

**In the Arbitration under the Arbitration Rules of the United Nations  
Commission on International Trade Law and the Trade Promotion Agreement  
between the Republic of Peru and the United States of America**

**GRAMERCY FUNDS MANAGEMENT LLC,  
GRAMERCY PERU HOLDINGS LLC**

*Claimant*

v.

**THE REPUBLIC OF PERU**

*Respondent*

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**EXPERT REPORT OF DELIA REVOREDO MARSANO DE MUR**

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June 2, 2016

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My name is Delia Revoredo Marsano de Mur, and I am an attorney practicing law in the Republic of Peru. I am submitting this expert report in my capacity as an independent expert to assist the Tribunal in resolving the referenced dispute.

## I. CREDENTIALS

1. I obtained my law degree from the *Pontificia Universidad Católica del Perú* in 1975. I have been Professor of Constitutional Law, Private International Law and Family Law at the *Pontificia Universidad Católica del Perú* for over 30 years; and I have also taught at the University of Lima and at the Peruvian Academy of Diplomacy. I have been a visiting Professor at other Law Schools in the U.S.A. and Latin America, including Yale University, Georgetown University, Louisiana State University (LSU) and University of California - Berkeley, and have participated in lectures, seminars and conferences throughout Europe and Latin America. I was a sitting Justice at Peru's Constitutional Tribunal from 1996 to 1997, and then from 2000 to 2005. I was also a member of the Commission for the Reform of the Peruvian Civil Code of 1936, which drafted the current Peruvian Civil Code. Among my most recent publications is the *Código Civil: Exposición de Motivos y Comentarios*. I am also an arbitrator before the Lima Chamber of Commerce and other national and international institutions. I currently specialize in Private International Law, Constitutional Law and Domestic and International Arbitration. I attach my curriculum vitae as Exhibit A.

## II. EXECUTIVE SUMMARY

2. This report discusses the following subjects generally: (i) The Current Value Principle, as applied to the Land Reform Bonds, including its meaning, background, effects and interpretation under Peruvian Law and (ii) the effects of the Constitutional Tribunal's July 16, 2013 enforcement order in docket N° 22-1996-PI/TC. I have read the case law cited in this report; the brief filed by the Association of Land Reform Bondholders of Peru ("ABDA") with the Constitutional Tribunal in March 2015 in that same docket, together with its annexes and appendices, as well as the relevant documents concerning the criminal investigation proceeding in progress before the Twelfth Criminal Court of Lima; and Supreme Decrees No. 017-2014-EF and No. 019-2014-EF issued by the Ministry of Economy and Finance ("MEF").



3. The conclusions of this report are:

- The Land Reform Bonds are valid and enforceable obligations. The Current Value Principle primarily contained in Article 1236 of the Civil Code and fully applicable to the Land Reform Bonds, mandates that when the value of an obligation is paid, such payment shall be equivalent to the obligation's original value.
- Any offer or methodology resulting in paying the Land Reform Bonds at anything less than their value pursuant to the Current Value Principle is invalid under Peruvian law.
- The Constitutional Tribunal's enforcement order of July 16, 2013 (docket N° 22-1996-PI/TC), through which the Constitutional Tribunal instructed the MEF to issue mandatory regulations applicable to all Land Reform Bonds with a specific dollarization methodology, contains defects that nullify it for a variety of reasons, but primarily because the Constitutional Tribunal manifestly exceeded its competence and transgressed constitutional principles and mandates. Allegations of wrongdoing and forgery concerning that enforcement order are further reasons why that enforcement order should have no effect.

### **III. PERSONAL EXPERIENCE DEFENDING THE RULE OF LAW AND THE CONSTITUTIONAL TRIBUNAL'S INDEPENDENCE**

4. The Rule of Law and the principle of Jurisdictional Independence — which are at the core of this expert report — are very close to my heart. Abiding by these principles has shaped my personal life. Defending them has put my life in peril and forced me to live in exile for over a year.
5. In 1996, I was one of seven judges elected by Congress to form Peru's Constitutional Tribunal, which monitors the state's adherence to the Constitution. In 1997, former President Alberto Fujimori of Peru, President since 1990, initiated a campaign to have Article 112 of the Peruvian constitution reinterpreted. Article 112 essentially provides for a 5-year Presidential term with only one immediate reelection. The so-called reinterpretation of article 112 of the Constitution was being made through Law 26,657, styled the



“Authentic Interpretation Act,” and would have allowed President Fujimori to run for office a third time, despite already having been President for two consecutive terms.

6. The Lima Bar Association challenged the constitutionality of Law 26,657. Because I was one of the seven sitting justices at the time that claim was filed, I immediately became the target of enormous political and personal pressure. On January 3, 1997, along with two other of the seven justices of the Constitutional Tribunal — Manuel Aguirre Roca and Guillermo Rey Terry — I voted that the provisions of this law could not be applicable to President Fujimori and, therefore, he could not run for president in 2000. For reasons that I will not address here, the other four justices recused themselves in that case.
7. Shortly after issuing that decision, Congress — under the Government’s control — created a biased Commission to investigate the circumstances of my decision, presented phony charges against me and illegally removed me and Justices Aguirre and Rey from the Tribunal — a clear violation of the Rule of Law, the Principle of Jurisdictional Independence and Autonomy of the Constitutional Tribunal. Shortly thereafter, I was elected Dean of Peru’s Bar Association by all Peruvian lawyers.
8. That was a very difficult time for me and my family. Apart from the countless death threats, for instance, a car that my husband had sold days before was incinerated and shot. The person that owned the car at the time died during this event. As another example, due to political pressure my husband’s commercial network quickly disappeared and he had to close his businesses. We perceived this as part of the government’s intimidation campaign against us.
9. At a press conference on 13 April 1998, in part moved by rumors that we were going to be imprisoned, I announced my decision to seek refuge in Costa Rica's Embassy and, together with my husband, applied for political asylum. I immediately sought protection from the Organization of American States’ Inter-American Commission on Human Rights. The Commission found among other things, that my removal was a violation of my due process and political rights. In January 2001, the Inter-American Court of Human Rights



vindicated our rights and ordered the Peruvian state to reinstate me to the Constitutional Tribunal.<sup>1</sup>

10. I returned to Lima when all legal proceedings against me were dismissed, and I was immediately reinstated as Justice to the Constitutional Tribunal. Coincidentally, one of the first decisions I was in charge of drafting was the decision in docket No 00022-1996-PI/TC concerning the Land Reform Bonds – which eventually became a landmark decision of March 2001 that upholds the right to property and confirm Peru’s obligation to honor its debts.

11. I mention this background not only because it forms a part of my own experience and qualifications to be an independent legal expert, but also because it highlights the importance to Peru of judicial independence and the rule of law.

#### **IV. THE PAYMENT OF THE LAND REFORM BONDS MUST REFLECT THEIR ORIGINAL VALUE AND PURCHASING POWER**

12. The facts concerning the Land Reform Bonds are not subject to much debate and are generally known to all Peruvians. After enacting Decree Law No. 17716 of June 24, 1969 — the Land Reform Act — the Peruvian State forced thousands of landholders whose property was expropriated to receive bonds as alleged compensation (“Land Reform Bonds”).<sup>2</sup> The terms and conditions of the Land Reform Bonds were clearly established in the Land Reform Act and consisted of Class A, B and C bonds payable in 20, 25 and 30 years, with interest rates of 6%, 5% and 4%, respectively.<sup>3</sup>

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<sup>1</sup> CE-89, Inter-American Court of Human Rights, *Caso del Tribunal Constitucional v. Peru*, Judgment of January 31, 2001.

<sup>2</sup> CE-01, Article 173 of Decree Law No. 17716. “*The Executive is hereby authorized to issue, at the request of the Ministry of Agriculture and Fishery, Land Reform Debt Bonds up to the sum of Fifteen Billion Soles Oro (S/.15,000,000.00) (sic).*” Article 177 of Decree Law No. 17716. “*The Land Reform Debt Bonds and the Industrial Promotion shares will be used to pay the value of expropriated property to the owners of said property, according to law [...].*”

<sup>3</sup> CE-01, Article 174 of Decree Law No. 17716.

13. Although the State guaranteed to honor the Land Reform Bonds “without reservations,”<sup>4</sup> in the mid-1980’s, Peru began defaulting on the Land Reform Bonds. It is a generally accepted fact that no payments were made after 1992 when the Agrarian Bank, the institution in charge of paying the bonds’ coupons, was liquidated.<sup>5</sup>
14. The constitutional and legal principles applicable to the Land Reform Bonds should not be subject to much debate. Peru’s Constitutional Tribunal (the highest oversight body of the Constitution) and Peru’s Supreme Court of Justice (the Judiciary’s highest court) have made abundantly clear that the Land Reform Bonds are valid obligations that must be honored by the State; that they constitute “debts of value,” as opposed to “debts of money” or “nominal debts;” and that payment of the Land Reform Bonds must be governed by the so-called Current Value Principle contained in Article 1236 of the Civil Code, pursuant to which payment of a debt must represent, at the time of payment, the value that such debt had when it was undertaken. These fundamental principles have been the established law of Peru for more than a decade.

