

Case N° \_\_\_\_\_

Brief N° \_\_\_\_\_

**Summary:** Requests joinder of Petitioners; requests application of current value principle to the Land Reform Bonds; and proposes an alternative method of valuation and payment.

## **PRESIDENT OF THE CONSTITUTIONAL TRIBUNAL**

The Land Reform Bondholders Association – ABDA, taxpayer I.D. N° 20555644265, domiciled in Paseo de la República N° 3195, office N° 904, San Isidro, Lima, with judicial address at mailbox N° 2092 of the Lima Bar Association, located in the Courthouse, hereby represented by its legal representative Rosario Cuéllar Martínez, pursuant to the Power of Attorney that is attached to this brief as Appendix D respectfully submits and asks that this honorable Tribunal:

On the basis of this Tribunal’s duty to enforce its Decision of March 2001 during these proceedings, ABDA requests:

### **REQUEST FOR RELIEF**

**1<sup>st</sup> Principal Relief.** Allow the joinder of Petitioners to these proceedings.

**2<sup>nd</sup> Principal Relief.** Safeguard the preeminence of the Constitution and the effectiveness of constitutional rights by declaring that the Supreme Decrees N° 017-2014-EF of January 17, 2014 and N° 019-2014-EF of January 21, 2014 are without basis and legal effect.

**3<sup>rd</sup> Principal Relief.** Revise this Tribunal’s Rulings of July 16, August 8 and November 4, 2013, ordering the Ministry of Economy and Finance (“MEF”) to pay the total and updated value of the Land Reform Bonds pursuant to the Consumer Price Index methodology plus the Bonds’ stated interest rates from placement date, compounded annually, plus any applicable late interest, as described herein and as set forth in Appendix A (“CPI Methodology”), through fully liquid Peruvian sovereign bonds (on substantially the same terms as Peru’s recent bond issuances to international markets), within six months of the date of any ruling from this honorable Tribunal.

**Subordinated Relief to the 3<sup>rd</sup> Principal Relief.** Order the MEF to pay the value of the Land Reform Bonds, updated pursuant to the corrected dollarization methodology as described herein and in Appendix B (“Corrected Dollarization Methodology”), plus any applicable late interest, through fully liquid Peruvian sovereign bonds (on substantially the same terms as Peru’s recent bond issuances to international markets) within six months of the date of any ruling from this honorable Tribunal.

**4<sup>th</sup> Principal Relief.** Declare that any Supreme Decrees or similar administrative acts pertaining to the Land Reform Bonds that have been issued in the past or will be issued in the future by the MEF or any other Ministry or governmental entity or agency that assumes competence over this matter, must be optional, and thus all Land Reform Bondholders will retain the constitutional right to obtain payment on the Bonds or any other relief through the judiciary or through direct negotiations with the Government in accordance with well-established principles of current value.

This brief constitutes an effort to put before the Tribunal all the evidence and arguments necessary for it to issue a final decision on this matter. This brief therefore supersedes any brief, petition or request previously filed in these proceedings by ABDA that have not yet been resolved, including ABDA's petitions dated December 9, 2013, March 24, 2014 and August 20, 2014. Accordingly, if the Tribunal is planning on issuing a decision on a previous petition presented by ABDA, this would no longer be necessary. To the extent there is any conflict or inconsistency between this brief and any other ABDA petition, what is stated in this brief prevails.

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## **I. Introduction**

1. On the basis of articles 70 and 139.3 of the Peruvian Constitution, the Land Reform Bondholders Association (“ABDA” or the “Petitioners”) ask this honorable Constitutional Tribunal (this “Tribunal”) to hold that Supreme Decrees N° 017-2014-EF of January 17, 2014, and N° 019-2014-EF of January 21, 2014 (the “Guidelines”), enacted further to this Tribunal’s Ruling of July 16, 2013 (the “Ruling”), breach the current value principle, and therefore provide new and specific instructions to the Ministry of Economy and Finance (the “MEF”) for the updating and payment of the land reform bonds (“Land Reform Bonds” or “Bonds”) as requested herein.

2. In November 2013, in response to a number of petitions filed by interested entities, including ABDA, in connection with the Ruling, this Tribunal made clear that under no circumstances could the land reform debt’s updating methodology result in nominal payment, and reserved its power to control any such methodologies. After closely analyzing the Guidelines, Petitioners now return to this Tribunal – evidence in hand – to show that the Guidelines indeed offer nominal payment, and in some cases no payment at all.

3. By this time there can be no dispute that the holders of the Bonds have a constitutional right to payment of the “current value” of the debt owed to them arising from the State’s expropriation of land. This Tribunal and other courts have held and repeatedly reaffirmed that the current value principle must apply to the Bonds. That principle ensures that an amount paid now be equivalent to the *justiprecio*’s original value, plus the promised interest. This is the price that the Government undertook to pay for making the landowners wait decades to receive full compensation.

4. While the Guidelines purport to establish a methodology for calculating the current value of the Land Reform Bonds, they actually do no such thing. Deconstructing their complex equations reveals that the amount of compensation they propose to pay is a trivial fraction of what is actually due to the bondholders. In fact, instead of paying current value, or anything close to that, the Guidelines offer *less than 0.5%* of the debt’s actual current value, as demonstrated by the expert report that the leading international accounting firm Deloitte has prepared for the purposes of this submission.<sup>1</sup>

5. The devastating effects that the Guidelines have on the value of the debt become apparent when using a real life example. For a 100,000 *Soles Oro* Class A bond, placed on June 12, 1973, with its last coupon clipped on June 12, 1982, and having an outstanding amount of 55,000 *Soles Oro*, the Guidelines offer to pay the preposterously trifling amount of 1,84 *Nuevos Soles* – which is not even enough to

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<sup>1</sup> “Comparative Analysis of Supreme Decrees N° 017-2014-EF and N° 019-2014-EF and Economic Value of Land Expropriated During Peruvian Agrarian Reform,” prepared by Deloitte (the “Deloitte Report”), Charts N° 1 and N° 2.

afford a copy of the *El Peruano* morning newspaper.<sup>2</sup> It is thus clear that, in the guise of providing updated compensation, the Guidelines actually deprive the bondholders of virtually the entire value of their property.

6. The Guidelines' absurdity and unfairness further comes to light when the value of the expropriated land is compared with the amount that results if the total debt is calculated using the Guidelines. Deloitte's conservative approximation of the total value of the land that the Government expropriated is \$42.4 billion.<sup>3</sup> Yet Deloitte also concludes that if the *entire* outstanding land reform debt is calculated using the Guidelines' formula, Peru would only end up paying at most a mere \$24 million to all bondholders combined.<sup>4</sup>

7. Far from adequately calculating that debt's current value, the Guidelines are yet another in a long line of attempts by the Government – spanning more than three decades – to evade the debt by one means or another and thereby expropriate the land without ever paying just compensation. As described in detail below, examples of these previous attempts include (i) the State's outright refusal to pay on the value of the Bonds; (ii) its assertion that merely providing the Bonds constituted full payment; (iii) its earlier scheme to pay a fraction of the Bonds' value through a process established by an emergency decree; and (iv) its claim that the Bonds can be paid at their nominal value.

8. This Tribunal and other Peruvian courts have time and again rejected these Government attempts to deprive bondholders of the compensation they are due. Like these previous tactics, the Guidelines do not offer compensation that reflects the true amount to which the bondholders are entitled and they too should be struck down.

9. The Guidelines proceed from a false premise. In trying to avoid compensating the bondholders, the Government first made unsubstantiated and inaccurate allegations to this Tribunal that Peru could not afford to pay actual current value determined through the otherwise predominantly accepted Consumer Price Index ("CPI") method for updating delinquent debts, and that doing so would have a severe impact on the economy and deprive citizens of needed public services.<sup>5</sup> These allegations were just scare tactics. In fact, the Government has no factual basis for them, and – in any case – they are not true.<sup>6</sup> As demonstrated by the economic report

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<sup>2</sup> This is the case of Ms. Lucila Castro Mendivil, whose land *La Collpa* was expropriated, located in the Llacanorca District, Cajamarca Province. Ms. Castro Mendivil is listed as one of many bondholders in the census prepared by the Peru Engineers' Association as supplemented by ABDA. *See also* Deloitte Report, Table 7.

<sup>3</sup> Deloitte Report, Table 11.

<sup>4</sup> Deloitte Report, Table 8.

<sup>5</sup> Constitutional Tribunal of the Republic of Peru. Decision issued in file N° 022-1996-AA/TC of July 16, 2013, Foundation 25.

<sup>6</sup> "On the Costs and Benefits of Restructuring the Selective Default of the Peruvian Land Debt – Fiscal and macroeconomic implications of honoring the debt associated with the land reform bonds," prepared by Dr. Ismael Benavides, Dr. César Peñaranda and Professor Carlos

prepared by Dr. Ismael Benavides, Dr. César Peñaranda and Professor Carlos Adrianzen, Peru not only can afford to honor its debt to the bondholders, but in doing so, Peru may even benefit from lower interest rates when accessing the international financial markets. Even at true current value, Peru would pay a relatively low price compared to the enormous value of the expropriated land.<sup>7</sup>

10. Even more deplorable than making baseless representations to this Tribunal, when the Tribunal gave the Government the opportunity, through its Ruling, to come up with a mechanism for determining the amounts due by reference to the U.S. dollar instead of the Peruvian CPI, the Government exploited that opportunity by issuing the Guidelines. In violation of this Tribunal's repeated instructions to preserve the "current value" of the Bonds, the Guidelines devised a scheme that was intended to ensure that, in practice, bondholders are never paid the current value of the debt, if anything.

11. The Guidelines' scheme calculates a purported "current value" of the Land Reform debt through equations that are so complex as to be impenetrable to many ordinary bondholders. When carefully scrutinized, however, it emerges that the equations contain obvious algebraic errors and indefensible assumptions, which dramatically reduce the debt's value, as the expert reports prepared by economists Iván Alonso, Ítalo Muñoz and Dr. Alan Heston all show. Hence, while the Guidelines should fulfill the fundamental principles that this Tribunal and other courts have repeatedly endorsed, they are, in fact, an attempt to subvert them.

12. Moreover, the Guidelines set out a bureaucratic, multi-step process that is plainly designed to coerce or at the very least deceive the bondholders into waiving their rights; that may be prolonged indefinitely; and that makes no promise ever to actually pay the bondholders. The Guidelines are also overly burdensome and discriminatory – by affording different standards of treatment to bondholders that are in the same legal position.

13. As part of this scheme, the Guidelines say they are the exclusive means for bondholders to be paid. In other words, the Guidelines purport to extinguish bondholders' fundamental rights to pursue their claims in courts. In addition, the Guidelines are impermissibly retroactive to the detriment of bondholders that already have ongoing judicial proceedings demanding payment of their Bonds because they purport to impose on the judicial process an updating methodology that is incorrect and generates absurd results.

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Adrianzen (the "Benavides Report"), Sections III and IB. *See also* memorandum N° 447-2014-FE/52.04 of October 15, 2014 issued by the Ministry of Economy and Finance in which the Ministry states that it has not made any estimate, calculation or technical study regarding the possible impact that the payment of the Land Reform Bonds might cause to the general budget.

<sup>7</sup> Deloitte Report. *Compare* Table 8 (range of \$12.6M - \$23.9M USD for price Peru will pay under MEF formula) against Table 11 (of \$42,418M value of expropriated land).

14. In short, after expropriating valuable land more than forty years ago and defaulting on its express guarantee to pay the Bonds, the Government is now – once again – attempting to pay *nominal* value through a formula that is indecipherable to most bondholders, depriving bondholders of their right to seek judicial relief from courts in favor of a burdensome and discriminatory process that may take years or more, without even a firm commitment ever to pay all the bondholders.

15. The time has come for this Tribunal to put an end to the Government's persistent attempts to deny, evade or circumvent Peru's obligation to pay the Bonds at current value with the promised interest. The bondholders have been deprived of compensation for decades and the Government has had countless opportunities to pay that compensation. Despite the clear directions of this Tribunal and other Peruvian courts, the Government has offered excuses instead of payment. Decades of avoidance and dissembling have only made the situation worse. Fortunately, Peru now has a sufficiently strong and mature economy that it can afford to do the right thing and honor its commitments. Further postponing the day of reckoning of the Bonds will only ensure that the aggregate debt amount continues to swell, and could eventually reduce Peru's international standing and creditworthiness.<sup>8</sup>

16. Accordingly, the new bench of the Tribunal should declare that the Guidelines breach the current value principle as espoused by this Tribunal in March 2001, and should direct the Government, within six months, to pay the bondholders the current value of the debt, determined by the CPI Methodology set forth in Appendix A, plus the Bonds' stated interest and any applicable late interest, in liquid, internationally traded Peruvian sovereign bonds issued on substantially the same terms as Peru's last international bond issuance. Alternatively, if the Tribunal orders that current value be calculated by U.S. dollar indexation – despite the fact that dollarization does not provide full current value – then at the very least it should order the Government to pay within six months, in liquid, internationally traded sovereign Peruvian bonds issued on substantially the same terms as Peru's last international bond issuance, according to the Corrected Dollarization Methodology described herein and as set forth in Appendix B, plus any applicable late interest.

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<sup>8</sup>

Benavides Report, Section IV.

## II. Standing

17. The Association consists of approximately 342 members that hold Land Reform Bonds and whose assets will be affected by the outcome of these proceedings.<sup>9</sup> Therefore, pursuant to article 54 of the Constitutional Procedural Code and article 92 of the Civil Procedural Code, the Tribunal should allow the Association to join these proceedings.

