

<sup>62</sup> Para. 197 of the Award, citing RER-10, Guidotti II, para. 4.

<sup>63</sup> Respondent’s Statement of Rejoinder, para. 179.

USD 33,222,630.29.<sup>64</sup> 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.<sup>65</sup>

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**<sup>66</sup>, 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,

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<sup>64</sup> See RER-11, Quantum II, para. 213; CWS-6, Joannou, para. 7; CE-711.

<sup>65</sup> *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, Doc. RA-340, para. 222.

<sup>66</sup> 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.<sup>67</sup>**

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.<sup>68</sup>

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

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<sup>67</sup> *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, Doc. RA-340, paras. 229-230. Emphasis added.

<sup>68</sup> 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...”<sup>69</sup>

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”.<sup>70</sup> 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.<sup>71</sup>

102. The term ‘not clear-cut’ appears shortly after in the Award:

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<sup>69</sup> Paras. 180 and 181 of the Award.

<sup>70</sup> FTA, Doc. RA-1, Art. 10.28.

<sup>71</sup> 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 ...<sup>72</sup>

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.”**<sup>73</sup>
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.”**<sup>74</sup>
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.<sup>75</sup>
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

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<sup>72</sup> Paras. 220-221 and 225 of the Award. Emphasis added.

<sup>73</sup> Page 56 of the Award

<sup>74</sup> Page 58 of the Award.

<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup>

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.<sup>78</sup>

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.

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<sup>76</sup> Paras. 231 and 232 of the Award. Emphasis added.

<sup>77</sup> Para. 263 of the Award. Emphasis added.

<sup>78</sup> 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.

A handwritten signature in cursive script that reads "Brigitte Stern". The signature is written in black ink and is positioned above a horizontal line.

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.<sup>1</sup>

### 2. *Fedax v. Venezuela*

The same approach has been adopted by ICSID, in relation with promissory notes in *Fedax*.<sup>2</sup> 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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<sup>1</sup> *Companie 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.

<sup>2</sup> *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*,<sup>3</sup> 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*<sup>4</sup> 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 artículo 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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<sup>3</sup> *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.

<sup>4</sup> *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*,<sup>5</sup> 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

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<sup>5</sup> *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.”<sup>6</sup> 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...**<sup>7</sup>

**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*.**

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<sup>6</sup> *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, Dissenting Opinion, para. 35.

<sup>7</sup> *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.