#### **A. Legal Basis of the Current Value Principle**

15. The Current Value Principle is set forth, primarily, in Articles 1235 and 1236 of the 1984 Peruvian Civil Code. Its purpose is to protect the value that a debt or obligation’s principal (the value of the obligation as originally undertaken) has *vis-à-vis* the loss in purchasing power of the currency used for payment of such debt or obligation. This protection extends until the payment is made or an obligation is fulfilled. For context, Article 1235 of the Civil Code basically allows parties to a contract or other legal relationship to update the value of a debt by mutual agreement.<sup>6</sup> Article 1236 of the Civil Code, on the other hand, provides:

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<sup>4</sup> **CE-01**, Article 175 of Decree Law No. 17716. “*Bonds will be issued to the order of the beneficiary and cannot be transferred until the year of their amortization. They will be guaranteed by the State without reservations whatsoever and without prejudice to the fact that they can be pledged in support of all the goods and income of the Land Reform. Bonds will be issued in annual series for each class. [...]*”

<sup>5</sup> **CE-07**, Decree Law N° 25478, May 8, 1992.

<sup>6</sup> **CE-55**, Peruvian Civil Code of 1984, Article 1235: “*Notwithstanding article 1234, the parties may agree that the amount of a debt undertaken in national currency be referred to automatic readjustment indexes, as established by Peru’s Central Reserve Bank, to other currencies or merchandise, for the purposes of maintaining said amount at constant value.*”

*When the value of an obligation must be restored, said value shall be calculated at the value it has on the date of payment, unless otherwise provided by law or agreement to the contrary.*<sup>7</sup>

16. Under Peruvian law, however, the Current Value Principle only applies to a category of obligations styled “obligations of value,” as opposed to the so-called “obligations of money” or “monetary obligation.” According to Felipe Osterling, the original drafter of Articles 1235 and 1236 of the Civil Code, Article 1236 “*which must be applied to all obligations that are not monetary, but are rather obligations of value.*”<sup>8</sup> Classic examples of “obligations of value” include the obligation to compensate, to restitute, obligations arising from unjust enrichment, and their purpose is to restore the obligation’s original value.<sup>9</sup> In turn, “obligations of money” are paid by delivering a specific — and sometimes fixed — sum of money, identical to the amount owed, only taking into account the notional amount of the currency stipulated when the obligation was undertaken.<sup>10</sup> This is the case, for instance, of a mutual loan agreement (in Spanish *Contrato de Mutuo*) entered into without any type of agreement for preserving the purchasing power of the currency.

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*The payment of the debts mentioned in the previous paragraph shall be made in national currency, in an amount equivalent to the reference value as of the date of maturity of the obligation.*

*If the debtor delays payment, the creditor may demand, at his choice, that the debt be paid at the reference value as of the date of maturity of the obligation, or as of the date in which payment is made.”*

<sup>7</sup> In 1993, article 1236 of the Civil Code was revised by Legislative Decree No. 768, published on April 22, 1993, with this text: “*When by law or judicial decision an obligation must be restored or its value must be defined, said value is calculated at the value it has on the date of payment, unless otherwise provided by law or agreement to the contrary. The Judge, even during the enforcement proceedings, is authorized to update the monetary claim by applying the criteria referred to in Article 1235 or any other corrective index allowing the readjustment of the amount of the obligation at constant value. For this purpose, the judge shall take into account the circumstances of the specific case, in a duly reasoned decision.*” Later, this article returned to its original wording—the current one—pursuant to Law No. 26598, published on April 24, 1996. See, CE-55.

<sup>8</sup> CE-76, OSTERLING, Felipe and CASTILLO, Mario. *Estudio sobre las obligaciones dinerarias en el Perú* [Study of Monetary Obligations in Peru]. National Autonomous University of Mexico, Mexico City, 1995, p. 102.

<sup>9</sup> See CE-74, BENAVIDES, Eduardo. “El cumplimiento de prestaciones dinerarias en el Código Civil Peruano” [Payment of Monetary Benefits in the Peruvian Civil Code], *Themis – Revista de Derecho [Law Review]*, No. 30, Lima, 1994, p. 176.

<sup>10</sup> See CE-76, OSTERLING, Felipe and CASTILLO, Mario. *Estudio sobre las obligaciones dinerarias en el Perú*. National Autonomous University of Mexico, Mexico City, 1995, p. 47.

17. Through the Current Value Principle, Peru's legal system essentially aims to safeguard the fundamental right to property contained in Article 2, subparagraph 16 of the Constitution, the inviolability of which the State is obligated to guarantee as ordered by Article 70 of the Constitution. As held by the Constitutional Tribunal, the Current Value Principle is "inherent to property."<sup>11</sup> The Current Value Principle thus emerges as a counterweight to the loss of a currency's purchasing power; which was noteworthy in Latin American countries that — like Peru — suffered extreme inflation rates for significant periods of time. This legal principle thus mandates that obligations be paid in such a way that maintains its value through time; namely, that the value of payment be equivalent to the original value of the obligation.<sup>12</sup>

18. Osterling and Castillo further explain that "*the objective of [article 1236] lies—fundamentally—in the need for the creditor, when the debtor has defaulted on its obligation and when the creditor demands the performance of the obligation or its value from the debtor, to receive that performance or that value, at constant terms.*" Otherwise, they state that "*in countries such as ours, in which devaluation of the national currency, to a greater or lesser degree, is frequent, the debtor would have an improper benefit, and his intentional misconduct or negligence would be compensated with insignificant payments, i.e., with benefits that would be repugnant to elementary principles of justice.*"<sup>13</sup> As the authors indicate, the method for updating the value of the obligation "*must be closely related to the devaluation of the amount of money owed, so as to keep its purchasing power intact.*"<sup>14</sup>

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<sup>11</sup> CE-11, Constitutional Tribunal, Decision, Exp. N° 022-96-I/TC, March 15, 2001, Rationale 7.

<sup>12</sup> OSTERLING and CASTILLO state that: "[According to this principle] *when a money obligation is undertaken in national currency, the notional amount of the aforesaid obligation will be unimportant, and what will matter is the value that the aforesaid amount represents, which shall be preserved intact until it is fulfilled.*" In: CE-76, OSTERLING, Felipe and CASTILLO, Mario. *Estudio sobre las obligaciones dinerarias en el Perú*. National Autonomous University of Mexico, Mexico City, 1995, p. 47.

<sup>13</sup> CE-82, OSTERLING, Felipe and CASTILLO, Mario. *Tratado de las Obligaciones, Parte 2, Biblioteca para leer el Código Civil* [Treatise on Obligations, Part 2, Reference for Reading the Civil Code]. Fondo Editorial de la Pontificia Universidad Católica del Perú, Lima, 1996, p. 170.

<sup>14</sup> CE-76, OSTERLING, Felipe and CASTILLO, Mario. *Estudio sobre las obligaciones dinerarias en el Perú*. National Autonomous University of Mexico, Mexico City, 1995, p. 103.



19. With regard to Article 1236 of the Civil Code, Peruvian legal scholar Arias-Schreiber comments:

*We believe that in these cases we are in the presence of what legal scholarship terms obligations of value, which are those in which money is only a measure of value used to recover the creditor's patrimony, such that when reparation is made, the amount paid must be calculated as the value it has on the day of payment, i.e., duly readjusted to prevent the damage that results from devaluation caused by the loss of the of purchasing power of the currency used for payment of the compensation because of nonperformance or partial, late or defective performance of an obligation.*<sup>15</sup> (emphasis added, bold in original).

20. Based on the foregoing, the Current Value Principle has three main features: (i) it works as a counterweight to the loss of a currency's purchasing power; (ii) it functions as a general rule that extends to all obligations of value, and (iii) it is compensatory in nature.<sup>16</sup>

#### **B. Application of the Current Value Principle to Land Reform Bonds**

21. In March 2001, the Constitutional Tribunal made clear that the payment of the Land Reform Bonds was governed by the Current Value Principle. It did so by partially upholding a claim for unconstitutionality filed by the Engineers Bar Association of Peru ("CIP") against certain provisions of Laws Nos. 26597 and 26599. In short, those laws effectively derogated Article 15 and the Fourth Transitory Provision of the Legislative Decree N° 653 of August 1991, which provided that "*the value of expropriated lands will be paid at its market value and in cash.*"<sup>17</sup> According to the Constitutional Tribunal, paying the land's updated value responded to a "*basic sense of justice*" as per Article 70 of the

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<sup>15</sup> CE-69, ARIAS-SCHREIBER, Max. *Luces y sombras del Código Civil peruano de 1984* [Lights and Shadows in the 1984 Peruvian Civil Code], Vol. II, Librería Studium, Lima. 1991, p. 64.

<sup>16</sup> See CE-76, OSTERLING, Felipe and CASTILLO, Mario. *Estudio sobre las obligaciones dinerarias en el Perú*. National Autonomous University of Mexico, Mexico City, 1995, p. 102.

<sup>17</sup> CE-66, Article 15 and the Fourth Transitory Provision of the Legislative Decree N° 653.