18. Those provisions of the Constitutional and Civil Procedural Codes permit joinder when a proceeding is likely to affect the intervenor's legitimate interest. Article 54 of the Constitutional Procedural Code establishes that "whoever has a legally relevant interest in the outcome of a process may enter an appearance as a party in a permissive joinder." Also, article 92 of the Civil Procedural Code allows joinder when two or more individuals have "related claims" or "because the ruling to be issued with respect to one may affect the other."<sup>10</sup> According to author Ursula Indacochea Prevost, the expansive language of these provisions have been said to provide "a broad presumption of the intervention of third parties."<sup>11</sup>

19. Although the foregoing provisions by their terms apply to constitutional injunctions and civil complaints, they are also applicable to these constitutional proceedings on the basis of the principles of Supplemental Applicability and Procedural Flexibility. The principle of Supplemental Applicability – contained in article IX of the Preliminary Title of the Constitutional Procedural Code – establishes that when there is a gap in the code, provisions of "Procedural Codes that are related to the disputed matter shall be supplementarily applicable," provided that they do not frustrate the purposes of the constitutional process and that they contribute to their development. The Principle of Procedural Flexibility further requires this Tribunal to "adjust the requirement of formalities" set forth in the Constitutional Procedural Code to "guarantee the preeminence of the Constitution and the force and effect of constitutional rights."<sup>12</sup> Articles 54 and 92 should thus guide this Tribunal's determination on the Association's application for permissive joinder.

20. The text and logic of Articles 54 and 92 compellingly support the Association's joinder in these proceedings. Those Articles provide that intervention is appropriate when a person's legitimate interests are at stake in a proceeding. As Professor Juan Monroy Gálvez has explained, "legitimate interests" refers to those interests "recognized by the legal system as worthy of protection," which is why "they are offered a mechanism to make them effective (recognition of subjective rights) and

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<sup>9</sup> Multiple bondholders, domestic and foreign, whom in one way or another have collaborated in the preparation of this brief, also support the arguments presented herein. In total, and apart from the Association, this petition has been endorsed in writing by over 100 bondholders, which are identified in Appendix C.

<sup>10</sup> Constitutional Procedural Code, article 54 and Civil Procedure Code, article 92.

<sup>11</sup> Indacochea Prevost, Ursula, *Práctica Constitucional Litisconsorcio e intervención de terceros en el proceso de amparo*, Lima: Gaceta Constitucional N° 1, p. 537.

<sup>12</sup> Constitutional Procedural Code, article III.

a mechanism to protect them in the case that they are affected or unknown (as in a legal proceeding).”<sup>13</sup> This Tribunal has similarly explained that permissive joinder allows “the presence of several people as parties, who, due to direct obligations or common interest, are united in a specific position and request the court to make a logical and legally unified decision.”<sup>14</sup>

21. There can be no question that the Association’s members meet that test. The Association has a common interest and, consequently, is united with the Engineers’ Bar Association insofar as it also seeks respect for the right of property and payment of the current value of the Bonds.

22. Moreover, all bondholders would benefit from a logical and legally unified decision. The Tribunal’s decision in this case will affect not only the Engineers’ Bar Association and its members, but also ABDA’s 342 members, the over 100 additional bondholders who have endorsed this application, and indeed all bondholders in light of the *erga omnes* effects that the decisions of this Tribunal have pursuant to article 81 of the Constitution. On this score, this Tribunal has held that “as opposed to decisions rendered in the course of ordinary proceedings, where the judge’s ruling binds the parties involved in those proceedings only,” decisions in constitutional proceedings “often have a wider scope” and “not only bind those whom are parties” to said proceedings.<sup>15</sup>

23. There are practical examples of the *erga omnes* effect of the Tribunal’s decision on all bondholders. In March 2001, this Tribunal declared “articles 1 and 2 and the First Final Provision of Law N° 26597 as well as the Unique Temporary Provision of Law N° 26756” to be unconstitutional (“March 2001 Decision”).<sup>16</sup> That decision struck down a number of legal provisions pertaining to all the bondholders, and thereby permitted bondholders to pursue their claims in Peruvian courts. In the Rulings of July and August 2013, the three signing judges established evaluation guidelines and indicated that these guidelines would be applicable to all lawsuits that were related to updating or collecting the Land Reform Bonds, even to the very legal proceedings that had been commenced in reliance upon the Tribunal’s landmark 2001 Decision.<sup>17</sup> These examples show how the Tribunal’s decisions in cases concerning the Bonds have had and will continue to have a significant effect on all bondholders, including the Association’s members. Thus there can be no question about the fact that the Association has a legitimate interest in these legal proceedings.

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<sup>13</sup> Monroy Gálvez, Juan, *Diccionario Procesal Civil*, Lima: Gaceta Jurídica, 2013, pp. 196, 197.

<sup>14</sup> Constitutional Tribunal of the Republic of Peru. Case N° 961-2004-AA, July 2, 2004, Section 3.

<sup>15</sup> Constitutional Tribunal of the Republic of Peru, Case N° 4119-2005-PA/TC, August 29, 2005, Section 52.

<sup>16</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC, March 15, 2001, Dispositive.

<sup>17</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC, July 16, 2013, Dispositive N° 2. *See also* Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC, August 8 2013, Foundation 10.

24. Moreover, the Association is an appropriate type of organization to intervene on behalf of its members. The Tribunal has articulated three requirements for a private entity to intervene in a proceeding such as this one: (i) having legal status; (ii) having a corporate purpose directly related to the intention of the complaint; and (iii) having a high degree of social representation.<sup>18</sup> The Association meets these requirements. *First*, the Association has valid legal status, as evidenced by the Association’s certificate of incorporation before the Lima public registry.<sup>19</sup> *Second*, article 2 of the Association’s bylaws shows that its purpose is to “obtain from the Peruvian Government the recognition and payment of the debt arising out of Law N° 15037 and Decree Law N° 17716,” which falls squarely within the object of these proceedings. *Finally*, the Association has a high degree of social representation, as evidenced by the certification and a list of its members.<sup>20</sup>

25. The previous bench of the Tribunal nevertheless held that the Association’s September 30, 2013 petition was “improper” because it was not “a party to these proceedings.”<sup>21</sup> Respectfully, that reasoning misses the point. Of course the Association is not *currently* a party to the proceedings. It would not be seeking to intervene if it were. The point is that the Association is entitled to intervene because it has a legitimate interest in these proceedings. Denying the Association’s joinder application would consequently deprive the Association of its due process right to be heard. Thus, regardless of how the Tribunal might have been inclined to decide the Association’s earlier motion to reconsider the Tribunal’s November 4, 2013 holding, the Association’s current motion to join the proceeding should be granted.

26. In any event, since this Tribunal’s November 2013 Ruling, new facts have arisen that further warrant the Association’s intervention in these proceedings. Most significantly, in January 2014, the MEF issued the Guidelines – which expressly purport to bind all bondholders, not just the Engineers’ Bar Association or its members.

27. Moreover, as Section IV.A.3 below explains, the Guidelines have dramatically impacted the value of Land Reform Bonds, decreasing their value almost entirely in direct violation of the right to property. For the members of the Association, this implies a crippling financial loss. The financial impact that this has had on the members of the Association, as well as the fact that any ruling issued in the future will undoubtedly affect the bondholders’ interests, amply justifies the Association’s joinder now.

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<sup>18</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00013-2012-PI/TC, March 20, 2013, Section 6.

<sup>19</sup> Certificated copy of the Association’s incorporation in the Public Registry.

<sup>20</sup> See Appendix D.

<sup>21</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC, November 4, 2013, Sections 7-8.

28. Based on the foregoing, the Association requests that this Tribunal accept its joinder to this proceeding, so that it entertains the Association's arguments on the effect that the July 16, 2013 Ruling and the Guidelines have on bondholders' constitutional rights.

### **III. Facts**

29. This section summarizes the facts leading to the current situation with the Land Reform Bonds. Specifically, this section addresses (A) the Land Reform Bonds as compensation for the expropriations that took place beginning in 1969; and (B) the State's attempts to avoid paying the adjusted value of the debt evidenced by the Bonds, including its misrepresentations leading to this Tribunal's Ruling of July 16, 2013, and the Guidelines issued by the MEF in January, 2014.

#### **A. Land Reform Bonds**

30. Beginning in 1969, the Peruvian Government implemented a series of measures aimed at transforming the country's social landscape by addressing the wealth-distribution system, particularly the economic and land ownership system. One such measure was the promulgation of Decree Law N° 17716 – the Land Reform Act – which sought to transform the country's land-tenure structure and replace the *latifundio* and *minifundio* system with redistribution of rural land.<sup>22</sup>

31. The land reform consisted of a series of expropriations of rural parcels. Ownership of these parcels – formerly owned by both individuals and legal entities – initially passed to the State and was subsequently distributed among peasants and small farmers organized in cooperatives and agricultural associations.<sup>23</sup> Those whose property was expropriated were entitled to compensation based on an appraisal conducted by the State and payment of the fair value was required by constitutional mandate.<sup>24</sup>

32. The State promised to pay over time, with interest, by issuing and placing the Land Reform Bonds. Landowners had no choice in the matter, for the law made surrender of land and acceptance of the Bonds mandatory. The State, therefore, not only took the land but effectively compelled the landowners to loan the State the funds with which to pay compensation for the takings.

33. The Government ultimately issued three classes of Land Reform Bonds: (i) Class A, with 6% annual interest over twenty years beginning as of their

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<sup>22</sup> Decree Law N° 17716, Land Reform Act, articles 1, 2 and 3.

<sup>23</sup> *Id.*, Articles 56 and 67.

<sup>24</sup> Political Constitution of Peru 1933, amended by Law N° 15242, published on November 30, 1964, Article 29: "Property is inviolable. No person may be stripped of his property except by court order or for reasons of public utility or in the interest of society, which must be legally established, and only after payment of the fair value. In the case of expropriations for reasons of Land Reform (...), the law may establish that compensation (...) may be paid in the form of bonds, the acceptance of which shall be mandatory (...)."

placement; (ii) Class B, with 5% annual interest over twenty-five years; and (iii) Class C, with 4% annual interest over thirty years.<sup>25</sup> These Bonds stated that they were payable annually in cash until maturity. They represent the State's obligation to pay the fair value of the land, which had the "State's unreserved guarantee" pursuant to article 175 of the Land Reform Act.<sup>26</sup>

34. The Ministry of Agriculture and Irrigation's webpage indicates that between June 1969 and June 1979, more than nine million hectares of land were expropriated, consisting of some 15,826 land lots. According to that source, this benefited approximately 370,000 families.<sup>27</sup> In a 2006 report, Congress noted that the MEF made a "net bond placement" equal to "13.285 billion *Soles Oro*."<sup>28</sup> That report also indicated that "payments were made for 10.763 billion *Soles Oro* of the principal" and that there was an outstanding balance of some 2.521 billion *Soles Oro*.<sup>29</sup>

## B. The State's efforts to avoid its obligations

35. The State has for decades evaded its constitutional obligation to pay fair value for the expropriated land. Through one means or another it has sought to ignore, deny or trivialize that obligation. With each such attempt, intervention of Peruvian courts and of this Tribunal has been necessary to check that unlawful conduct and protect the bondholders' constitutional rights. History thus establishes a pattern of Government mistreatment of the bondholders' rights, followed by successful bondholder petitions for redress.<sup>30</sup>

### 1. Undervaluing and selective default

36. Pursuant to article 29 of the 1933 Constitution, which was valid when the Land Reform Act was enacted, the land reform should have resulted in the payment of fair compensation for the expropriated lands of individuals and companies. Instead, the mechanisms established in the Land Reform Act were openly

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<sup>25</sup> Decree Law N° 17716, Land Reform Act, Article 174.

<sup>26</sup> *Id.*, Articles 173, 174 and 175.

<sup>27</sup> *El proceso de reforma agraria, Objetivos de la reforma agraria*, Ministerio de Agricultura y Riego, available at <http://www.minag.gob.pe/portal/marco-legal/titulación-y-créditos/titulación-agraria-en-el-perú/el-proceso-de-reforma-agraria>; see also Matos Mar, José and J. M. Mejía, *La reforma agraria en el Peru*, Lima: Instituto de Estudios Peruanos, 1980, p. 171.

<sup>28</sup> 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, which proposes the "Legal Certainty for the Physical and Legal Restructuring of parcels affected by the Land Reform Process and Land Reform Debt Adjustment and Payment Act," p. 13.

<sup>29</sup> *Id.*

<sup>30</sup> Compare, for instance, the content of this Tribunal's March 2001 decision (ordering payment of the Bonds' updated value) against the Letter 091-2010/EF-75.20 of November 17, 2010 issued by the National Bureau of Public Debt indicating that "any proposal to the effect that the land reform bonds be paid at current value is not viable." Emphasis in the original.

abusive, and fair value was not given in exchange for the takings.<sup>31</sup> Available sources on this topic indicate that the Land Reform Act did not set forth a fair method for assessing the value of the land, but that it indicated that the amount of the *justiprecio* would be set, among other ways, on the basis of the sworn declaration of self-valuation (*autoavaluo*), or “on the basis of the land’s economic capabilities” and that the Land Reform General Directorate fixed the *justiprecio* on the basis of the land’s quality using a representative hectare sample for agricultural lands.<sup>32</sup>

37. This initial value assessment from the beginning undercompensated the expropriated landowners. In their publication *Quantitative Aspects of the Land Reform*, Caballero and Alvarez indicate that “the total amount of the expropriations – slightly over 15 billion *Soles Oro* – is pretty low,” as it corresponds to “approximately half of the national budget for agricultural loans in 1977,” and “only 20% more than the national investment in irrigation in 1978.”<sup>33</sup>

38. To make matters worse, during the 1980s, Peru began defaulting on the payment of the Bonds’ coupons. This default has been attributed to the deteriorating economic situation, which resulted in terrible hyperinflation (as described in paragraphs 45 and 46), the winding down of the Agrarian Bank that took place from 1992<sup>34</sup> and the currency switch from *Soles Oro* to *Inti*.<sup>35</sup> Although Peru for a time created some individualized bank accounts and credited those accounts with nominal payments and deposits, it appears that it stopped paying the debt altogether – even on a nominal basis and unadjusted for current value – approximately in 1992.<sup>36</sup>

39. Despite the State’s “unreserved guarantee” in the Land Reform Act to pay the full value of the Bonds, Peru not only stopped paying the land reform debt, it also took steps to avoid paying its current value, even in the face of clear instructions from this Tribunal.