Constitution, and derogating from that principle would breach the Current Value Theory which the Tribunal noted is “*inherent to property.*”<sup>18</sup>

22. For context, Law No. 26597, published on April 24, 1996, established the procedure for handling expropriation proceedings for purposes of land reform and allocation of rural properties, in a way that ran counter to basic principles of law and justice, by allowing the State to pay the Land Reform Bonds at face value and indicating that the mere delivery of the bonds — even if later defaulted — constituted fair compensation. Indeed, Article 2 of Law No. 26597 stated that:

*[...] the Land Reform Bonds were delivered as a cancellation of the expropriation's value. Therefore, regardless when said bonds are to mature, payment thereof shall be made at their nominal value plus the interest set forth for each issuance and type of bond, in accordance with the legal provisions under which they were created; and thus the readjustment for inflation specified in the second part of Article 1236 of the Civil Code, as amended by Legislative Decree No. 768, is not applicable.*<sup>19</sup>

23. Also, Law No. 26597 amended various rules applicable to the Land Reform Bonds, including for those proceedings already underway, allowing the State to pay them at face value. Considering Peru's inflation, such payment was worthless. The CIP thus filed an unconstitutionality claim against various articles of that law. The Constitutional Tribunal repealed that article because—among other violations—it violated the fundamental right to property and the Current Value Principle.

24. The Constitutional Tribunal confirmed that the current value principle is inherent to property<sup>20</sup> and that the State is under an obligation to guarantee it as provided in Article 70 of the Constitution (taking into account the exceptions that this same article establishes).<sup>21</sup>

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<sup>18</sup> CE-11, Judgment of the Constitutional Tribunal of March 15, 2001, entered in File No. 022-96-I/TC, rationale 1.

<sup>19</sup> CE-88, Law N° 26597, April 24, 1996, Article 2.

<sup>20</sup> CE-11, Judgment of the Constitutional Tribunal of March 15, 2001, entered in File No. 022-96-I/TC, rationale 7.

<sup>21</sup> CE-72, Article 70 of the Constitution of Peru. “*The right to property is inviolable. The State guarantees it. It is exercised in harmony with the common good and within the limits of the law. No one shall be deprived of their property, except solely on grounds of national security or public need, declared by law,*

As mentioned earlier, it also recognized that the provisions established in Legislative Decree No. 653 for valuation and updated payment of expropriated lands (current value) respond to a “*basic sense of justice*” according to Article 70 of the Constitution.<sup>22</sup>

25. The Constitutional Tribunal also made clear that paying the Land Reform Bonds at face value would be confiscatory, and thus a violation of Article 70 of the Constitution, which only allows expropriation when it is followed by fair compensation.<sup>23</sup> In view of this last point, any order from the Executive or the Judiciary had to apply the Current Value Principle in the terms of the Constitutional Tribunal’s decision.<sup>24</sup> According to Felipe Osterling, nominal payment “*embraces the notion that monetary laws are public policy, that the value of the currency is established by law and that its use as legal tender, except for express authorization by the law itself, cannot be subject to agreements among individuals that could reduce its value.*”<sup>25</sup> Latin American legal scholar Luis Uribe maintains that this criterion “*rests on a legal fiction consisting of the idea that the value of such amount has not changed in the time between the birth of the obligation and the moment of its solution.*”<sup>26</sup>
26. The application of the Current Value Principle to the payment of Land Reform Bonds has also been used by Peru’s Supreme Court. For example, the Permanent Constitutional and

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*and upon cash payment of the fair value, which must include compensation for potential damages. There are procedures established before the Judiciary to challenge the property value indicated by the State in the expropriation proceedings.”*

<sup>22</sup> CE-11, Judgment of the Constitutional Tribunal of March 15, 2001, entered in File No. 022-96-I/TC, rationale 1.

<sup>23</sup> *Ibid*, rationale 2; see CE-72, Article 70.

<sup>24</sup> This legal mandate was already contained in General Provision One as well as in the former Organic Law of the Constitutional Tribunal (published on January 10, 1995 with Law No. 26435, now repealed) and the current Law 28301 dated July 23, 2004. In both cases, General Provision One contains the following mandate: “*Judges and Tribunals shall interpret and apply the laws, or any norm that has the force of a law, as well as regulations, in accordance with the interpretation that derive from the rulings issued by the Constitutional Tribunal in any type of proceedings. .*” See CE-77.

<sup>25</sup> CE-56, REVOREDO, Delia (compiler). *Código Civil Peruano, Exposición de motivos y comentarios* [Peruvian Civil Code, Statement of Legislative Intent and Commentary], T.V, Lima, 1984, p. 296.

<sup>26</sup> CE-57, URIBE, Luis. *Las obligaciones pecuniarias frente a la inflación* [Pecuniary Obligations Vis-à-Vis Inflation]. Temis, Bogotá, 1984, p. 30.

Social Law Division of the Supreme Court, in its Judgment dated July 12, 2006, (CAS. No. 1002-2005-ICA), held:

*Considering that said bonds represent the mechanism for paying the land reform debt in the form of fair compensation, they cannot be paid at face value because – due to the inflationary process and the legal currency changes – they no longer reflect the value for which they were issued. This is why, pursuant to the [Constitutional Tribunal March 2001 Decision], it is inappropriate to apply “nominal value” criterion for the payment of the land reform bonds, but instead the “current value” principle under which said bonds represent the value for which they were originally issued.<sup>27</sup>*

27. This same Division, in its Judgment dated January 26, 2001 (CAS. No. 1958-2009-LIMA), indicated that:

*[...] that the land reform bonds must be paid in accordance with the current value principle, pursuant to the binding [Constitutional Tribunal March 2001 Decision].<sup>28</sup>*

28. Therefore, by no later than 2006 it was abundantly clear that, under Peruvian law, the payment of the Land Reform Bonds is subject to the Current Value Principle and as such, payment should neutralize the effects of inflation and the loss of the currency’s purchasing power in such a way that payment reflects the bonds’ original value.

**C. As per well-established jurisprudence in Land Reform Bonds cases, Peruvian courts and tribunals have used the CPI to comply with the Current Value Principle**

29. Peruvian courts have generally held that the Land Bonds have to be updated using CPI and that the Constitution, the Civil Code, and the 2001 CT Decision all imposed an obligation on the Government to pay the current value of the Land Bonds under CPI. For instance, in 2006 and 2010 Peru’s Supreme Court, acting through its Permanent Chamber on

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<sup>27</sup> CE-14, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1002-2005 ICA, July 12, 2006, Whereas Clause 15.

<sup>28</sup> CE-15, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1958-2009, January 26, 2010, Whereas Clause Three.

Constitutional and Social Law, reiterated that methodology when ordering payment of Land Bonds.<sup>29</sup> Lower courts have also repeatedly used CPI in multiple judgments.<sup>30</sup>

30. Peru's obligation to honor the Land Bonds at their current value using CPI is also found in acts of Congress. For instance, a 2005 report by the Agrarian Commission of Congress noted that the Government "could not constitutionally elude its obligation to pay the Land Reform debt" and deemed it "essential" to provide current value for the Land Bonds.<sup>31</sup> That report recommended to Congress the approval of a bill mandating the use of the CPI for Metropolitan Lima published by the National Institute of Statistics and Informatics ("INEI").<sup>32</sup> The report noted that the CPI is the "*official*" factor applied by the State to update national accounts, and that no government or private agency "has questioned the validity" of the CPI for such purposes.<sup>33</sup>

**D. In 2004, the Constitutional Tribunal rejected the possibility of imposing a dollarization method for payment of the Land Reform Bonds**

31. While the Tribunals and Courts have for years applied the CPI (and similar methodologies based on the fluctuation of the currency's purchasing power) to calculate the current value of land reform bonds, the Constitutional Tribunal has expressly indicated that imposing a dollarization methodology as the "only solution" for all creditors would be unconstitutional.

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<sup>29</sup> **CE-14**, Supreme Court, Constitutional and Social Law Chamber, CAS No 1002-2005 of July 12, 2006, Sections 5 and 15; *see also* **CE-15**, Supreme Court, Constitutional and Social Law Chamber, CAS No 1958-2009 of January 26, 2010, Foundation 4.

<sup>30</sup> *See for instance*, **CE-148**, Civil Court of Pacasmayo, Resolution, Case File N° 163-73, January 29, 2010, Sixth Consideration and Decision (upholding an expert report that updated the value of Land Bonds using CPI); **CE-142**, Specialized Civil Court of Pacasmayo, Expert Report, File N° 163-1973, December 18, 2009, pp. 4, 7, 8; **CE-126**, Superior Court of La Libertad, Second Civil Chamber, Resolution, Case File N° 652-07, June 14, 2007, First, Fifth, and Seventh Considerations and Decision (upholding an expert report that updated the value of Land Bonds using CPI); **CE-119**, Fifth Civil Court of Trujillo, Expert Report, File N° 303-72, November 6, 2006, pp. 4-5; **CE-123**, Superior Court of Lima, Third Civil Chamber, Case N° 1577-2006, Resolution of January 31, 2007, Fifth Consideration (upholding an expert report that updated the value of Land Bonds using CPI, 2005-09-12) p. 2.