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<sup>31</sup> José María Caballero, *Reforma y Reestructuración Agraria en el Perú*, Publicaciones Cisepa N° 34, Lima, Pontificia Universidad Católica del Perú, 1976, pp. 37 and 38.

<sup>32</sup> José María Caballero and Elena Alvarez, *Aspectos cuantitativos de la reforma agraria 1969-1979*, Instituto De Estudios Peruanos 1980, p. 60.

<sup>33</sup> *Id.*, p. 61.

<sup>34</sup> Decree Law N° 25478, May 8, 1992. The Agrarian Bank was declared (the entity responsible for the amortization and interest of the Bonds) in a state of liquidation. Liquidation was concluded by Resolution 078-2008-EF of September 27, 2008.

<sup>35</sup> On January 11, 1985 Law N° 24064 was published through which the *Inti* was adopted as Peru’s currency.

<sup>36</sup> On the next day of the publication of Decree Law N° 25478, the payments to the creditors of the Agrarian Bank were suspended, including to the bondholders. There is no evidence that the bondholders were included in the list of creditors of the Agrarian Bank or that it was determined which entity of the Peruvian Government should make the payments of the outstanding coupons.

## 2. Law N° 26597

40. Although Article 15 of the Agricultural Sector Investment Promotion Act provided that payment for expropriations should be made at market value, through a series of laws – in particular the enactment of N° 26597 – the Government avoided this obligation and instead attempted to impose the view that the mere fact of physically delivering the Bonds was tantamount to effective payment.<sup>37</sup>

41. In 1996, however, the Engineers' Bar Association asked this Tribunal to declare Law N° 26597 unconstitutional on the basis that it affected the valuation criteria and payment for expropriated lands enshrined in article 70 of the Constitution. The Engineers' Bar Association argued that the land reform expropriations had actually been "seizures," because landowners had received Bonds that were worth far less than the expropriated land, and that due to the "inflation process," the value of the Bonds had been "eroded in relation to the actual value of the expropriated land."<sup>38</sup>

42. At that time, Congress joined forces with the Administration to avoid paying the current value of the debt and defended the validity of the challenged statute. As this Tribunal noted, Congress "denied and opposed" the Engineers' Bar Association's petition, arguing that "the land reform bonds are valid payment and are governed by the nominal payment principle, under which the creditor receives the exact sum of money appearing on the bond, regardless of any changes in its purchasing power."<sup>39</sup>

43. On March 15, 2001, the Tribunal issued a landmark opinion. The Tribunal upheld the Engineers' Bar Association unconstitutionality claim and confirmed the principle that the Land Reform Bonds should be adjusted in accordance with the valuation principle enshrined in article 1236 of the Civil Code and Article 70 of the Constitution.

44. The Tribunal declared article 1 of Law N° 26597 unconstitutional because "the criteria for the valuation and payment of the adjusted value of the expropriated land" responds to "a sense of basic justice, in accordance with article 70 of the Constitution," which that law ignored when it provided for payment of "the face value amount only."<sup>40</sup> The Constitutional Tribunal also found article 2 of Law N° 26597 unconstitutional because it attempted to validate the fair value system presented in the Bonds while treating this value "in an unalterable way that failed to

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<sup>37</sup> Legislative Decree N° 653, Agricultural Sector Investment Promotion Act, Article 15 and Fourth Transitory Provision. *See also* Law N° 26207, article 3, expressly repealing the Fourth Transitory Provision of Legislative Decree N° 653, thus derogating the market value principle. Law N° 26597 then basically provided that the "expropriation processes for purposes of Land Reform" would be implemented in accordance with Law N° 26207, which had already repealed payment of the fair market value principle.

<sup>38</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC of March 15, 2001, Background, paragraph 6.

<sup>39</sup> *Id.*, Background, paragraph 7.

<sup>40</sup> *Id.*, Foundation 1.

take into account the effects of time.”<sup>41</sup> The Tribunal further declared these legal provisions unconstitutional “as they violated the valuation criteria inherent to property.”<sup>42</sup>

45. The “sense of basic justice” to which the Tribunal’s March 2001 Decision referred arose from the effect of hyperinflation on the value of the Bonds during the long payment period the State had imposed. Between 1980 and 1987, Peru’s annual inflation rate never dipped below 50%.<sup>43</sup> Between 1988 and 1990, the economic situation continued to worsen and inflation spiraled out of control, reaching its peak in August 1990, when annual inflation was 12,378%.<sup>44</sup> In that month alone, existing currency lost 75% of its value. This means that at the end of that month, the same amount of money would have the power to buy only 1/4 of the goods and services it could have purchased at the beginning of that month. In other words, prices were more than 100 times higher by August of 1990 than they had been a year earlier; more than 7,000 times higher than they had been the year before that; and more than 30,000 times higher than they had been just three years earlier in August of 1987. For bondholders, the face value of the debt owed to them – as denominated in *Soles Oro* – virtually disappeared.

46. In response to the profound inflation and currency devaluation crisis, the administration changed the currency twice in a span of six years. In 1985, Peru switched from *Sol Oro* – the currency in which the Bonds were issued – to *Inti*.<sup>45</sup> In 1991, the State once again changed the official currency from the *Inti* to the *Nuevo Sol*.<sup>46</sup> As a result, the nominal equivalent of one *Sol de Oro* is now equal to 0.000000001 – one billionth – of a *Nuevo Sol*.<sup>47</sup>

47. Congress eventually recognized the obvious deterioration of the Peruvian currency’s value and the need to arrive at a current value of the land reform debt. In a 2006 report, a Congressional Committee opined that the State had “acknowledged the debt and promised to pay it” by issuing the Land Reform Bonds, but “as the value of the currency deteriorated,” it had become “essential” to apply an

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<sup>41</sup> *Id.*, Foundation 2.

<sup>42</sup> *Id.*, Foundation 7.

<sup>43</sup> Deloitte Report, Annex 3.

<sup>44</sup> Reinhart, Carmen, Savastano, Miguel, *The Realities of Modern Hyperinflation*, p. 21, available at <https://www.imf.org/external/pubs/ft/fandd/2003/06/pdf/reinhard.pdf>.

<sup>45</sup> Law N° 24064, Article 1: “As of February 1, 1985, the *Inti* is hereby established as the unit of currency in Peru (...).” Under this law, one *Inti* was equal to one thousand *Soles Oro*.

<sup>46</sup> Law N° 25295, Article 1: “The ‘*Nuevo Sol*’ is hereby established as the unit of currency in Peru (...).” Under this law, one *Nuevo Sol* is equal to one million *Intis*.

<sup>47</sup> Central Reserve Bank of Peru, table of equivalencies: <http://www.bcrp.gob.pe/billetes-y-monedas/unidades-monetarias/tabla-de-equivalencias.html>.

adjustment factor that “to the extent possible, would allow the value of the confiscated assets to remain constant.”<sup>48</sup>

### 3. Emergency Decree N° 088-2000

48. While the Engineers’ Bar Association unconstitutionality claim was pending, the Administration continued trying to avoid paying the current value of the land reform debt. In 2000, Peru passed Emergency Decree N° 088-2000, recognizing the land reform debt and purporting to implement a mechanism for crediting and paying it, using new bonds issued by the Public Treasury.<sup>49</sup> To adjust the value of the Land Reform Bonds, Emergency Decree N° 088-2000 ordered them converted “to U.S. dollars at the official exchange rate in effect on the issue date,” applying “to the result an annual interest rate of seven point five percent (7.5%) up to the month immediately prior to the date the calculation was made, compounded annually.”<sup>50</sup>

49. Emergency Decree N° 088-2000 was particularly damaging because it provided that payment would be made by swapping the Land Reform Bonds for newly-issued sovereign debt with a maturity of 30 years *but with no interest*. In other words, it converted a compulsory *interest bearing* loan to the State into a compulsory *interest free* loan. Additionally, the Emergency Decree authorized free negotiability of the Bonds only for certain purposes – for instance, to acquire very specific agricultural land (such as fallow lands; or land that was undergoing an irrigation project); or to purchase stock in State-owned agricultural companies.<sup>51</sup>

50. Various bondholders objected to the Emergency Decree N° 088-2000. On February 3, 2004, the Ica Bar Association filed an unconstitutionality claim against several articles of the decree. It was argued, among other things, that the Emergency Decree violated the right to property; and the principle of judicial independence, by unlawfully interfering with proceedings that were pending before Peruvian courts dealing with the payment of compensation for expropriations; and the right to due process, since it attempted retroactively to impose a procedure that did not exist at the time the underlying events occurred.<sup>52</sup>

51. That claim was the basis for this Tribunal to set another historic precedent. On August 2, 2004, the Tribunal upheld the independence of the judiciary and concluded that “the procedure governed by Emergency Decree N° 088-2000”

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<sup>48</sup> 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, which proposes the “Legal Certainty for the Physical and Legal Restructuring of parcels affected by the Land Reform Process and Land Reform Debt Adjustment and Payment Act,” p. 13.

<sup>49</sup> Emergency Decree N° 088-2000, Article 2. Payment System, “Payment of the accredited and recognized debts in accordance with the provisions of this law shall be made with Bonds issued by the Public Treasury up to the amount of the adjusted debts (....)”

<sup>50</sup> *Id.*, Article 5.

<sup>51</sup> *Id.*, Article 2.

<sup>52</sup> Constitutional Tribunal of the Republic of Peru, Case N° 0009-2004-AI/TC, of August 2, 2004, Background, paragraphs 1 and 2.

should be interpreted “as an option that may be freely chosen by creditors as an alternative to the option of going to Court to demand payment of the adjusted amount of the debt, plus applicable interest.”<sup>53</sup> In other words, the Tribunal left open the possibility for Land Reform Bond holders to seek compensation before a competent court. Similarly, with regard to the alleged violation of the principle of equality under the law – petitioners in that case argued that the Emergency Decree N° 088-2000 used an adjustment method “different from that normally provided for creditors,”<sup>54</sup> under the Civil Code – the Tribunal held that there was no such violation so long as Emergency Decree N° 088-2000 was merely an “option” and was not mandatory. As argued below, at a minimum, the Tribunal’s 2004 resolution should serve as persuasive precedent for the Tribunal now as it assesses the Guidelines.

#### 4. The Tribunal’s July 2013 Ruling

52. Due to the Government’s delay in resolving the Land Reform Bond problem, on October 5, 2011, the Engineers’ Bar Association filed a petition seeking enforcement of this Tribunal’s Decision of March 2001, which had declared Law N° 26597 unconstitutional.

53. On July 16, 2013, the Tribunal deemed it necessary to address the request so as to “monitor and ensure definitive compliance with the order” contained in its March 2001 Decision (the “Ruling”), and that is why the Tribunal enacted an enforceability declaration. It reaffirmed its March 2001 Decision that expropriation without payment of fair value, or for which “only the face value was paid,” violated “a basic sense of justice” in accordance with article 70 of the Constitution.

54. In its Ruling, the Tribunal reproachfully summarized the Government’s conduct with respect to the payment of the Land Reform Bonds:

“(…) although the Executive Branch initially showed willingness to honor the debt resulting from the expropriations conducted as part of the Land Reform [...] it later abandoned its efforts and to date the State has failed to establish criteria for the ‘valuation and payment of the adjusted amount of the debt,’ much less paid it. On the contrary, as counsel for the Engineers’ Bar Association has shown, the Executive Branch, in various responses given to persons whose property was expropriated under the Land Reform, and through its government attorneys in claims filed to collect the fair price owed, has consistently denied the need to adjust the amount of the debt, given that there is no court or administrative order to do so, and the

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<sup>53</sup> *Id.*, Foundation 17.

<sup>54</sup> *Id.* Foundation 12.

judgment of this Court ‘cannot apply to events that occurred before the judgment was rendered.’”<sup>55</sup>

55. While the Tribunal’s decision reaffirmed that the Government is obliged to pay the current value of the debt, it also went further and considered several methods for calculating that current value. Among those methods was the one most commonly used to update delinquent Peruvian debts, namely the CPI method. However, the Tribunal held, without citing any supporting evidence, that using the CPI method would yield an amount that would jeopardize Peru’s compliance with other obligations, including the provision of “public services.” In other words, the Tribunal appeared to consider that Peru could not afford to pay the debt if calculated using the CPI method.

56. Accordingly, in an act of purported balancing of the bondholders’ constitutional rights against this asserted threat to the general welfare, the Tribunal endorsed a different method: “calculating the adjusted value of the bonds by indexing the existing obligations to the equivalents in foreign currency” and then “applying the interest rate for United States Treasury Bonds.”<sup>56</sup>

57. The Tribunal thus ordered that “within six months of this Ruling, the Executive Branch shall issue a supreme decree regulating the procedure for the recording, valuation and forms of payment of the land reform bond debt.”<sup>57</sup>

58. Subsequently, on November 4, 2013, after interested persons and organizations – including the Association – filed motions for annulment and clarification of the Ruling, this Tribunal provided that although the MEF had the authority to issue Guidelines, “the process of adjusting the debt” should “under no circumstance” lead to a “result that reflects the practical application of a nominal criteria” and it reserved its jurisdiction to monitor calculation processes leading to a nominal payment.<sup>58</sup>

##### 5. The MEF’s January 2014 Guidelines

59. In January 2014, the MEF issued the Guidelines containing the “Regulations for the Administrative Process of Recording, Adjusting and Paying the Land Reform Bond Debt.”