<sup>31</sup> **CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR, N° 11459/2004-CR, and N° 11971/2004-CR, p. 13.

<sup>32</sup> *Id.*, Article 8, p. 39.

<sup>33</sup> *Id.*, p. 13.

32. On October 10, 2000, the Executive Branch issued Emergency Decree No. 088-2000 in an attempt to once and for all resolve the payment of Land Reform Bonds. Article 5 of Emergency Decree 88-2000 established a methodology for updating Land Reform bonds known as “dollarization,” indicating that *“the unpaid principal of the bonds will be converted to United States dollars at the official exchange rate in effect on the issue date and an annual seven and a half percent interest rate (7.5%) would be applied to the resulting amount until the month prior to the month of the calculation, compounded annually.”*<sup>34</sup> Article 2 of this mechanism establishes that valid and registered bonds would be paid *“by the delivery of bonds issued by the Public Treasury for the value of the updated debts.”*<sup>35</sup>

33. The Ica Bar Association brought an unconstitutionality claim against Articles 1, 3, 5, 9 and 10 of Emergency Decree No. 088-2000, arguing the violation of property rights, due process, equality before the law and effective judicial protection, as well as the principles of judicial independence and *res judicata*. I was sitting as Justice of the Constitutional Tribunal at the time. On August 2, 2004, the Constitutional Tribunal dismissed the claim and held that the Decree did not violate the principle of judicial independence because:

*[Emergency Decree 88-2000] does not attempt to impose any solution on the creditors of land reform debt but merely offers an alternative to the possibility of going before the Judiciary to demand performance of the obligation.*<sup>36</sup>

34. The Tribunal’s analysis is highly relevant to this case. Armed with the mission of analyzing the alleged unconstitutionality of Emergency Decree No. 088-2000, the Constitutional Tribunal declared that it was constitutional *insofar as it was an option for the creditor*, meaning it was entirely up to the creditors whether they accepted such methodology or not, and that creditors retained the right to file suits claiming the amounts owed. The Constitutional Tribunal held that this situation is very different from Law No. 26597—which gave rise to the Decision dated March 15, 2001, mentioned above, and was

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<sup>34</sup> CE-88, Emergency Decree N° 088-2000, October 10, 2000, Article 5.

<sup>35</sup> *Id.*, Article 2.

<sup>36</sup> CE-107, Judgment of the Constitutional Tribunal dated August 2, 2004, entered in File No. 0009-2004-AI/TC, rationale 11.

declared unconstitutional—that in fact imposed a sole solution that had to be adopted even by those with a judicial proceeding underway.

35. The Tribunal expressly indicated that Article 5 of Decree 88-2000 did not impose an updating methodology excluding indexation as per the Civil Code.<sup>37</sup> The Court thus confirmed its previous opinion with regard to the mechanisms for updating the debt, given that it verified that such mechanisms had not been displaced by the new decree. Finally, the Constitutional Tribunal made clear that preventing bondholders from accessing the judiciary to demand what they consider to be the bonds' fair payment would be unconstitutional.

36. Hence by 2006, Peruvian law established that the Land Reform Bonds had to be paid at current value, that the CPI was the normal method for calculating current value, that the Peruvian courts were available to bondholders to vindicate their rights to payment of the Land Reform Bonds' current value, and that the government could not impose a mandatory payment mechanism that offered less than current value, or prevented the bondholders from seeking current value in courts.

#### **V. THE CONSTITUTIONAL TRIBUNAL'S ENFORCEMENT RULING OF JULY 16, 2013 CONTAINS DEFECTS AND SHOULD BE REPEALED**

37. On July 16, 2013, the Constitutional Tribunal issued an Enforcement Order in File No. 022-1996-PI/TC (hereinafter the "2013 Order"), pertaining to the same case in which the Constitutional Tribunal handed down its landmark decision of March 2001 vindicating the application of the Current Value Principle to the payment of Land Reform Bonds.

38. The 2013 Order is a response to a motion requesting the enforcement of the March 2001 Decision, filed by the CIP on October 5, 2011, in which the CIP specifically requested the: "*initiation of the process of updating claims arising from the proceedings and from land reform and the respective payment [of the Land Reform Bonds].*" The CIP broadened this request, asking the Tribunal to rule on "*the means available to those whose property has been expropriated, heirs or assignees of the Land Reform for collecting on their claims,*

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<sup>37</sup> *Ibid*, rationale 13.



*either by means of updated payment of the Land Reform Bonds with the respective interest, which Bonds were acknowledged and issued by the Peruvian State, as well as the new valuation of the expropriated land at market value pursuant to the current Article 15 of Legislative Decree No. 653.”*

39. In the midst of a media scandal related to accusations of alleged manipulations of the 2013 Order and abuses by certain Justices of the Constitutional Tribunal — on which I will comment below — the 2013 Order ordered that the Land Reform Bonds be updated by *“converting the unpaid principal into United States dollars, as of the first date that the coupons of the aforesaid bond were not paid, plus the interest rate for United States Treasury Bonds.”*<sup>38</sup> The Constitutional Tribunal further ordered the Executive to issue a specific regulation styled “supreme decree” to regulate the registration, valuation and payment method of the land reform bonds in each case.<sup>39</sup>

40. In this section I will explain the reasons why the Constitutional Tribunal’s 2013 Order contains defects that are relevant for the analysis of its validity. In particular:

- Subsection A explains why the Constitutional Tribunal lacks jurisdiction to rule on CIP’s motion in the terms that it did;
- Subsection B explains why the decision is arbitrary and fails to state its reasons, given that it arrives at conclusions based on economic and factual considerations that were not asserted, argued or in any way proven in that particular case;
- Subsection C explains why the 2013 Order violates the Constitutional Tribunal’s own internal voting protocols;
- Subsection D addresses the very troubling allegations and evidence of wrongdoings surrounding the issuance of the 2013 Order.

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<sup>38</sup> CE-17, Ruling of the Constitutional Tribunal dated July 16, 2013, entered in File No. 022-1996-PI/TC, rationale 25 and holding 2.

<sup>39</sup> *Ibid*, holding 3.





**A. The Constitutional Tribunal lacks jurisdiction to rule on the CIP motion in the terms it did**

41. Because the 2013 Order was intended to be an enforcement order and not a so-called “manipulative judgment” through which the Constitutional Tribunal can reverse previous holdings, the Constitutional Tribunal did not have the power to reverse or expand the March 2001 Decision. Having done so, however, the 2013 Order should be deemed invalid under Peruvian law.

**i. As an enforcement order, the 2013 Order was not allowed to modify the March 2001 Decision**

42. The Constitutional Tribunal has jurisdiction to enforce its own decisions or judgments. The Constitutional Tribunal has held that during the enforcement proceedings “[it] *maintains its jurisdiction for the purposes of issuing compulsory orders and mandates — given the case — to avoid having its jurisdictional decisions stripped of meaning, and along with it, the binding force [of its decisions] weakened, as well as the status of res judicata of its decisions, pursuant to the terms of Article 204 of the Constitution, and Article 82 of the Code of Constitutional Procedure.*”<sup>40</sup>

43. The Constitutional Tribunal’s power to enforce its judgments is governed primarily by the general principle of enforceability of judgments, requiring that judgments be complied with in their own terms.<sup>41</sup> The Constitutional Tribunal is thus bound by the principle of procedural consistency, according to which it is allowed to enforce only that which has

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<sup>40</sup> CE-150, Ruling of the Constitutional Tribunal dated June 10, 2010, entered in File No. 0031-2008-PI/TC, rationale 3. The following, among others, have similar implications: CE-161, ATC(E) No. 0023-2007-PI/TC of June 22, 2011, rationale 4; and CE-175, ATC(E) No. 0002-2011-PI/TC of May 22, 2013, rationale 4.

<sup>41</sup> CE-72, Article 139.2 of the Constitution. “*The following are principles and rights of the Judiciary: [...] Independence in the exercise of the judicial function. No authority may take over cases pending before the courts or interfere with the exercise of their functions. Nor may they rescind final rulings that have been approved with force of res judicata, halt proceedings that are underway, or modify judgments or delay their enforcement. These provisions do not affect Congress’ right to pardon or authority to investigate; however, the exercise of such right or authority must not interfere with the legal proceeding, and they have no legal effect.*” See also CE-133, Judgment of the Constitutional Tribunal dated June 5, 2008, entered in File No. 579-2008-PA/TC, rationales 15 to 18. Similar judgment in CE-103, Constitutional Tribunal Judgment No. 015-2001-AI/TC, rationales 11 to 16.

been requested by the parties and ordered in the decision or judgment – nothing more, nothing less.<sup>42</sup> In other words, an enforcement order (being of lower hierarchy than a decision) cannot change or otherwise modify the holdings of the Decisions it purports to enforce.<sup>43</sup>

44. But the 2013 Order did just that. The March 2001 Decision confirmed the constitutional principle that state had to pay fair value for expropriation, but the 2013 decision in effect says state can pay *less* than fair value for expropriation because paying fair value would have a budgetary impact. That is a very different holding and really does modify the original decision – and in that respect also constitutes a violation of the *res judicata* principle.