60. The Guidelines set out a “mandatory” procedure for bondholder claims.<sup>59</sup> To initiate that administrative procedure, however, any bondholder that is a

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<sup>55</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC, of July 16, 2013, Foundation 18.

<sup>56</sup> *Id.*, Foundation 24.

<sup>57</sup> *Id.*, Dispositive sections 2 and 3.

<sup>58</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-P1/TC, 4 November 2013, Foundations 7, 10, 12 and 14.

<sup>59</sup> Supreme Decree N° 17-2014-EF, article 4.

party to ongoing judicial proceedings seeking payment of the value of the Bonds must first “abandon” those proceedings and any rights to participate in any other legal proceedings in the future.<sup>60</sup> Sovereign debt restructuring is not uncommon, and Peru has – as a matter of fact – restructured its sovereign debt several times in the past. But it has never asked creditors to waive their procedural rights just to reconcile the amount due.

61. This is followed by a complex, bureaucratic and uncertain administrative process. That process could take up to seven years before the bondholders receive any value: five years for bondholders to file their “applications” to be “officially identified and registered” as the Bonds’ legitimate holders, followed by a two-year process to hear each individual claim.<sup>61</sup> This two-year period is comprised of eighteen months for the MEF to “register” the application; and six months to finalize the “administrative updating.”<sup>62</sup>

62. The Guidelines provide that no payment of any kind can occur until an unspecified “minimum” quantity of claims has been submitted.<sup>63</sup> More generally, the Guidelines say nothing about the form of compensation bondholders might ultimately receive, leaving it unclear if the Government ever will pay in cash or will simply issue another bond with below market terms and long maturity. In fact, article 17.1 merely indicates that the MEF, “taking into account principles of fiscal balance and financial sustainability,” as well as “fiscal rules” and the “multi-annual macroeconomic framework,” shall “define the options that the bondholders may choose from” for the purposes of collecting.<sup>64</sup>

63. The Guidelines also contain provisions stating how the Government proposes to calculate the debt due to each bondholder. It describes these calculations by a series of complex equations. The equations are not easy for a lay person to understand. They purport to convert a nominal amount of *Soles Oro* into U.S. dollars using what they call a “parity exchange rate.” However, instead of using a well-established international reference for such a parity exchange rate, the Guidelines calculate that rate with another complex equation that is unusual and unfounded.<sup>65</sup>

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<sup>60</sup> *Id.*, Final Supplemental Provision N° 1.

<sup>61</sup> *Id.*, Articles 6.1 and 6.2.

<sup>62</sup> *Id.* Fourth Supplemental Final Provision. *Ver tambien*, Emergency Decree N° 88-2000, for instance, did not impose these burdensome and complex administrative procedures. That was, in fact, a very straightforward regulation. Although article 10 of Decree 88-2000 provided that acceptance of new bonds meant the “abandonment” of ongoing judicial proceedings, nothing therein barred bondholders from pursuing their claims before the judiciary.

<sup>63</sup> *Id.*, Article 17.2.

<sup>64</sup> *Id.*, Article 17.1.

<sup>65</sup> “*An Analysis of the Formulas for Calculating the Redemption Value of Land Reform Bonds in Peru*,” prepared by Dr. Iván Alonso and Dr. Ítalo Muñoz (the “Alonso Report”), p. 6 (noting that they “know of no economic theory or reputable author supporting a formulation similar to the MEF formula.”). *See also* “*The Appropriate Parity Exchange Rate to be Used in Valuing*

64. That equation is also mathematically wrong. As Dr. Ivan Alonso and Dr. Italo Muñoz explain in their report submitted along with this brief, the Guidelines’ yield the absurd result that as Peruvian currency *weakens* against the dollar, each *Sol* is worth *more* and therefore *fewer* dollars are required to achieve parity. This makes no sense. This basic error in the equation thus turns the purpose of using a parity exchange rate on its head.

65. The Guidelines then apply to this incorrectly restated principal amount not the interest rate stated in the Bonds, but an interest rate for U.S. Treasury bills (also known as T-bills) of just one-year duration. The one-year U.S. Treasury bills have interest rates that are not only considerably *lower* than the interest rates specified in the Land Reform Bonds, but also rates that are considerably lower than U.S. Treasury bonds of durations closer to those of the Land Reform Bonds, as the following chart shows:

Bond	Issuance	CUSIP	Issue Date	Yield	Rate
U.S. Treasury	30 years	912810RD2	15/01/2014	3.899%	3.750%
U.S. T-bills	1 year	912796FG9	13/11/2014	0.140%	0.142%

66. The information from the table above comes from the U.S. Treasury Department’s webpage.<sup>66</sup> It shows the dramatic difference between the interest rate of a 1-year T-bill and a 30-year Treasury bond. There can be no doubt that they are fundamentally different securities. So, instead of applying a 4%, 5% or 6% interest rate, or an interest rate of a 20- or 30-year U.S. Treasury bond, the Guidelines offer bondholders interest rates that are currently less than 0.15%. Dr. Alonso and Dr. Muñoz actually test the outcome of using such different rates and conclude that doing so “has a significant effect on the updated value of the bonds.”<sup>67</sup> Table 3 of their report shows the dramatic difference in compound value for a \$1,000 Treasury bond.

67. As Dr. Alonso and Dr. Muñoz explain in their report, it makes no economic sense to use a short-term interest rate with respect to a long-term bond such as the Land Reform Bonds.<sup>68</sup> Also, the Guidelines stop paying interest altogether as of 2013, and make the mistake of converting back to *Sol* at the average foreign exchange rate of 2013, instead of the exchange rate in effect at the time of actual payment – which, pursuant to the Guidelines, may occur many years from now.<sup>69</sup>

68. As addressed below, the Guidelines also discriminate among bondholders, classifying them in: (i) those over 65 years of age; (ii) individuals over legal entities; (iii) the original bondholders over the assignees. The Guidelines provide that persons over the age of 65 who are *original* bondholders are entitled to collect

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*Land Reform Bonds in Peru*,” prepared by Dr. Alan Heston (the “Heston Report”), Table 1, Estimates of Annual Parity Exchange Rates, Based on ICP Benchmark Comparisons.

<sup>66</sup> See Annex 22.

<sup>67</sup> Alonso Report, p. 10.

<sup>68</sup> *Id.*, Section II.

<sup>69</sup> Alonso and Munoz Expert Report, p. 12.

before other individuals who are older than 65 but are *not* original bondholders. The Guidelines then provide the same priority for people under 65 years of age, and thereafter, give preference to legal entities that are holders of the land reform debt, followed by legal entities that have acquired the bonds as part of the payment of obligations provided for under law, and finally, legal entities that acquired the obligations for “speculative ends.” The Guidelines do not explain why these classes were established, how any individual bondholder will be classified under them or precisely what use will be made of the classifications in paying bondholders. The fact is, no Bond has priority over any other. To the contrary, all the Bonds received the same guarantee and are equal in entitling the owner – whoever that may be – to payment of the debt.

69. Perhaps even more importantly, the Guidelines make the procedures and the updating methodology established therein the only avenue for bondholders to collect the value of their Bonds. They provide no explanation as to why bondholders should be deprived of their fundamental right to present their claims in court, before judges who can consider the facts and apply the law impartially. They consequently deprive bondholders of their right to access the judicial system and have their day in court.

#### **IV. Argument**

70. The Constitutional Tribunal should closely scrutinize whether the Guidelines fulfill the requirements of the March 2001 Decision, and instruct the MEF to withdraw the Guidelines or to issue new Guidelines because the current Guidelines (A) do not offer bondholders the amount to which they are entitled; (B) deprive bondholders of their right to vindicate their claims in court; (C) impose on bondholders an unduly burdensome procedure; and (D) impermissibly discriminate among bondholders.

##### **A. The Guidelines do not fulfill the Tribunal’s mandate, or the State’s constitutional obligation, to pay the Bonds’ current value plus interest**

71. There can be no dispute that the bondholders are entitled to the current value of the debt plus interest.

72. The current value principle is firmly established in Peruvian law and in the instructions established in the March 2001 Decision. The principle is encapsulated in Article 1236 of the Civil Code, which provides that when “the value of an obligation is to be repaid, it shall be calculated to reflect the value it has at the time of payment, except as otherwise provided by the law or a contract.”<sup>70</sup>

73. This Tribunal and other courts have consistently held that this principle applies to the Land Reform Bonds. For example, the Tribunal’s seminal March 2001 Decision confirmed the mandatory application of the current value principle, and said

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<sup>70</sup> Civil Code, Article 1236.

it was “inherent to property.”<sup>71</sup> The Constitutional and Social Law Chamber of the Supreme Court of Justice has likewise held that payment of the Bonds must be based on the “current value principle, under which said bonds represent the value for which they were originally issued.”<sup>72</sup> The same Chamber of the Supreme Court has further stressed that this was necessary because inflation should not “harm creditors and benefit debtors.”<sup>73</sup>

74. Most critically for purposes of the current application, the mandate that the Tribunal gave to the MEF in July 2013 specifically called upon the MEF to prepare decrees that would provide a mechanism to pay current value, and in November 2013, warned that “in no circumstance” could the updating mechanism result in a “nominal payment,” going so far as to “reserve its competence” to control any methodologies that may produce such a result.<sup>74</sup>

75. The application of the current value principle to the Bonds also has a special constitutional dimension because the Bonds represent a debt that arose decades ago from the State’s expropriation of land. Article 70 of the Constitution enshrines the “inviolable” right not to be deprived “of one’s property except, exclusively, for reasons of national security or public necessity, declared by the law,” and further establishes that an expropriation can occur “only after receiving cash payment of the fair price, including compensation for any damages.”<sup>75</sup> The Inter-American Court of Human Rights – whose decisions on human rights issues are binding on Peruvian courts pursuant to the 4<sup>th</sup> Transitory and Final Provisions of the Constitution – has also held that the duty to make “prompt, effective and adequate” compensation after a taking constitutes a general principle of law.<sup>76</sup>

76. Despite the fact that, as this Tribunal has held, the right to property “is closely related to personal freedom, as an expression of the economic freedom to

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<sup>71</sup> Constitutional Tribunal of the Republic of Peru, Case N° 0022-1996-AA/TC, of March 15, 2001. Foundation 7.

<sup>72</sup> Cassation N° 1002-2005, of July 12, 2006, Whereas Clause 15. *See also* Cassation N° 1958-2009, of January 26, 2006, Whereas Clause 3 (reaffirming the current value principle and even referring to this Tribunal’s March 2001 Decision in the sense that nominal payment would constitute an abuse of a right which the Constitution proscribes).

<sup>73</sup> Cassation N° 110-2006, of March 6, 2007, Whereas Clause 6.

<sup>74</sup> Constitutional Tribunal of the Republic of Peru, Case N° 0022-1996-AA/TC, of July 16, 2013, Foundation 28 (indicating that the updating mechanism “must result in the amount of the current value of the bonds, plus interest.”). *See also* Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC, November 4, 2013, Foundation 8 (reserving its competence to ensure that the Guidelines comply with the current value principle).

<sup>75</sup> Political Constitution of Peru of 1993, Article 70; Constitution of Peru of 1979, Article 125; Constitution of Peru of 1933, Article 29. The right to property has also been recognized by supranational treaties, such as the Universal Declaration of Human Rights and the American Convention on Human Rights.

<sup>76</sup> Inter-American Court of Human Rights. *Salvador Chiriboga v. Ecuador*, Preliminary Objection and Merits, Judgment of May 6, 2008, Series C, N° 179, paragraph 96.

which all persons are entitled in a social democratic State under the rule of law,”<sup>77</sup> the bondholders were forced by the State to accept long-term debt that was vulnerable to the kind of savage inflation against which the current value principle protects.

77. So there can be no question that current value is owed. In the Guidelines, however, the MEF has grossly distorted *how* current value is to be calculated. As will be explained below, the right way to determine current value is not overly complicated: take the principal amount of the debt at placement and apply the CPI to it; then add to that updated principal amount the interest, calculated at the rate the State promised to pay in the bonds, ranging from 4% to 6% per year. That produces current value plus the compensation for being deprived of the use of the money for so long. While there are some additional considerations when it comes to calculating the current value of bonds from which some of the coupons have been removed, that is the basic method.<sup>78</sup>

78. There is nothing unusual or extraordinary about this CPI method. It is used all the time in Peru when it comes to updating debts. Courts have routinely endorsed this method of updating. They have done so with respect to Land Reform Bonds as well as in many other contexts. In short, there can be no question that the CPI method produces current value.

79. Unfortunately, the MEF did not follow this straightforward method. Instead, it used a dollarization approach. The method used by the MEF in the Guidelines entails converting the debt denominated in *Soles Oros* into U.S. dollars using a so-called parity exchange rate derived from a formula the MEF *invented* for this purpose. The converted amount is then inflated to supposedly current value by using the interest rate of a U.S. Treasury bill, and then converted back to *Nuevos Soles* at the average 2013 nominal exchange rate. The dollarization approach is not commonly used in Peru for purposes of updating, perhaps because it is unnecessarily complicated and requires currency conversion as well as applying an inflation rate of some kind. However, as will be demonstrated below, even if there might be some validity in theory to a method that updates a debt by inflating a reference currency rather than inflating Peru’s own currency, the dollarization method the MEF used in the Guidelines is logically, mathematically and equitably indefensible.