**ii. Even if deemed a manipulative judgment and not an enforcement order, the 2013 Order would not have had sufficient votes to be valid under Peruvian law**

45. The Constitutional Tribunal is also empowered to reverse — in the appropriate circumstances — its own holdings and constitutional interpretations. Such prerogative, however, can only be made through so-called “manipulative judgments,” which the 2013 Judgment clearly is not. On July 16, 2013, when the 2013 Order was issued, manipulative judgments required at least 5 votes pursuant to article 10 of the Governing Rules of the Constitutional Tribunal. For context, in October 2015 the Constitutional Tribunal amended this provision and currently only 4 votes are necessary.<sup>44</sup> There is no doubt that the 2013 Order was not in any way, shape or form intended to be a manipulative judgment. But even

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<sup>42</sup> This is provided in Article VII of the Preliminary Title of the Code of Civil Procedure when it establishes that the judge “*may not go beyond the petition or base his decision on events other than those that have been asserted by the parties.*”

<sup>43</sup> As the Constitutional tribunal has held, judgments issued in the course of unconstitutionality claims are binding “*not only with respect to the decimum or operative part of the judgment but also with respect to the arguments –ratio decidendi- on which they are premised. Unlike the obiter dicta – which can be considered secondary or supplementary criteria – the ratio decidendi is ultimately, the manifestation or implementation of the Constitutional Tribunal’s interpretive activity.*” **CE-124** Constitutional Tribunal Decision of February 13, 2007, entered in File No. 0006-2006-PCC/TC, rationale 41. *See also*, **CE-135**, Constitutional Tribunal Decision of August 26, 2008, entered in File No. 0005-2007-PI/TC, rationale 44.

<sup>44</sup> **CE-208**, Administrative Ruling No 138-2015/P-TC of October 7, 2015.

if it were, it would be invalid as it was issued with only 3 votes in favor plus a casting vote, thus lacking the minimum number of votes.

**B. The 2013 Order's lack of motivation violates due process**

46. Even if the 2013 Order were intended to be a manipulative judgment, and the Constitutional Tribunal had the authority and necessary votes to take the decisions it took through the 2013 Order, it never had the evidence necessary to take those decisions. This constitutes, in and of itself, a breach of the fundamental right of due process. This affects the validity of the 2013 Order.
47. The fundamental right to due process contemplated in Article 139, subparagraph 3 of the Constitution provides for, among other things, the right to have a well-reasoned order. The Constitutional Tribunal explains it as follows: *"the right to obtain from the judicial organs a reasoned, motivated response, consistent with the causes of action duly deduced by the parties in any type of proceeding. [Due process also] guarantees that judges of any instance express the mental process that led them to the adjudication of the dispute, ensuring that the power to administer justice is exercised in accordance with the Constitution and the law"*.<sup>45</sup> This is what is commonly referred to as the Principle of Necessity of Proof which, according the Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice, means *"the facts on which the judicial decision is based can be demonstrated with evidence incorporated into the proceedings and that have been inspected by the parties, meaning that the parties had the possibility to make objections, challenges and comments; and together with this, that no evidence can be considered if that evidence was not legally incorporated into the proceedings."*<sup>46</sup>
48. As stated in Article 188 of the Code of Civil Procedure, *"[t]he purpose of the evidence is to prove the facts stated by the parties, provide certainty to the Judge with respect to the*

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<sup>45</sup> CE-92, Judgment dated June 20, 2002, entered in File No. 1230-3002-HC/TC, rationale 11.

<sup>46</sup> CE-136, Judgment entered in File No. 3299-2007-Lima, p. 22979, published in *El Peruano* on September 4, 2008.

issues under dispute, and substantiate his decisions”<sup>47</sup> The Permanent Constitutional and Social Law Division of the Supreme Court has specifically held:

*[i]f the right to furnish evidence, as established in the cited Article [188] of the Code of Civil Procedure, serves to convince the Court of the existence or inexistence of the facts alleged by the parties, the result would be “a pointless and merely ritualistic guarantee” if the courts did not adequately (thoughtfully) evaluate the evidence, leading to an irregular or arbitrary judgment, which, according to Professor Morello, achieves a partial, illogical and inequitable study of the facts [...].<sup>48</sup>*

49. Despite the fundamental due process principles governing any jurisdictional activities prohibiting any court or tribunal from making a determination of fact without the right evidence, the Constitutional Tribunal did just that. The 2013 Order mandated the Land Reform Bonds to be updated using a very particular dollarization methodology after making a very specific determination of facts. In its rationale 25, the Constitutional Tribunal, after generally describing the methods of the Consumer Price Index (“CPI”), Adjusted CPI and the dollarization contained in Emergency Decree 88-2000, stated:

*Of the methods presented, this Tribunal finds it appropriate to opt for an updating criterion that employs conversion of the unpaid principal into United States dollars as of the date of default on the payment of the coupons of the bond, plus the interest rate of United States Treasury bonds. This is due to the fact that, first, the method of conversion to United States dollars has legal precedent in Emergency Decree No. 088-2000, and second, because as stated, the other valuation methods described would generate severe impacts on the Budget of the Republic, to the point of making impracticable the very payment of the debt. In that respect, this Tribunal must emphasize that, although payment of the land reform debt is an obligation that the State must inevitably assume, it is not the only obligation that the State has. Rather, according to Article 44 of the Constitution, its duty is “to promote the general welfare, which is based on justice and on the overall and sustainable development of the Nation,” which entails addressing a series of basic services [...] which it not only must maintain, but optimize as much as possible.<sup>49</sup> (Emphasis added)*

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<sup>47</sup> CE-71, Civil Procedure Code, Article 188.

<sup>48</sup> CE-125, Cas. No. 2808-2006-La Libertad, Temporary Civil Division of the Supreme Court, April 18, 2007, Whereas Clause Five.

<sup>49</sup> CE-17, Ruling of the Constitutional Tribunal dated July 16, 2013, entered in File No. 022-1996-PI/TC, rationale 25.

50. The 2013 Order's total lack of reason is apparent because the factual basis that "the other means of valuation"—that is, the CPI— "would generate severe impacts on the Budget of the Republic, to the point of making impracticable the very payment of the debt" was never proven in the case. The Constitutional Tribunal does not refer to any evidence, report, information, discussion or argument that supports the aforesaid premise, particularly:

- There is no evidentiary reference to the notional amount of the land reform debt;
- There is no evidentiary reference to the number of unpaid bonds or their class or date of issuance;
- There is no evidentiary reference to the updated amount of the Land Reform Bonds if calculated following the CPI;
- There is no evidentiary reference to the alleged updated amount of the Land Reform Bonds if calculated using the described dollarization method;
- There is no explanation, reasoning or evidentiary reference to why using the CPI would generate "severe impact" on the National Budget;
- There is no explanation, reasoning or evidentiary reference to the manner in which this could affect the national budget, taking into account the economic situation of Peru at that time.

51. Notably, the facts assumed as true by the Constitutional Tribunal are not within the handful of premises that, according to Article 190 of the Code of Civil Procedure do not require evidence, which are: (i) well-known facts or facts of public knowledge, like the occurrence of the Lima and Callao Earthquake of 1940; (ii) empirical laws—for example, human beings need oxygen to survive; (iii) undisputed facts, or those argued by one party and allowed by the other; and (iv) facts that the law assumes without allowing evidence to the contrary, or *jure et de jure* assumptions.<sup>50</sup>

52. To state the obvious: in order to conclude that ordering the payment Land Reform Bonds calculated using the CPI would generate a "severe impact" on the budget, one needs to know the total amount that results from updating all outstanding Land Reform Bonds using CPI. Then, one would need to compare that amount to the budget and establish some

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<sup>50</sup> CE-71, Civil Procedure Code, Art. 190.

reasonable threshold for the term “severe impact.” None of those determinations were never made. By that same token, in order to conclude that a specific dollarization methodology would not have a severe impact on the budget, the Constitutional Tribunal also needed to verify what that methodology entailed in economic terms for Peru and for its budget, through admissible evidence incorporated into the record. It is clearly contrary to the fundamental right to due process, and common sense, to reach a conclusion of this nature and magnitude without having the necessary evidence.

53. Two more rulings issued by the Constitutional Tribunal in the same docket confirm the arbitrariness of the Tribunal’s decision. Even if the 2013 Order would affect the National Budget, the Peruvian Ministry of Economy and Finance was not notified, and hence was denied its rights to comment and present evidence. In a Ruling of August 8, 2013, the Constitutional Tribunal wrongly considered that it was not mandatory to accept the intervention of this Ministry because the process was in a phase of execution.<sup>51</sup> Due process mandates that the adjudicator of a dispute, even accepting that the Constitutional Tribunal had the authority to issue a decision in these terms, consider the points of view of all affected parties.