80. The evidence that Petitioners present here proves that the MEF’s approach provides nothing even close to current value. Deloitte has calculated the value of two hypothetical bonds under the conventional CPI approach and under the MEF’s Guidelines. That calculation shows that under the conventional CPI approach, the amount due on a 5,000 *Soles Oro* Class A bond, with all of its coupons still in place, is 29,544.13 *Nuevos Soles*. Given that the CPI approach is the most widely used way of determining current value, this amount of 29,544.13 *Nuevos Soles* is at the very least a fair estimate of the current value of that bond. But under the MEF’s

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<sup>77</sup> Constitutional Tribunal of the Republic of Peru, Case N° 05614-2007-PA/TC, of March 20, 2009, Foundation 4.

<sup>78</sup> See Appendix A. See also Section IV.A.1.c below.

Guidelines, that bond would be worth a paltry 71.67 *Nuevos Soles*,<sup>79</sup> about enough to buy a lunch, a t-shirt or a couple of movie tickets.

81. That is obviously a miniscule fraction – less than 0.25% – of current value. It is basically a way of saying the debt is worthless. Indeed, as Deloitte has also demonstrated, if the MEF’s formula is applied to the entirety of the remaining outstanding debt on the Land Reform Bonds, the total amount the State would owe in satisfaction of *all* the Bonds is (depending on certain assumptions) between \$12.6 million and \$23.9 million.<sup>80</sup> Deloitte’s maximum estimate of \$23.9 million assumes that all outstanding Land Reform Bonds are unclipped and issued in 1969, both of which are unrealistic assumptions. If, instead, a great number of outstanding Land Reform Bonds consist of clipped Bonds and were issued throughout the 1970’s, the total amount owed by the State will actually be much less than \$23.9 million and potentially much less than \$12.6 million. In light of the fact that the State expropriated 7,877,925 hectares of land, which today is worth (by very conservative estimates) \$42.4 billion, it is simply inconceivable to suggest that the genuine current value of the remaining debt is so small.<sup>81</sup>

82. The remainder of this section will demonstrate (1) that the Guidelines fail to satisfy the mandate to pay current value because they do not use the CPI method or provide adequate compensatory interest, and (2) that the Guidelines fail to satisfy the mandate because – even if dollarization could in theory be a way of determining current value – the particular dollarization approach the Guidelines prescribe is hopelessly flawed and cannot even come close to current value.

1. The Guidelines do not provide current value because they do not use the CPI method

83. The appropriate method to determine current value is by updating principal based on the CPI, and then adding interest at the rates the Bonds promised. That is the most reliable method, and the only one that honors the State’s original promise to pay fair compensation for the expropriations. Because the Guidelines do not use this CPI method, they cannot fulfill the State’s obligation to provide current value.

84. As noted by Dr. Benavides, Dr. Peñaranda and Professor Adrianzen, apart from “failing to honor the Land Reform Debt for several decades, the Government has attempted to further expropriate bondholders through and absurd valuation methodology contained in two Supreme Decrees that were issued in January 2014.”<sup>82</sup>

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<sup>79</sup> Deloitte Report, Table 4.

<sup>80</sup> *Id.*, Table 8.

<sup>81</sup> *Id.*, Tables 11 and 12.

<sup>82</sup> Benavides Report, p. 15.

85. In this section, Petitioners show (a) that CPI is the correct method for calculating the current value of the Bonds; (b) interest should be added to the updated principal; (c) in calculating CPI on Bonds with some coupons clipped, the remaining principal should be determined as of the original placement date; (d) the fact that some aspects of the MEF's approach are based on instructions in this Tribunal's fragmented July 2013 Decision is no bar to an adequate majority of this Tribunal revising those instructions based on a more complete and accurate factual record.

- a. *CPI is the correct method for calculating the current value of the Land Reform Bonds and is used almost without exception in Peru*

86. There can be no serious dispute that CPI is the most reliable method for updating the principal amount of an old debt. It is conceptually sound, far more so than dollarization. And it is a near unanimous practice of Peruvian courts and government bodies. Were it not for the Government's inaccurate assertions about Peru's inability to pay the bondholders based on CPI – which will be addressed below – the Tribunal would most likely have once again endorsed the CPI method in its July 2013 Decision.

87. In concept, the CPI method is perfectly suited to updating an old debt to current value. The current value principle requires that the original value of the debt be brought current in a way that avoids the pernicious effects of Peruvian inflation, so as to ensure that the amount due today has purchasing power equivalent to the amount due when the debt was originally created.

88. The CPI method accomplishes precisely this purpose, and hence produces the most accurate indication of current value. The CPI is a measure of variation in the purchasing power of money over time. It is usually established by state organs that compile, verify and publish statistics, or otherwise by central banks. Essentially, it is a weighted numerical figure that measures the increase or decrease in prices of goods and services consumed by the average family unit for a given period, in comparison to the previous period.<sup>83</sup> This index is calculated on the basis of the prices of a set of products, known as the family market basket, determined by constant surveys of the products regularly purchased by a number of consumers, and the variation in the prices of each one, compared to the previous sample.<sup>84</sup> This percentage may be positive, indicating that prices increased; or negative, indicating that prices decreased.

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<sup>83</sup> *Diccionario de Términos Económicos y Financieros “la Caixa”* [“La Caixa” Dictionary of Economic and Financial Terms], available at [https://portal.lacaixa.es/docs/diccionario/I\\_es.html](https://portal.lacaixa.es/docs/diccionario/I_es.html) \1 “INDICE-DE-PRECIOS-AL-CONSUMO-%28IPC%29. See also Downes, John and Goodman, Jordan Elliot, “*Dictionary of Finance and Investment Terms*,” *Séptima Edición*, A.B. Barron’s Financial Guide pp. 137-138.

<sup>84</sup> Constitutional Tribunal of the Republic of Peru. Case N° 0022-1996-AA/TC, of July 16, 2013, Foundation 23.

89. To put it another way, the purpose of the CPI is to measure how the prices of the market basket of consumer goods and services in a given region change over time.<sup>85</sup> In other words, it is itself a measure of inflation.

90. This basic description of CPI demonstrates how it is precisely calibrated to producing current value. That is why CPI is almost always used to update all kinds of debts. Peru's National Institute of Statistics ("INEI"), for instance, has a *Frequently Asked Questions* section in its webpage that indicates that "apart from being a statistical indicator that allows the monitoring of the evolution of prices, CPI has multiple practical applications." One of these applications, the INEI explains, is "adjusting and/or updating the monetary values, on the basis a given currency's loss of its purchasing power through time because of inflation."<sup>86</sup> That is exactly what the current value principle aims to achieve.

91. On the other hand, dollarization can never be as precisely attuned to determining current value as the CPI method because it converts the original *Soles Oro* debt to U.S. dollars using an exchange rate at some initial date. Consequently, dollar indexation measures only the price progression of the U.S. over time. It has no actual connection to how prices have developed in Peru. U.S. inflation was, of course, dramatically lower than Peruvian inflation over the relevant period. So the dollar indexation will necessarily – and significantly – understate the true amount necessary to give the bondholders today the same purchasing power in Peruvian currency that they should have had decades ago.

92. Assuming that a dollarization approach is appropriate, switching from one currency to another should be made on the basis of a parity exchange rate. That much is true. However, this requires a series of complex steps – including having to evaluate purchasing power not just in Peru, but in both Peru and the U.S., and figure out the relationship between them. As will be shown later, there could be multiple ways of determining a parity exchange rate, each of which entails one or another set of calculations and data evaluations. The process thus becomes unduly convoluted, uncertain and potentially erroneous. There is no legitimate reason why bondholders should be subjected to such an imprecise and roundabout way of determining current value when a precise and direct way – the CPI method – is readily available.

93. Because the CPI method is in fact the most reliable tool for determining current value, Peruvian courts and government authorities use CPI to calculate current value almost without exception. To cite just one of many examples, in March 2012, the Supreme Court of Justice upheld the validity of a current value calculation in an appraisal report made on the basis of "the Consumer Price Index (Monthly Wholesale Average at a National Level)," in a case concerning compensation for expropriation of 5,300 hectares of rural lands located in Huánuco

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<sup>85</sup> *Id.*

<sup>86</sup> INEI, Frequently Asked Questions section, available at <http://www.inei.gob.pe/preguntas-frecuentes/>.

property of the Augusto Durand Estate.<sup>87</sup> Peruvian trial courts also routinely follow the lead of this Tribunal and the Supreme Court in using CPI.<sup>88</sup>

94. In November 2006, Congress' Agricultural Commission acknowledged the central role CPI has played in court cases. The Commission noted that CPI is the "official factor applied by the State to update national accounts," and that "judges in Peru shall render judgments ordering experts to adjust the value of certificates of indebtedness based on said index." The Commission further observed that "the Constitutional Tribunal and the Supreme Court of Justice have *uniformly ruled* on the application of current value principle for adjusting the Land Reform Bond debt, *based on the Consumer Price Index.*"<sup>89</sup> The Commission pointed out that the Ministry of Agriculture also "applies the CPI to adjust Debts in the process of being contested in relation to the Land Reform expropriations."<sup>90</sup> That opinion summed up: "no government or private agency has *ever questioned* the validity" of the CPI for such purposes.<sup>91</sup>

95. The CPI method as the appropriate way of calculating current value of a debt was not only never questioned, but repeatedly confirmed. For instance, in May 2011, Congress' Land Reform Committee evaluated several bills for "land reform debt adjustment and payment."<sup>92</sup> One of those bills, the Land Reform Bond Debt Swap Bill, stated that for the purposes of "adjusting the amount of the Land Reform Bonds, it was going to use Lima's Consumer Price Index, as determined by the INEI." Failing this, the Committee stated, it would use the index published by the "Central Reserve Bank of Peru."<sup>93</sup>

96. The Executive has also endorsed the use of CPI for calculating the current value of the Land Reform Debt. For instance, former General Director of the

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<sup>87</sup> Resolution of March 13, 2012 in Case N° 4385-2010-HUANUCO, Foundation 4. *See also* Appraisal Report N° 456-2-2008 prepared by Economist Carlos Adolfo Venegas Lizama on July 6, 2008, p 7.

<sup>88</sup> 9<sup>th</sup> Civil Court of Lima, Exp. 34632-1997-Civil. *See also* Resolution N° 66 issued by the 23<sup>rd</sup> Lima Civil Court on November 6, 1997 in case N° 13433-25, Whereas Clause Eleven. *See also* Resolution N° 99 issued on June 14, 2007 by the Second Civil Chamber of the Superior Court of La Libertad in the case followed by *Dirección General de Reforma Agraria* against *Negociación Azucarera Laredo Ltda. S.A.* in case N° 625-07, Foundation 7. *See also* Constitutional Tribunal of the Republic of Peru, Case No. 0041-2004-AI/TC, of November 11, 2004, Foundation 53.

<sup>89</sup> Opinion issued on the following Bills: N° 456/2006-CR, N° 3272/2008-CR and N° 3293/2008-CR proposing "measures for the payment of Land Reform bonds," p. 13.

<sup>90</sup> Opinion issued on the following Bills: 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, proposing the "Legal Certainty for the Physical and Legal Restructuring of parcels affected by the Land Reform Process and Land Reform Debt Adjustment and Payment Act," p. 14.

<sup>91</sup> *Id.* (emphasis added).

<sup>92</sup> Opinion issued on the following Bills: N° 456/2006-CR, N° 3272/2008-CR and N° 3293/2008-CR, proposing "measures for the payment of Land Reform bonds," p. 1.

<sup>93</sup> *Id.*, p. 18.

Ministry of Agriculture's Legal Affairs Office, Juan Pédola Montero, stated that the Ministry's Legal Affairs Office (in issuing its opinion on Bill N° 456/2006-CR) recommended using the adjusted CPI calculated by the National Institute of Statistics and Informatics.<sup>94</sup> Likewise, on November 23, 2006, the Director of the Strategy and Policy Office also supported the idea of using the price indexes to adjust the value of the debt.<sup>95</sup> Consistent with this position, in March 2005, the head of INEI, Farid Matuk, argued before a congressional working group dealing with land reform bills that the updating of the Land Reform Debt should be made using the CPI methodology, as was the case with the land reform debts in Nicaragua and Yugoslavia.<sup>96</sup>

97. In fact, Petitioners have been able to identify only a single case that did not use CPI. However, in that case, the court did not rely on dollarization. Instead, it awarded the current value of the expropriated land itself, plus damages.<sup>97</sup> If applied to all bondholders, this would likely produce a far greater debt than the CPI method does. This long-standing, widespread practical application of CPI confirms that it is the superior and only reliable method for determining the current value of the principal amount due on the Bonds.

98. In short, no other updating methodology can really accomplish the same goal, at least with the same ease and accuracy. The Guidelines were, therefore, mistaken in not using CPI as the method for updating the principal to current value.

b. *Bondholders are entitled to compensatory interest in addition to current value updating*

99. The law is clear that compensatory interest must be paid in addition to the updated principal. The MEF's Guidelines do not even properly update the principal to current value, and come nowhere close to providing the current value plus compensatory interest to which bondholders are entitled.

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<sup>94</sup> Report N° 1328-2006-AG-OGAJ, December 20, 2006, p. 2.

<sup>95</sup> Technical Report N° 071-2006-AG-OGPA/OEP, November 23, 2006, Section II.3.