**C. Even if it is only considered to be an enforcement order, the 2013 Order lacks the votes necessary to have been approved**

54. In addition to the aforementioned defects, the 2013 Order contains defects that, according to rules that regulate the functions of the Constitutional Tribunal, would in theory strip this decision of any binding effects, despite the fact that in practical terms the 2013 Order is deemed valid until annulled by the Constitutional Tribunal itself.
55. To be a valid under Peruvian law, the 2013 Order must be by majority, which requires four out of seven justices. The 2013 Order, however, was approved by only three Justices – Justices Urviola Hani, Álvarez Miranda and Eto Cruz. The 2013 Order nevertheless professed to be a decision of the Tribunal on the basis that the justices had split a 3-3 tie and hence the Chief Justice exercised a casting vote. Because there is no actual tie between

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<sup>51</sup> CE-180, Ruling of the Constitutional Tribunal dated August 8, 2013, entered in File No. 022-1996-PI/TC, rationales 2 and 3.

two draft opinions (three justices in favor of one draft opinion, and another three Justices in favor of another draft opinion), the President of the Constitutional Tribunal made improper use of his casting vote. To address this point better, we refer briefly to the Constitutional Tribunal decision-making process.

**i. The Constitutional Tribunal's decision-making process**

56. Article 201 of the Constitution establishes that the Constitutional Tribunal is made up of seven members.<sup>52</sup> This principle is developed by Article 5 of Law No. 28301, the Organic Law of the Constitutional Tribunal, which states that the Plenary Session of the Tribunal decides and adopts resolutions by a simple majority of votes.

57. The Justice who is assigned the case acts as drafter of the proposed decision.<sup>53</sup> Then, the full bench, in a so-called plenary session, deliberates on the proposed draft. The Justices then deliver to the writer of the proposed decision their disagreements with the form or substance of the draft order.<sup>54</sup>

58. A Justice may only change his vote after giving notice to the plenary session, and fully stating the Justice's reasons for doing so. The Secretary Reporter must inform the plenary session if and when there are changes in the vote of a Justice, and it shall be responsible for any failure to do so.<sup>55</sup>

59. Dissenting grounds of votes or dissenting votes must be sent by the Justices to the Secretary Reporter within forty-eight (48) hours following the day after the case is voted on, and they will be responsible for any failure to do, except for justifiable reasons. Otherwise, the Secretary Reporter will record the delay, and the order with the votes of the Justices that signed it, should be notified and published.<sup>56</sup>

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<sup>52</sup> CE-72, Article 201 of the Constitution. "*The Constitutional Tribunal is the oversight body of the Constitution. It is autonomous and independent. It is made up of seven members elected for five years.*"

<sup>53</sup> CE-108, Governing Rules of the Constitutional Tribunal, Article 41.

<sup>54</sup> *Id.*, Article 43.

<sup>55</sup> *Id.*, Article 44-A.

<sup>56</sup> *Id.*, Article 44.

60. Disagreement among Justices of the Constitutional Tribunal is a natural part of the deliberation process. It is perfectly allowed in adopting decisions, and this is manifested in the option of the Justices to vote in favor of the decision that is made, but on different grounds from those of the majority (concurring opinion), or to vote against the decision and state the reasons for dissenting (dissenting opinion). The Governing Rules establish in Article 8 that the basis of the vote and dissenting opinions are issued jointly with the judgment.<sup>57</sup>

61. If the draft opinion does not obtain the minimum number of votes in the Plenary Session, the docket will be passed on to the Justice appointed by the President to write the new draft expressing the opinion of the majority.<sup>58</sup> Thus, the goal is to have a draft opinion that has a majority of votes of the Justices, in which a timeframe can be granted for making modifications, rejecting the draft opinions that do not gather enough votes.

**ii. Casting Vote by the Constitutional Tribunal's Chief Justice**

62. The Chief Justice of the Constitutional Tribunal does not always have the prerogative to issue a casting vote, but rather only when there is a disagreement in the Plenary Session. For this, there has to be a tie between two draft opinions as mandated by Article 10-A of the Governing Rules of the Constitutional Tribunal, which provides:

*Article 10-A. -The President of the Constitutional Tribunal has the tie-breaking vote on cases that are under the special jurisdiction of the Tribunal en banc and in which there is a tie in opinions. When for any reason the President of the Constitutional Tribunal is unable to intervene in order to decide the case, the tie-breaking vote will rest on the Vice-President of the Constitutional Tribunal. In the event that the latter is unable to intervene in the resolution of the case, the tie-breaking vote will follow the rule of seniority, from the oldest to the newest Justice, until the majority needed to decide the case is found.<sup>59</sup>*

63. That was not the case here. As indicated by the Secretary Reporter himself in the report of the office of the reporting Justice: "Given that there are three positions that reach the

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<sup>57</sup> *Id.*, Article 8.

<sup>58</sup> *Id.*, Article 46.

<sup>59</sup> *Id.*, Article 10-A.



same decision (Justices [Urviola Hani], Eto Cruz and Álvarez Miranda) and another three who disagree with it (Justices Vergara Gotelli, Mesía Ramírez and Calle Hayen), there is a tie.”<sup>60</sup> There are many cases which use the casting vote correctly, including decision of September 3, 2008 in docket N° 01878-2011-PA/TC; Decision of April 8, 2014 in docket N° 0246-2013-PA/TC; Ruling of January 29, 2014 in docket N° 01881-2012-AA; and Decision of January 9, 2014 in docket No 02332-2012-PHC/TC.<sup>61</sup> All of those decisions – cited as mere examples – show that a “tie” consists of two different positions with three votes each.

64. Obviously, it is incorrect to refer to the 2013 Order’s discrepancy between the Justices as a “tie between draft opinions,” and clearly inconsistent with the Constitutional Tribunal’s own practice. It follows from this that former President of the Constitutional Tribunal [Oscar Urviola] was not in a position to use a casting vote. Instead, as explained above, Justices should have gone back to the drawing board, so to speak, pursuant to Article 46 of the Governing Rules of the Constitutional Tribunal.

#### **D. Alleged wrongdoing in connection with the 2013 Order**

65. I have examined certain documents related to the criminal investigation currently underway before the 36<sup>th</sup> Criminal Court of Lima, presided over by Justice Vilma Buitrón Aranda, including (i) the accusation filed by Mr. Augusto Pretel;<sup>62</sup> (ii) the testimony of former Justice Carlos Mesía Ramírez and Mesía before the referenced Office of the 12<sup>th</sup> Prosecutor;<sup>63</sup> (iii) the Forensic Expert Report and Document Examination No. 12439-

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<sup>60</sup> CE-17, Ruling of the Constitutional Tribunal dated July 16, 2013, entered in File No. 022-1996-PI/TC, Note of the Secretary Reporter.

<sup>61</sup> CE-184, Constitutional Tribunal decision of September 3, 2008 in docket N° 01878-2011-PA/TC (Case of Proemina, S.A.C. against decision of September 16, 2010 issued by the Constitutional and Social Law Permanent Chamber of the Supreme Court of Justice; CE-189, Constitutional Tribunal decision of April 8, 2014 in docket N° 0246-2013-PA/TC (Case of Southern Peru Copper Corporation Sucursal del Peru – SPCC); CE-188, Constitutional Tribunal decision of September 3, 2008 in docket N° 01881-2012-PA/TC (Case of Orlando M. Flores v. judgment of the 5<sup>th</sup> Civil Chamber of the Lima Court of Appeals); and CE-187, Constitutional Tribunal decision of January 9, 2014 in docket No 02332-2012-PHC/TC (Case of Jesus Alberto Yataco Flores).

<sup>62</sup> CE-30, Criminal complaint of Augusto Pretel, March 30, 2015.

<sup>63</sup> CE-29, Statement to the Prosecutor’s Office of Carlos Fernando Mesía Ramírez.

12454/2015 requested by PNP [National Police of Peru] Major Omar Augusto Tristán Cárdenas and prepared by José Luis Carrión Cabrera and Félix Roger Escajadillo Cabrera on August 14, 2015<sup>64</sup>; (iv) Report 119-2015 filed by the Office of the 12<sup>th</sup> Provincial Criminal Prosecutor of Lima before the Special Criminal Court Justice of Lima;<sup>65</sup> (v) the testimony of former Justices Gerardo Eto before Office of the 12<sup>th</sup> Prosecutor;<sup>66</sup> (vi) the record of the pre-trial hearing in that case;<sup>67</sup> and the request for incorporation into the case of former Justice Gerardo Eto.<sup>68</sup>

66. The referenced documents and the statements contained therein strongly suggest that (i) on July 16, 2013, the same date on which the 2013 Order had been issued, the plenary session received for consideration the text that was voted on that same day; (ii) Justice Mesía did not have the 48 hours required by law to consider the text and therefore did not give his dissenting opinion as provided in the Governing Rules of the Constitutional Tribunal; (iii) someone attributed to him, as his dissenting opinion, a first draft by Justice Eto in that same case, in which the numerous signatures of Justice Eto were erased with white-out and making it look like it was Mesía's dissent, apparently without the consent of former Justice Mesía; (iv) and based on this alleged falsification, the former-President of the Constitutional Tribunal made use of Justice Mesía's dissenting vote in order to publish the 2013 Order.
67. Although it is true that it will be incumbent on the criminal investigation to determine whether the alleged facts occurred, and whether any criminal liability arises out of this situation, it is no less true that the events that are being raised in court are drawing a significant amount of attention and generating concern about the procedure used to approve the 2013 Order.