<sup>96</sup> Expreso, *INEI: Land Reform Debt Should be recalculated using CPI*, March 1, 2005.

<sup>97</sup> In March 2001, the Constitutional and Social Chamber of the Supreme Court of Justice upheld a claim filed by "Velarde Escardó y Compañía," a limited liability company, against the Ministry of Housing and Construction seeking the reversion of the lands that were part of *Fundo Maranga*, expropriated through Supreme Decree N° 032-71-VI. See claim filed by Velarde Escardó y Cía, a limited liability Company, on February 26, 1992 against the Ministry of Housing and Construction before the 1st Contentious-Administrative Court in Case N° 665-98. The Supreme Court affirmed the 1st Contentious-Administrative Court's decision ordering Peru to pay, "as compensation, [...] an amount reflecting the present market value of the expropriated lands, without prejudice to having to return the lands at issue." Notably, the Court also ordered the payment of "compensatory and late interest, according to the interest rate set forth by the Peruvian Central Bank." See Ruling N° 1 issued on January 6, 1999 by the 1<sup>st</sup> Contentious-Administrative Court in Case N° 665-98 and Resolution issued on March 6, 2001 by the Supreme Court in Case N° 1514-99.

100. The Supreme Court has drawn a clear line differentiating the concepts of updating, on one hand, and applying interest, on the other, noting that “*the adjustment of the fair price should not be confused (...) with the default interest due.*”<sup>98</sup> Although that case concerned the updating of *justiprecio*, the value of an actual land lot – as opposed to the value of the bonds – the principle set forth by the Supreme Court is equally applicable here because the Bonds reflect the *justiprecio* of the expropriations. It noted that “the main purpose of updating the compensation amount is to maintain the land’s objective value” and to “avoid the depreciation of the amount of the expropriation decision, up until the moment when payment is made.”<sup>99</sup> The Supreme Court distinguished that correcting has nothing to do with interest, which is a “compensation for the rent or benefits that the land could have generated” during that time.<sup>100</sup> Updating, therefore, in no way displaces the application of interest.<sup>101</sup>

101. The Supreme Court’s reasoning on this point is absolutely sound and coherent. Indexing the debt’s value and applying the correct interest rate address different issues. While indexing cures the effects of inflation, interest makes the individual whole for the time spent without his money.

102. In the case of the Land Reform Bonds, this rationale is especially apt because of the *pacta sunt servanda* principle that is established in article 1361 of the Civil Code. Bondholders were forced to accept bonds that embodied the contractual promise that they would at least receive interest of 6%, 5% or 4% of the principal.<sup>102</sup> Even if there had been *no* inflation in Peru since bond issuance, each bondholder would still be entitled to the interest he was promised. However, that promise was, and remains, broken. Therefore, to make bondholders whole, interest must also be paid.

103. As the Supreme Court has noted, not only is the Bonds’ interest “compensatory in nature” as it derives from the passage of time, it is also equivalent to the “bonds’ return” in accordance with article 1248 of the Civil Code.<sup>103</sup> As mentioned previously, Class A Bonds have a rate of 6%; the Class B Bonds’ rate is 5%; and the Class C Bonds’ rate is 4%.<sup>104</sup> To ignore the Bonds’ stated interest – namely their rate of return – or to use a different one, would therefore also breach article 1248 of the Civil Code. Consequently, the Supreme Court has held that “the payment of interest at the *legal* interest rate” was not appropriate because the Land

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<sup>98</sup> Cassation N° 4550-06, Transitory Civil Division of the Supreme Court, Whereas Clause 3.

<sup>99</sup> *Id.*, Whereas Clause 7.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*, Whereas Clause 8.

<sup>102</sup> Land Reform Act, article 174.

<sup>103</sup> Civil Code, article 1248. *See also* Cassation N° 2755-2001, Constitutional and Social Law Division of the Supreme Court of Justice, paragraph 12.

<sup>104</sup> Land Reform Act, article 174.

Reform Bonds “state their corresponding interest rate” as per article 174 of the Land Reform Act.<sup>105</sup>

104. Interest should be computed on a compounded basis. Courts do so regularly when determining what amount the State owes in payment of Land Reform Bonds. For example, on August 7, 2014, a Lima Civil Court ordered the payment of 3,386,522.76 *Nuevos Soles* after updating the Bonds’ face value using the CPI method and applying the Bonds’ interest on a compound basis for a given number of years.<sup>106</sup>

105. The MEF itself has acknowledged that interest should be compounded. While the Guidelines do not include meaningful compensatory interest in addition to updating of principal, they use an interest rate derived from U.S. Treasury bills (presumably to eliminate U.S. inflation during the relevant period). The Guidelines apply this interest rate on a *compound* basis.<sup>107</sup> In particular, the Guidelines’ formula is:

$$V_{hoy} = D_{i,0} \times \prod_{t=1}^{hoy} (1 + i_t) \times TC_{hoy}$$

In this formula, the  $\prod$  symbol means compounded.

106. Consequently, the Guidelines’ failure to provide bondholders with the promised compensatory interest on the Bonds, on a compounded basis, deprives bondholders of receiving compensation for the time value of the money that was due to them. Additionally, and to the extent applicable under Peruvian law, many bondholders ought to receive even greater payment in the form of late interest for defaulting – in this case, an extremely long and unjustified delay – on the payment of the obligation, pursuant to article 1246 of the Civil Code.

c. *The MEF Guidelines also deprive bondholders of current value in the way they update the principal of bonds with clipped coupons*

107. Considering that the current value principle seeks to safeguard the value of a debt from the pernicious effects of inflation over time, it follows that for bonds with clipped coupons, the principal amount of the debt must be determined as of the date the debt arose (or, as a proxy for that, when the Bond was placed) – not the date of the oldest unclipped coupon.

108. Yet the Guidelines incorrectly update the debt from the date of the oldest unclipped coupon. In doing so, they pick up on the Tribunal’s unexplained

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<sup>105</sup> Cassation No. 3860-2001, Constitutional and Social Law Division of the Supreme Court of Justice, Paragraph 5.

<sup>106</sup> File 34632-1997-Civil, Ruling of August 7, 2014.

<sup>107</sup> Supreme Decree N° 019-2014-EF issued on January 22, 2014, Annex 1.

statement that updating should be from the last unclipped coupon.<sup>108</sup> However, using the date of the oldest unclipped coupon is not only conceptually incorrect, but would also permit the State to benefit unfairly from the payment mechanism it imposed on the landholders at the time of the expropriations.

109. While this issue is technical, it also has significant practical implications. Using the date of placement preserves the remaining portion still due on the original debt. In contrast, using the date of the oldest unclipped coupon wipes out nearly all value for a great many bondholders. Hence to the extent that the Guidelines, and this Tribunal's Ruling, indicate using the date of the oldest unclipped coupon to determine the principal, they are wrong and should be corrected.

110. *First*, determining the principal amount as of the date of placement is conceptually correct. The debt to be updated is the amount promised as compensation for the land that the State expropriated. That debt arose upon expropriation. At that point, the landowners suffered the loss of their land, and, consequently, their right to compensation in a specific amount was created.

111. The main purpose of the application of the current value principle is to preserve the real value of that original debt over time in an inflationary environment. Even if the State paid a portion of that debt, for which the State should be credited, it should not be relieved of having to pay the real value of the balance still due.

112. In contrast, using the date of the oldest clipped coupon as the basis for updating would result in an incorrect updating of the debt. It would update a nominal amount of debt still due at some arbitrary date and would not have any bearing on the real value of the original debt. In this way it does not provide compensation for the land taken. It only provides compensation for defaulted payment on a Bond. That would be tantamount to saying that providing the Bonds was itself payment and adequate compensation for taking the land. But the Constitutional Tribunal decisively rejected that argument more than a decade ago, when it denied the Government's argument that it had fully paid for the land merely by handing over the Bonds.<sup>109</sup> That failed argument cannot be resuscitated now, either by the MEF in the Guidelines or even by the Tribunal in exercising its enforcement jurisdiction (as the next section will explain).

113. Drs. Alonso and Muñoz explain the rationale requiring valuation at the issuance date:

“The debt being valued arose on the date of issuance of the bond. If conversion into dollars is to be the method for updating the value of that debt, then in principle conversion should take place at the date of issuance.

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<sup>108</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC, of 16 July 2013, Foundation 25.

<sup>109</sup> Constitutional Tribunal of the Republic of Peru, Case N° 022-96-I/TC, March 15, 2001.

Otherwise, *the debt being valued is actually a different debt.*

The only difference between clipped and unclipped bonds is that some of the original principal of the clipped bonds has presumably been paid. The question then arises about how to offset those presumed payments against the original principal. The MEF formula implicitly assumes that all coupon payments were made in a currency that was not affected by inflation or devaluation. *This makes no economic sense.* The correct approach is to determine the original value of the bond on the date of issuance and then to deduct the dollar value of each coupon payment calculated as of the date of each such payment.”<sup>110</sup>

114. In its report, Deloitte corroborates Drs. Alonso’s and Muñoz’s opinion, and confirms that “[a]bsent a methodology which considers . . . the value of the outstanding principal updated from the date of issuance, Bondholders will only be credited with nominal value for each detached Coupon and the outstanding principal and will be exposed to the economic impact of the severe hyperinflation Peru experienced after the Bonds were issued.”<sup>111</sup> Deloitte adds:

“Such economic exposure significantly reduces the value of the compensation received by Bondholders and because Peru’s inflation rate following the issuance of the Bonds always exceeded the Bond stated interest rate it is *impossible for any Bondholder to receive an amount of compensation equal to the then present value of the debt owed to such Bondholder* by the Peruvian State with respect to the applicable land expropriation.”<sup>112</sup>

115. *Second*, updating the debt based on the date of oldest unclipped coupon would also produce arbitrary results. Assume for example that the State placed two identical bonds on the same day, each for 5,000 *Soles Oro*, to compensate for taking two identical parcels of land right next to each other. Assume also that over the ensuing years the State paid no coupons on one of them, while it paid 50% of the coupons on the other. Even under the MEF’s hopelessly flawed approach, the fully intact bond would at least be worth only 71.67 *Nuevos Soles*. In concept, the clipped bond – which over time has gradually had half of its coupons redeemed – should be worth at least half of the unclipped bond. However, because of the MEF’s assumption that the updating of the original principal starts only after all those coupons have been redeemed, under the MEF’s approach the clipped bond is worth less than 0.01 *Nuevos*

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<sup>110</sup> Expert report prepared by Dr. Ivan Alonso and Dr. Italo Munoz, p. 14 (emphasis added).

<sup>111</sup> Deloitte Report, Section 2.3, Chapter 1.

<sup>112</sup> *Id.*

*Soles*. In other words, instead of being worth more than half of the unclipped bond, according to the MEF, it is completely worthless and equivalent to no payment whatsoever.<sup>113</sup>

116. That result makes no economic sense and defies any concept of equity and fairness. In this example, the land parcels were identical. The original debt due on them should have the exact same current value. The amount still due on the original debt represented by the second bond must be reduced by the payments that the State has already made, but that fact must not change the current value of what remains of that original debt.

117. The reason for this arbitrary result is not hard to discern. By using the date of an unclipped coupon, the MEF proposes to start updating years after the debt originated. During those years, between placement and the time the State stopped paying coupons on any given bond, Peru suffered the hyperinflation that the current value principle should protect against. So under the MEF method, by the time the updating starts, the bonds have already been decimated by hyperinflation, with much of their value having already been wiped out. This shows why the Guidelines issued by the MEF violate the current value principle: it subjects the unpaid portion of the original debt to hyperinflation, which is the very result that the current value principle is supposed to prevent.

118. *Third*, using the date of the oldest unclipped coupon would also unjustly permit the State to benefit from its own wrongdoing to the detriment of the bondholders. The State imposed on the bondholders a drawn out process by which they would be paid slowly over decades. However, despite its express guarantee to honor the Land Reform Bonds, enshrined in article 175 of the Land Reform Act, the State then stopped paying the Bonds and during that time the value of the Bonds declined precipitously.

119. By using the unclipped coupon date as a benchmark for determining the principal amount due, the State benefits from the long delay in payment and the dramatic decline in the value of the currency in which the Bonds were issued. But that result should not be allowed because, as the Supreme Court already held, inflation should not “harm creditors and benefit debtors.”<sup>114</sup> Such a result would also infringe the legal maxim that no one can benefit from his own wrong – *commodum ex injuria sua nemo habere debet* – which in August 2009 this honorable Tribunal held constituted a “general principle of law.”<sup>115</sup>

120. In short, the State should not take advantage of its default or inflation to the detriment of the bondholders. Otherwise, this Tribunal would be saying that after the State has made bondholders wait decades to collect the debt, it now can

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<sup>113</sup> *Id.*, Charts I and II, Tables 4 and 5.

<sup>114</sup> Cassation N° 110-2006, of March 6, 2007, Whereas Clause 6.

<sup>115</sup> Constitutional Tribunal of the Republic of Peru, Decision issued in file N° 2262-2007-PA/TC of August 11, 2009, Foundation 7.

avoid paying the true value of the land. The current value principle, inherent to property, must prohibit this result.

- d. *Despite its prior invitation to the Government to use dollar indexation, this Tribunal should now direct payment according to CPI*

121. The Tribunal's indication to the Government to devise a dollar indexation valuation does not prevent the Tribunal from now directing payment according to the CPI Methodology.

122. In its Ruling, the Tribunal was obviously trying to put an end to an historic pattern of injustice by enforcing the 2001 Decision. That is why the Tribunal ordered the MEF to come up with a formula effectively reflecting current value of the Bonds, and went so far as to expressly reserve its competence to control the updating operations that the MEF devised and to prevent a result tantamount to nominal payment. There is no doubt that the Tribunal had the objective of preserving the criteria established in the March 2001 Decision. Neither the Tribunal nor any other authority has the legal competence to reverse or contradict the March 2001 Decision, as has been explained in previous cases.<sup>116</sup>

123. Instead, the Tribunal appears to have been misled into thinking that Peru is incapable of honoring this debt if calculated by CPI – and on that basis it ordered the MEF to devise a dollarization-based methodology. But this is incorrect. Consequently, there is currently no impediment to revisiting the July 2013 Ruling, along with reviewing the Guidelines, and to ordering the application of CPI to ensure the payment of current value.

- i. Lack of evidence for findings

124. The Tribunal permitted the MEF to devise an updating method based on dollarization after concluding that Peru would not be able to afford paying the debt if it were calculated using the CPI. As explained in more detail in this Section, this premise, however, was not only unproven, but it is also incorrect. Using the review function that the Tribunal reserved for itself in the November 2013 Ruling, now the Tribunal has a unique opportunity to evaluate the issue in light of a more complete and accurate record.

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<sup>116</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00791-2014-PA/TC, of July 15, 2014, Conclusion 16. (“The enforcement phase of a final judgment cannot become a forum for a new proceedings to modify or annul the effects of that judgment, precisely because this would distort its purpose, which is to ensure compliance with what was decided in a final, conclusive and definitive judgment that is *res judicata*. During the enforcement phase, both the judges and the Constitutional Tribunal have the special obligation to protect and enforce what was decided in the final judgment, and under no circumstances may they attenuate, modify or increase the effects of the decision, or incorporate new claims or valuations that were not part of the dispute at issue in the original proceeding in which the final judgment was rendered, much less rule based on their own subjective criteria.”)

125. When this Tribunal favored an adjustment methodology on the basis of the U.S. dollar, it based its decision on the assumption that using the CPI would cause a “severe impact” on the nation’s economy. The Tribunal said it was compelled to follow what it described as a “balancing judgment” between the obligation to “pay the land reform debt” and the obligation to “promote general welfare.”<sup>117</sup> In other words, the Tribunal expressly compromised the bondholders’ constitutional rights to property and to be paid at current value because of the Government’s misrepresentations that honoring those rights would seriously harm the Peruvian economy.

126. Those misrepresentations were, however, totally unsupported, without any evidentiary foundation, and inaccurate. In file N° 0022-1996-AA/TC there is no evidence at all showing how paying the land reform debt at CPI current value would have a “severe impact” on the economy, create a budgetary imbalance, or paralyze any public service. That is why the Constitutional Tribunal justices who signed the Ruling cited no evidence of the alleged severe impact, nor did they demonstrate that “the other valuation methods described would have serious impacts on the Budget of the Republic, to the point of making the payment of the debt itself impracticable.”<sup>118</sup> Given the Constitutional obligation for Court decisions to be motivated and reasoned,<sup>119</sup> it would have been reasonable to have had some evidence supporting this central claim.

127. Yet in a July 17, 2013, television interview conducted by journalist Jaime de Althaus Guarderas, the President of the Tribunal was asked whether the Constitutional Tribunal “had made any calculation of how much will represent the [Land Reform debt].” He answered that “it is not for [the tribunal] to make that calculation.”<sup>120</sup>

128. While it is understandable that the Tribunal itself may not have been in a position to make such a calculation, new facts have demonstrated that not even the MEF made such a calculation demonstrating this alleged “severe impact.” In October 2014, according to the Law on Transparency and Access to Public Information, the MEF was asked to disclose “any estimation, calculations, technical studies or other documents,” prepared either by the MEF or by any third party “related to the potential impact that payment of the land reform bonds may have on the public budget.”<sup>121</sup> In response the MEF responded:

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<sup>117</sup> Constitutional Tribunal of the Republic of Peru, Case N° 0022-1996-AA/TC, of July 16, 2013, Foundation 25.

<sup>118</sup> *Id.*

<sup>119</sup> Constitutional Tribunal of the Republic of Peru, Case N° 0006-2010-PHC/TC, of August 3 2010, Foundation 3 (holding that “the requirement that judicial resolutions be motivated and reasoned is a principle that is inherent to the jurisdictional function and is, at the same time, an individual constitutional right”). *See also* Cassation N° 876-2004-Junin, Third Transitory Civil Chamber of the Supreme Court, Whereas Clause 2.

<sup>120</sup> Interview made on July 17, 2013 by Jaime de Althaus Guarderas to the President of the Tribunal, *available at* <https://www.youtube.com/watch?v=E0zp1o376zg>.

<sup>121</sup> Memorandum N° 447-2014-EF/52.04 of October 15, 2014.

“The Ministry of Economy and Finance has not prepared those estimations, calculations or technical studies that are being requested.”<sup>122</sup>

129. The fact is, Peru would not suffer any kind of severe negative impact by honoring its obligations to the bondholders. The attached opinion of three eminent economists – Dr. Benavides, Dr. César Peñaranda, and Professor Carlos Adrianzén – demonstrates that Peru can pay its debt, even calculated using the appropriate CPI method for determining current value.

130. Starting from the most reliable official data available – the 2006 Congressional Committee report – Dr. Benavides, Dr. César Peñaranda, and Professor Carlos Adrianzén estimate the total amount of the debt to be approximately 15 billion *Nuevos Soles*. Indeed, a November 2006 memorandum prepared by the Agricultural Commission of Congress, and reviewed and updated for this proceeding, demonstrates that the total current value of the debt – using CPI updating, and adding interest at the promised rates – is approximately 15.251 billion *Nuevos Soles* (or about U.S.\$5.1 billion at current exchange rates).<sup>123</sup>

131. Peru can pay this amount without the dire consequences the Government alleged. To do so, the Government would probably want to pay the debt by issuing new bonds of the kind that trade freely in international markets. The Government could thus pay the bondholders in these new, freely transferable bonds.<sup>124</sup>

132. As explained in the expert report prepared by recognized economists – including Dr. Benavides, a former Minister of Economy and Finance – issuing new bonds would certainly not imperil Peru’s economy. To the contrary, restructuring the Land Reform Debt “by issuing sovereign debt” in the aforementioned amount “would increase the ratio of debt to GDP by only 2.3% from a very low 18%,<sup>125</sup> and would create a fiscal impact of only 0.7% of the general current budget.”<sup>126</sup> Peru regularly issues such bonds, and could easily afford to pay the relatively modest annual

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<sup>122</sup> *Id.*

<sup>123</sup> Benavides Report, p. 12.

<sup>124</sup> To demonstrate the viability of this type of restructuring, in May 2014, Argentina – whose economy notably is not as strong as Peru’s – issued up to \$6.1 billion in Treasury bonds and notes to compensate the Spanish firm Repsol for nationalizing the oil company YPF. Reuters, *Argentina emite 6.150 mln dlr en bonos para compensar a española Repsol por YPF*, May 8, 2014, available at <http://ar.reuters.com/article/topNews/idARL2N0NU0GH20140508>.

<sup>125</sup> As has been reported, Peru has one of the world’s lowest debt to GDP ratios. See Peru21, *Perú entre los países con menor deuda pública sobre PBI*, April 29, 2013, available at <http://peru21.pe/economia/peru-entre-paises-menor-deuda-publica-sobre-pbi-2128667>. For a comparison of global debt to GDP ratios, with specific mention to the 2010-2014 periods, see World Bank’s – Central Government Debt as a Total (% of GDP), available at <http://data.worldbank.org/indicator/GC.DOD.TOTL.GD.ZS/countries>.

<sup>126</sup> Benavides Report, p. 3.

amounts due on the new bonds, without sacrificing the economy or needed public services.

133. The motion that Peru is in a position to issue new bonds to honor the Land Reform Debt, thus attenuating the impact that this may have in the current year's budget, has been supported by this Tribunal in its Ruling. Indeed, the Tribunal held that:

“Another legitimate option or alternative would be that the state or the government, issue new and freely transferable bonds, and with an interest rate equal to that which is currently being used by the Peruvian state in its issuances. Considering the high credibility that sovereign debt instruments have achieved, in such a way that the payment in bonds, and not in cash, (*sic.*), does not affect the fisc, nor the right of bondholders, and serve as an instrument of economic recovery.”<sup>127</sup>

134. In fact, paying the Land Reform Debt could benefit Peru's economy. In the opinion of Dr. Benavides, Dr. Peñaranda and Professor Adrianzen, resolving the debt could further improve Peru's credit rating and thereby reduce Peru's cost of borrowing. As they explain, “recent empirical evidence suggests that the reduction of the cost of issuing new sovereign debt – expected over the medium term – could approach 3 percentage points.” They demonstrate that, “just getting closer to Chile (the foreseeable 3 percentage point drop at 30 years) would reduce the present value of the Peruvian external debt by nearly U.S.\$18 billion, which would more than compensate for the fiscal effort.”<sup>128</sup>

135. Furthermore, the economic report of the aforementioned economists indicates that curing the selective default “would create a better level of confidence among foreign and domestic investors, helping to attract capital investment in a number of ways,” and could also help “improve the climate of legal security in the country, which is one of the most important elements in creating confidence for investors.” All of the above, in the opinion of Dr. Benavides, Dr. Peñaranda, and Prof. Adrianzen, “would have a very positive impact on Peru's overall reputation in the market.”<sup>129</sup>

136. All in all, the truth is that long overdue payment on the Land Reform Bonds at their true current value would not cause the severe impact that the Government alleged. To the contrary, it would reflect positively on Peru as a country that honors its debts. There is thus no basis at all on which to compromise the bondholders' rights to be compensated.

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<sup>127</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC, July 16 2013, Foundation 29.

<sup>128</sup> Benavides Report, p. 20.

<sup>129</sup> *Id.*, p. 18.

ii. The Ruling is not binding on the Tribunal

137. Even putting aside the fact that the Tribunal was constrained by the inaccurate information that had been provided to it, in this case the Ruling was not issued with enough votes to be valid as the enforcement order it purports to be. Pursuant to article 5 of Law N° 28301 (Organic Law of the Constitutional Tribunal) a “majority” of votes is necessary to issue an enforcement act, namely *four out of the six* Justices that were serving at the moment. But the Ruling was issued with *three* instead of *four* votes.

138. The absence of the necessary majority can be better explained by looking at the Justices’ individual opinions: (i) three Justices (Urviola, Eto and Alvarez) voted in favor of using a dollarization approach; (ii) one Justice (Mesía) voted in favor of using CPI; while (iii) two Justices (Calle and Vergara) voted for the dismissal of the claim. There was, therefore, no majority. The Justices should have continued deliberating until reaching a majority of four votes.<sup>130</sup> Instead, the Tribunal made use of a mechanism (a casting vote) that can only be used when there is an actual tie at three votes, pursuant to article 10A of the Normative Regulation of the Constitutional Tribunal.<sup>131</sup> The Ruling is therefore formally invalid even as an enforcement ruling, and should be reviewed by the entirety of the bench.

139. Although there is no doubt that the Ruling was intended to be an enforcement ruling, it is also clear that – in any case – the Tribunal could not have intended to reverse, revise or manipulate the March 2001 Decision, as this would require no less than *five* favorable votes.<sup>132</sup> The Ruling, however, only has *three* votes in favor. It is evident that through the Ruling, the Constitutional Tribunal made a number of considerations and remarks on various types of valuation methods; supposedly analyzed their impact on Peru’s budget; decided to use a method that converts to U.S. dollars on the basis of a “parity exchange rate”; indicated that the MEF should apply the interest rate of the U.S. Treasury bonds; and indicated the valuation date of bonds with clipped coupons. To the extent that those aspects of the Ruling modify or manipulate the March 2001 Decision, the Ruling also lacks the necessary votes to that effect.

140. Therefore, the Tribunal is not shackled by the Ruling and is free to revisit it now. To the contrary, because of the misinformation that had been provided to the Tribunal as well as the way in which aspects of the Ruling deprive the bondholders of the amounts to which they are legally entitled, the Tribunal should revisit and revise the Ruling as explained herein.

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<sup>130</sup> Constitutional Tribunal’s Normative Regulation approved by Administrative Resolution N° 095-2004-P-TC, article 46.

<sup>131</sup> *Id.*, article 10-A. *See also* Constitutional Tribunal of the Republic of Peru, Case N° 0228-2009-AA/TC, April 4, 2011, Executive Summary, p. 1 (indicating that the President of the Constitutional Tribunal has the casting vote when there is a tie, meaning, the same number of votes between various positions during deliberation held by the full bench).

<sup>132</sup> Law N° 28301 – Constitutional Tribunal Organic Law, article 5 – quorum.

2. Subordinately, even if dollar indexation were appropriate, the Guidelines are nevertheless impermissible because the method they prescribe provides only nominal value

141. This Tribunal's reservation of its jurisdiction to ensure that MEF's formula does not result in nominal payment was prescient, because that is just what the MEF's dollarization approach actually offers. As Deloitte demonstrates by calculating the amounts due under two hypothetical bonds, those payments would be less than 0.5% of current value. This is tantamount to nominal value – and in the opinion of Dr. Benavides, Dr. Peñaranda and Prof. Adrianzen, equivalent to an additional expropriation.<sup>133</sup>

142. In this section Petitioners show why the MEF's dollarization approach in particular is so flawed and could not be permitted even if dollarization was a theoretically sound method for updating the Bonds. In particular, Petitioners will show that the Guidelines contain value-depressing errors and incorrect assumptions that need to be addressed, namely: (i) incorrectly calculating the so-called parity exchange rate, which includes a clear algebraic error in the formula issued by the MEF; (ii) incorrectly using the interest rate of the 1-year U.S. T-bill; and (iii) incorrectly ordering conversion back to *Nuevos Soles* at the average 2013 exchange rate and stopping interest accrual at that date. These flaws are in addition to problems in the Guidelines already identified above, including incorrectly updating the value of bonds with clipped coupons as of the date of the oldest unclipped coupon, and failing to offer meaningful compensatory interest.