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<sup>64</sup> CE-25, Institute of Legal Medicine and Forensic Sciences, Expert Report N° 12439 - 12454/2015.

<sup>65</sup> CE-213, 12th Prosecutor of Lima, Criminal Claim against Oscar Díaz, File N° 119-2015, November 20, 2015.

<sup>66</sup> CE-28, Statement to the Prosecutor's Office of Gerardo Eto Cruz, August 28, 2015.

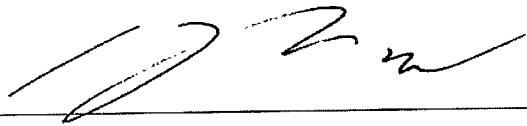
<sup>67</sup> CE-36, Transcript of the hearing on charges filed against Oscar Díaz, January 6, 2016.

<sup>68</sup> CE-221, Motion of Gerardo Eto before the 36<sup>th</sup> Criminal Judge of Lima (Vilma Buitron Aranda), February 11, 2016.



68. I cannot be indifferent about these allegations and the documents that have surfaced. If the reported events, which are supported even by the declaration of former justices of the Constitutional Tribunal and reports of forensic document examiners, end up being true, we would not only be looking at a crime but also the potential undue interference in the independent exercise of jurisdictional functions. This would undermine the autonomy that the Constitutional Tribunal enjoys and the guarantee that it provides in the control of legality and protection of the Constitution. To be clear, no jurisdictional organ in Peru, including of course the Constitutional Tribunal, should allow their decisions to be manipulated (including creating fake documents through the use of white-out). To again state the obvious, this would cast a very dark shadow on what should be one of Peru's most respected institutions; and would raise serious concerns about respect for the independence of the Constitutional Tribunal's jurisdictional activity.

69. Finally, considering that the Supreme Decrees No. 017-2014-EF and No. 019-2014-EF were issued on the basis of the 2013 Order of which we have already explained the defects that affect its constitutionality and validity, they are also tainted with the same defects as the 2013 Order and, therefore, are unconstitutional.



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Delia Revoredo Marsano de Mur

June 2, 2016

## EXHIBIT A

### RÉSUMÉ

**Full name** : Delia Revoredo Marsano de Mur  
**Place and date of birth** : Lima, Peru, February 1st, 1943  
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#### 1. CURRENT ACADEMIC AND PROFESSIONAL SITUATION

Attorney at Law specialized in Private International Law, Constitutional Law and Domestic and International Arbitration. Professor at the Law School in *Pontificia Universidad Católica del Perú*. Invited Professor at other Law Schools in U.S.A. and Latinoamerica, participating as lecturer in seminars and conferences in Europe and Latinoamerica. Arbitrator at the Chamber of Commerce of Lima and other national and international institutions. Independent consultant, lecturer, and author of several legal works on her area of expertise.

#### 2. ACADEMIC DEGREES AND TEACHING EXPERIENCE

- 2.1. Attorney at Law graduated from the *Pontificia Universidad Católica del Perú* (1975).
- 2.2. Professor at the Law School of the *Pontificia Universidad Católica del Perú* (Since 1975).
- 2.3. Extraordinary Professor at the Law and Political Science School of the *Universidad de Lima* (Since 1993).
- 2.4. Professor at the Diplomatic Academy of Peru (1977-1984).
- 2.5. Honorary Professor at the *Universidad Nacional de San Agustín de Arequipa - Perú* (2004).
- 2.6. Visiting Professor at the Universities of Louisiana, Yale, Georgetown, and Harvard, in the United States of America, among other Peruvian and foreign universities.

#### 3. PROFESSIONAL ACTIVITIES

- 3.1. President of the VII Arbitration Latin American Congress - Abril 2013.
- 3.2. Ad Honorem Member of the High-Level Committee designated to advise the Prime Minister (2012-2013).
- 3.3. Member of the Panel of Conciliators and Arbitrators of the International Centre for Settlement of Investment Disputes - ICSID (Since 2011).
- 3.4. Judge of the Peruvian Constitutional Court (1996-1997 and 2000-2005).
- 3.5. Dean of the Lima Bar Association (1998-1999).

## **EXHIBIT A**

- 3.6. General Director of the Peruvian Judicial Academy (1988-1990).
- 3.7. Member of the Commission for the Reform of the Peruvian Civil Code of 1936 (appointed by Supreme Resolution N° 339-84-JUS dated July 25<sup>th</sup>, 1984)
- 3.8. Member of the Commission for the Reform of the Peruvian Civil Code of 1984 (appointed by Ministerial Resolution N° 195-2003-JUS dated May 22<sup>th</sup>, 2003).
- 3.9. Ratification as Member of the Commission in charge of preparing the draft bill of the Reform of the Peruvian Civil Code of 1984 in 2011. (Ministerial Resolution No. 366-2004-JUS del 07/08/2004).
- 3.10. President of the Commission designated by the Executive Power of Peru to study and make a proposal of a Project of Arbitration Law (Ministerial Resolution N° 382-88-JUS dated August 31<sup>st</sup>, 1988).
- 3.11. Expert in Peruvian Law before foreign Courts in the United States of America and Europe.
- 3.12. Member of the National Group appointed by the Peruvian Government before the Permanent Arbitration Court (1984).
- 3.13. Vice-President of the Commission at the Ministry of Foreign Affairs on Private International Law (Ministerial Resolution N° 47-91-RE).
- 3.14. Legal advisor at the Ministry of Foreign Affairs of Peru, in matters of Private International Law and International Criminal Law (appointed by Ministerial Resolution N° 473-91-RE dated September 27<sup>th</sup>, 1991).
- 3.15. Substitute judge at the Court of Justice of the Cartagena Agreement. Designated unanimously at the Meeting of Plenipotenciaries of Andean Countries (1985).
- 3.16. Delegate for the Peruvian State before the Third Interamerican Conference Specialized in Private International Law, CIDIP III, La Paz, Bolivia (appointed by Supreme Resolution N° 200-84-RE dated April 10<sup>th</sup>, 1984).
- 3.17. Member of the Permanent Court of Arbitration at the Hague (1985-1996).
- 3.18. Member of the Consulting Committee of the Permanent Special Multiparty Commission of the Congress of the Republic of Peru, in charge of the control, supervision and evaluation of the National Plan Against Corruption (Since 2009).
- 3.19. Member of the Arbitration Court of the American Chamber of Commerce - AMCHAM (Since 2013).
- 3.20. Arbitrator of the Chamber of Commerce of Lima, Arbitration Tribunal of the Lima Bar Association, as well as at other national and international institutions.

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- 3.21. Specialized in the fields of Private International Law, Constitutional Law, and Domestic and International Arbitration.
- 3.22. President of the Advisory Council of the Arbitration Peruvian Institute (2012-2013).
- 3.23. Judge of the Tribunal of Honor of the Lima Bar Association (Since 2010).

### **4. MEMBERSHIPS**

- 4.1. Numerary Member of the Peruvian Academy of Law (Since 2016).
- 4.2. Member and advisor at the Lawyers' Interamerican Federation-FIA (Since 1988).
- 4.3. Associate Member of the Peruvian Association on International Law (Since 1978).
- 4.4. Member of the Peruvian Association of Maritime Law, affiliated to the International Maritime Committee (Since 1979).
- 4.5. Founder Academic Member and Numerary Member of the Interamerican Academy of International and Comparative Law of the Interamerican Federation of Lawyers (Since 1988).
- 4.6. Honorary Member of the Peruvian Association of Women Lawyers (Since 1990).
- 4.7. Founder Member and Numerary Member of the Peruvian Center of International Studies.
- 4.8. Associate member of the Hispanic-Luso-American Institute of International Law.
- 4.9. Member of the Lima Bar Association and honorary member of the Bar Associations of the Peruvian cities of Ayacucho, Callao, Huánuco, Pasco, Arequipa, Loreto, La Libertad, Tacna and Moquegua, and Junín, among others.

### **5. ARTICLES AND PUBLICATIONS**

- 5.1. "The applicable law to International Contracts among individuals according to the Project of Preliminary Section of the Peruvian Civil Code". Booklet, 1978.
- 5.2. "The applicable law to the International Contract among individuals according to the Project of Preliminary Section of the Peruvian Civil Code", published in the Law Magazine of the Pontificia Universidad Católica del Perú (PUCP), 1978.
- 5.3. "Draft of the Preliminary Section" in "Projects and Drafts on the Reform of the Civil Code", Volume I, Editorial Fund of the PUCP. 1980.

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- 5.4. "The selection of the applicable law for the validity of the arbitration agreement and the controversy on the main subject matter in international commercial arbitration", Hispanic-Luso-American Institute of International Law, 1982.
- 5.5. The divorce in the new Civil Code. Article published in the newspaper *El Comercio* in 1983.
- 5.6. New regime on goods. Article published in the newspaper *El Comercio* in 1983.
- 5.7. New patrimonial regimes in marriage. Article published in the newspaper *El Comercio* in 1983.
- 5.8. The divorce in the new Civil Code. Article published in the newspaper *El Comercio* in 1983.
- 5.9. Project of Civil Code. Article published in the Magazine of the *Universidad de Lima*, June 1984.
- 5.10. "Civil Code: Background information, concordances, statement of motives and explanations". Volumes I to III. Published by *Industria Avanzada*, 1985.
- 5.11. "Statement of Motives and Comments to Section X of the Peruvian Civil Code of 1984 (Private International Law) in "Civil Code Volume VI", Published by *Okura* Editors, 1985.
- 5.12. Compiler of "Civil Code: Statement of Motives and Comments", Published by *Okura* Editors, 1985.
- 5.13. "The Notion of Private International Law". Article written jointly with Roberto Mc Lean, and published in the book in honor of José León Barandiarán, published by *Cultural Cuzco* in 1985, and in the Magazine of the Peruvian Society of International Law.
- 5.14. "International Inheritance with the New Civil Code" in the book in honor of Rómulo E. Lanatta Guilhem, published by *Cultural Cuzco*, 1986.
- 5.15. "International divorce in the Civil Code of 1984" published in "Legal studies in honor of Professors Carlos Fernández Sessarego and Max Arias Schreiber Pezet", *Cultural Cuzco* editors, 1988.
- 5.16. "Object and sources of Private International Law" published in book in honor of Mario Alzamora Valdez, *Cuzco* editors, 1988.
- 5.17. "Some aspects of the International Regime of Marriage. International Family Law in the Peruvian Civil Code (Section X)" in the book "The Family in Peruvian Law", published by the *Fondo Editorial de la Pontificia Universidad Católica del Perú*, 1990.
- 5.18. "The Project of Civil Code" published in the Magazine of the *Universidad de Lima*.
- 5.19. Booklets published by the Magistracy Academy, the Supreme Court, and the National Palace of Justice, 1990.
- 5.20. "Proposal for a new international regime of rights over goods in the Peruvian Civil Code (Book in honor of Dr. Jorge Avendaño, July 2004).

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- 5.21. "Rights of Women" published in the Forum Magazine on the Bicentenary of the Lima Bar Association (July 2004).
- 5.22. "Commentaries on Article 1344 of the Peruvian Civil Code: Opportunity of stipulation of the penal clause", in: Contractual and extra contractual, 2011.
- 5.23. Prologue in book in honor "International Arbitration: past, present and future" to the arbitrators Bernardo Cremades and Yves Derains. Peruvian Institute of Arbitration, 2013.
- 5.24. "Manuel de la Puente y Lavalle: Hombre de Honor". Book in honor to Doctor Manuel de la Puente y Lavalle, Volume I, Peruvian Academy of Arbitration, 2013.
- 5.25. Compiler of "Civil Code: Statement of Motives and Comments", Second Edition, Published by Thomson Reuters, 2015.

## **6. SEMINARS, CONFERENCES AND CONGRESSES**

- 6.1. Participant at the "Global Constitutionalism Seminar", seminar for supreme judges and presidents of constitutional courts, Law School at Yale University, September 2000, 2002, September 2003, and October 2004 (New Haven, USA).
- 6.2. Conference at the *Pontificia Universidad Catolica del Peru*, celebrating the centenary of the Congress of Lima. (1977).
- 6.3. Conference at the Peruvian Institute of Law and Banking Technique: The International Purchase and Sale (1980).
- 6.4. Conference organized by the *Pontificia Universidad Catolica del Peru* in Petro-Peru: "Substitutory Proposal to the Preliminary Section of the Civil Code" (1980).
- 6.5. Conference on Proposal to Substitute the Preliminary Section of the Civil Code, organized by the class "Enrique Normand" (1981).
- 6.6. Conference and Lecture at the XIII Congress of the Hispanic-Luso-American Institution on International Law: "Civil and Commercial Arbitration in the Ibero-American Community" (1982).
- 6.7. Conferences at the Louisiana State University on reference and the International Regime of Goods (1983).
- 6.8. Lecturer at Seminar in the Arequipa Bar Association. International Family Law (1983).
- 6.9. Lecturer at the Conference in the *Universidad Mayor de San Marcos* "The International Contract of Purchase and Sale of Goods"
- 6.10. Lecturer at the Conference in the National Council of Women in Peru: Women in the New Civil Code (1985).
- 6.11. Lecturer at the Conference on Private International Law taking place at the Law Symposiums in *Universidad Mayor de San Marcos* (1988).



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- 6.12. Lecturer in the Seminar taken place at the Judiciary Power in 1987 on Private International Law, Section X of the New Civil Code.
- 6.13. Lecturer in the XII National Ordinary Assembly of the national Association of Judges of Peru, taken place in the city of Piura. Objectives and Projects of the Judiciary Academy (March 1990).
- 6.14. Conference taken place at the *Banco Continental*, "Proposal to Substitute the Preliminary Section of the Civil Code" organized by the Legal Committee on Women and Family Rights (1981).
- 6.15. Lecturer at the Forum on the New Civil Code organized by the Arequipa Bar Association in May 1984.
- 6.16. Lecturer in the XII National Ordinary Assembly of the Judiciary Association of Peru: Legal Updates and Judiciary Academy.
- 6.17. Lecturer in the Forum on the New Peruvian Civil Code, Section X.
- 6.18. Conference at the Lima Bar for the presentation as co-author the work "Civil Code, Background, Concordances, Exposition of Motives and Commentaries" (1985).
- 6.19. Conference at the Italian Institute of Culture: "General Guidelines in Family Law.
- 6.20. Participant at the XII International Judicial Conference "Equilibrium between Independence and Judicial Responsibility", organized by the Furth Family Foundation from May 19<sup>th</sup> to May 21<sup>st</sup>, 2004 (Bucarest, Rumania).
- 6.21. Participant as Lecturer in the Course "The Law facing Terrorism: The Challenge of Modernity", organized by the *Universidad Rey Juan Carlos* (Aranjuez - Madrid) in Spain from July 19<sup>th</sup> to July 23<sup>rd</sup>, 2004.
- 6.22. Participant in the panel in the Law Week at the University of Yale (New York, United States of America), in the Seminar - Global 2004: "Terrorism and the State with Legal Order: "The challenge for the global constitutionalism" taken place from October 8th to October 10th, 2004.
- 6.23. Lecturer in the First Conference of Jurisdictional Advisors of the Constitutional Court of Peru, named "Delia Revoredo Marsano".
- 6.24. Participant as lecturer in the University of Berkeley, invited by the Robbins Collection Lectures in Political Culture and Legal Tradition, with the theme: Jurisdictional Competence of the Constitutional Court of Peru (2005).
- 6.25. Lecturer in the "Seminar of Analysis of the Process of Reform of the Civil Code", Ministry of Justice (2006).

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### **7. DEGREES AND HONORS**

- 7.1 First place during the three years of Law continued studies followed at the Pontificia Universidad Católica del Perú (1967 - 1968 - 1969).
- 7.2 Diploma awarded by L'Union Internationale des Avocats, of the Inter American Bar Association and of the Unión Iberoamericana de Abogados, México (October 1980).
- 7.3 Acknowledgement received by Supreme Resolution No. 339-84-JUS of 07/25/84 as Advisory of the Commission in charged of studying and revising the Civil Code.
- 7.4 Godmother of 21 graduated classes as Lawyers from 07 different peruvian Universities (national and private).
- 7.5 Administrative Resolution No. 085-90-P-CS of 12/13/90, issued by the Plenary Chamber of the Peruvian Supreme Court of Justice to tribute Dr. Delia Revoredo a vote of institutional recognition and gratitude for the important work played as General Director of the Magistracy Academy.
- 7.6 Tributes offered by various Bar Associations, Municipalities, national and private Universities across the country after the dismissal by the Congress of Alberto Fujimori, as a judge of the Constitutional Court.
- 7.7. Gold Medal awarded by the National Assembly of Rectors of Peru.
- 7.8. Medal of Honor to Work "Pedro Huilca Tecse" awarded by the Federation of Construction Workers of Peru.
- 7.9. National Recognition: "Strengthening of the Constitutional Rule of Law and Access to the Justice: Ministry of Justice" by the Minister of Justice of Peru (2009 and 2010).
- 7.10. Diploma awarded by the National Council of Women of Peru (March 1982).

### **8. ACADEMIC CONTRIBUTION**

- 8.1. Library of the Universidad Catolica del Peru.
- 8.2. Law Review - Pontificia Universidad Catolica del Peru.
- 8.3. Organizing Committee of the Civil Code.
- 8.4. Publication "Lawyer of the Americas" Miami University.
- 8.5. Journal of the Peruvian Society of International Law.
- 8.6. Proposal on International Arbitration before the XIII Congress of the Hispanic - Luso - American Institute of International Law (IHLADI).

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### **9. LANGUAGES**

- 9.1 Spanish: Native speaker.
- 9.2 English: Good (second language).
- 9.3 French: Good.