143. As noted above, the correction and adequate application of each and every one of the previous elements are what Petitioners refer to as the “Corrected Dollarization Methodology,” which is described in detail in Appendix B. For all purposes related to this brief, whenever the term “Corrected Dollarization Methodology” is used, this honorable Tribunal should understand that Petitioners mean the economic calculations contained in said Appendix B, plus any applicable late interest.

- a. *The Guidelines incorrectly calculate the parity exchange rate, and their formula contains an obvious algebraic mistake*

144. As noted in Section III, the Ruling directed the government to use the “*tipo de cambio de paridad*” to convert the value of the land reform debt into U.S. dollars for dollar indexation. In the words of this Constitutional Tribunal, the purpose of this instruction was to shield the currency from the effects of inflation.<sup>134</sup> However, as shown here, the MEF's calculation of a parity exchange rate is wrong

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<sup>133</sup> Benavides Report, p. 18.

<sup>134</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-96-PI/TC of July 16, 2013, Foundation 24 (emphasis added).

both in concept and in execution, and it consequently produces absurd results that are at odds with the very purpose of using a parity exchange rate.

i. The approach to establishing a parity rate is wrong

145. As the attached report of Dr. Alan Heston shows, the Guidelines use the wrong conceptual approach to establishing a parity exchange rate.

146. In particular, the Guidelines fix the parity exchange rate by calculations based solely on relative inflation rates and historical nominal exchange rates. They do not actually take into consideration relative price data that should be the basis for a parity exchange rate.

147. As Dr. Heston explains, there is a vastly superior alternative, which draws on an internationally recognized method for calculating parity exchange rates, and which does take into consideration relative price data. In particular, since 1970 the International Comparison Program (“ICP”) of the United Nations and the World Bank has performed detailed international price comparisons at approximately 5-year intervals to make calculations of purchasing power parity.<sup>135</sup> Peru “began participation in 1980 and has taken part in all subsequent rounds.”<sup>136</sup>

148. Dr. Heston has provided the “best estimates” of the parity exchange rate between Peru and the United States for each of the years 1968 through 1999 based on ICP benchmark comparison.<sup>137</sup> That is the correct way to calculate a so-called parity exchange rate. His results are reported in Table 1 of his Expert Report, and show that a parity rate calculated on the basis of the aforementioned pricing data is very different from the one calculated on the basis of the Guidelines.<sup>138</sup> Those estimates are more reliable than the Supreme Decree’s equations, which are not grounded in any relative purchasing power data. He concludes by saying that the parity exchange rates presented in his report “provide the best estimates of the parity exchange rates for converting the value of land reform bonds denominated in Peruvian *Soles* into U.S. dollars.” In contrast, he adds “I do not believe that the methodology set forth in the Supreme Decree is appropriate to estimate such parity exchange rate.”<sup>139</sup>

149. Dr. Heston’s report is entitled to great weight. He is considered a leading world expert on international economic comparisons and purchasing power parity. He is a professor emeritus in the Department of Economics at the University of Pennsylvania, and before that, was an Assistant Professor at Yale University. Dr. Heston co-directs the University of Pennsylvania’s Center for International Comparisons (CIC), and he took part in the ICP’s benchmark comparisons and, by

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<sup>135</sup> Heston Expert Report, pp. 5-6.

<sup>136</sup> *Id.*, p. 6.

<sup>137</sup> *Id.*, pp. 6-7.

<sup>138</sup> *Id.*, Table 1, p. 8.

<sup>139</sup> *Id.*, p. 9.

1985, expanded the number of countries in the database. He subsequently further expanded these comparisons to produce what became known as the Penn World Table. For that work, Dr. Heston was in 1998 recognized as an American Economic Association Distinguished Fellow.

ii. The formula is incorrect

150. Instead of using internationally accepted and scientifically valid price comparisons like the eminent Dr. Heston did, the MEF Guidelines contain complex formulas to establish parity exchange rates. Not only do the Guidelines provide no justification for these concocted formulas, but they are demonstrably incorrect even from a basic algebraic point of view.

151. In their expert report, Dr. Ivan Alonso and Italo Muñoz explain that “[a] basic test to confirm that any formula in economics or any other discipline is correct is that both sides of the equation must be expressed in the same units.”<sup>140</sup> Otherwise, they indicate “they are not measuring the same thing.” In the opinion of Dr. Alonso and Dr. Muñoz the “MEF parity formula fails this elementary test, as can be seen by checking the units on each side.”<sup>141</sup>

152. This is the MEF’s parity rate formula:

$$TC \text{ Paridad}_{emisión} = TC_{emisión} \times \left( \frac{IPC_{emisión}^{Perú}}{IPC_{emisión}^{EEUU}} \right) \times \frac{1}{\text{promedio} \left( \frac{IPC_t^{Peru}}{IPC_t^{EEUU} \times TC_t} \right)}$$

153. This formula can be reduced to its constituent units as follows:

$$\frac{\text{Soles}}{\text{Dollar}} = \frac{\text{Soles}}{\text{Dollar}} \times \frac{\text{Pure number}}{\text{Pure number}} \times \frac{1}{\frac{\text{Pure number}}{\text{Pure number} \times \frac{\text{Soles}}{\text{Dollar}}}}$$

154. To simplify, Dr. Alonso and Dr. Muñoz then insert the number 1 in place of each “pure number”:

$$\frac{\text{Soles}}{\text{Dollar}} = \frac{\text{Soles}}{\text{Dollar}} \times \frac{1}{1} \times \frac{1}{\frac{1}{1 \times \frac{\text{Soles}}{\text{Dollar}}}}$$

155. Then, as they explain, “the pure numbers on the right-hand side cancel out and the fraction appearing in the denominator at the bottom of the rightmost term is inverted,”<sup>142</sup> leaving:

<sup>140</sup> Alonso and Muñoz Expert Report, pp. 3-4.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*, p. 4.

$$\frac{\text{Soles}}{\text{Dollar}} = \frac{\text{Soles}}{\text{Dollar}} \times \frac{1}{\frac{\text{Dollar}}{\text{Soles}}}$$

or:

$$\frac{\text{Soles}}{\text{Dollars}} = \frac{\text{Soles}}{\text{Dollars}} \times \frac{\text{Soles}}{\text{Dollars}}$$

156. As Dr. Alonso and Dr. Muñoz explain, “[t]hus we have an exchange rate on the left-hand side and a squared exchange rate on the right-hand side.”<sup>143</sup> In other words, the error is evident. The unit *Soles/Dollar* cannot be equal to *Soles/Dollar x Soles/Dollar*. That is, *Soles/Dollar* is not equal to  $(\text{Soles/Dollar})^2$ .

157. In their opinion, “this cannot be right,” as it would be “the same as comparing one meter, which is a measure of length, with one square meter, which is a measure of area.” They conclude by saying that “[o]n purely mathematical grounds, the MEF formula is untenable.”<sup>144</sup>

158. Dr. Alonso and Dr. Muñoz also explain that the Government’s formula “has no economic rationale.”<sup>145</sup> Citing Economists Paul Krugman and Maurice Obstfeld, they first explain that “[a] typical textbook statement of relative [purchasing power parity] is that the percentage change in the exchange rate between two currencies over some time period equals the difference between the percentage changes in national price levels.”<sup>146</sup> This means that the increase in the parity rate is:

$$\frac{TC \text{ Paridad}_{emisión}}{TC \text{ Paridad}_{año base}} = \frac{IPC_{emisión}^{Peru}}{IPC_{emisión}^{US}}$$

159. Rearranging those terms, as explained by Dr. Alonso and Dr. Muñoz, the equation can be expressed as:

$$TC \text{ Paridad}_{emisión} = TC \text{ Paridad}_{año base} \times \left( \frac{IPC_{emisión}^{Peru}}{IPC_{emisión}^{EEUU}} \right)$$

160. Inexplicably, however, “the MEF ‘parity exchange rate’ formula “adds the term  $1/e$  and changes the term  $TC \text{ Paridad}_{año base}$  to  $TC \text{ Paridad}_{emisión}$ .” Although the MEF’s formula thus bears “some similarity” to a relative purchasing power parity calculation or “PPP,” it is no such thing because “relative PPP

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*, pp. 4-5.

<sup>145</sup> *Id.*, Section I.B.

<sup>146</sup> *Id.*, p. 6.

calculation would start from an exchange rate, *TC Paridad*<sub>año base</sub> that had previously been determined to be a parity rate.”<sup>147</sup>

161. As they explain, “[t]here is no indication, and no reason to assume, that either *TC<sub>emisión</sub>* (the prevailing exchange rate in any given year in which bonds were issued) or *I/e* (an approximation of the average real exchange rate) is a parity rate.” In other words, the Guidelines use a base year conversion rate between soles and dollars that is a nominal exchange, *not* a parity exchange rate as the Tribunal had directed.

162. Also, they explain that “[e]ven if one of *TC<sub>emisión</sub>* or *I/e* were a parity rate, including both of these terms would be unnecessary. As has been shown in the previous subsection, either *TC<sub>emisión</sub>* or *I/e* is redundant.”<sup>148</sup> In other words, the Guidelines multiply by an exchange rate not once but twice. This calculation just makes no sense.

163. Dr. Alonso and Muñoz indicate that they “see no economic rationale for these changes” and “know of no economic theory or reputable author supporting a formulation similar to the MEF formula.”<sup>149</sup>

iii. The MEF’s parity exchange rate formula was based on faulty assumptions and thus produces absurd results

164. In very simple terms, Dr. Alonso and Dr. Muñoz explain why the MEF’s formula “produces results that are the opposite of what the Tribunal intended, which was to mitigate the effects of hyper-inflation on the value of the bonds.”<sup>150</sup> As will be explained here, they note that “rather than mitigating the effects of hyper-inflation, the MEF formula actually magnifies those effects.”<sup>151</sup>

165. They start out by indicating that “using the MEF exchange” would be “grossly misleading, due to the economic and mathematical issues discussed above.” Table 1 of their report, pasted below, compares the parity exchange rates for 1969-1981 according to the MEF formula with the official exchange rates.<sup>152</sup>

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<sup>147</sup> *Id.*, p. 7.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*, pp. 6-7.

<sup>150</sup> Alonso and Muñoz Expert Report, p. 9.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*, p. 7.

Table 1  
Alternative Exchange Rates, 1969-1981  
(Soles Oro per US\$)

Year	MEF Parity Rate <sup>a</sup>	Official Rate <sup>a,b</sup>
1969	1,028.67	38.70
1970	1,029.04	38.70
1971	1,072.85	38.70
1972	1,082.24	38.70
1973	1,132.50	38.70
1974	1,201.12	38.70
1975	1,619.57	45.00
1976	3,412.08	68.71
1977	7,690.89	124.77
1978	19,059.24	194.09
1979	36,774.00	254.50
1980	70,485.71	341.31
1981	165,197.64	504.58

<sup>a</sup> End-of-year rates.

<sup>b</sup> Source: Banco Central de Reserva del Perú.

166. The difference between the two exchange rates is dramatic, and demonstrates the absurdity of the MEF's parity rate. For instance, between 1969 and 1974, the MEF's parity rate is never lower than 26 times the official rate. That gap grows exponentially with time. By 1981, the MEF's parity rate is approximately 327 times the official rate.

167. On this score, Dr. Alonso and Dr. Muñoz point out the obvious fact that "Table 1 shows that the MEF formula exceeds the official rate in every single year by a huge margin." They show how "unrealistic the MEF's parity rate calculation is," and indicate that "in 1981 the difference between the official exchange rate and the open market rate, which was 509.80, was only about 1%, while the rate that derives from applying the MEF formula was more than 300 times higher."<sup>153</sup>

168. The "MEF parity exchange rate is not just vastly higher than the official exchange, but over time it grows exponentially compared to the official exchange rate." In the words of Dr. Alonso and Dr. Muñoz:

"This exponential growth reflects the algebraic error mentioned earlier. The MEF formula begins with the nominal exchange rate, which increases directly with hyperinflation, and then multiplies by the ratio of Peru's inflation relative to U.S. inflation, which also increases directly with

<sup>153</sup>

*Id.*, p. 8.

hyper-inflation, since U.S. inflation was negligible relative to Peru's. In this way the MEF formula effectively multiplies the effect of hyper-inflation by more hyper-inflation."<sup>154</sup>

169. While Drs. Alonso's and Muñoz's criticisms are based on comparing the MEF calculated parity exchange rate and the official exchange rate, they become even more compelling when comparing the MEF's purported parity exchange rate with the true parity exchange rates that Dr. Heston calculated. That comparison is shown in the following table:

Alternative exchange rates, 1969-1981  
(Soles Oro per USD)

Year	MEF parity rate <sup>a</sup>	Official rate <sup>a,b</sup>	Parity rate Dr. Alan Heston <sup>c</sup>
1969	1,028.67	38.70	14.00
1970	1,029.04	38.70	15.00
1971	1,072.85	38.70	15.50
1972	1,082.24	38.70	16.30
1973	1,132.50	38.70	16.80
1974	1,201.12	38.70	17.50
1975	1,619.57	45.00	20.60
1976	3,412.08	68.71	25.30
1977	7,690.89	124.77	32.60
1978	19,059.24	194.09	48.30
1979	36,774.00	254.50	71.20
1980	70,485.71	341.31	108.10
1981	165,197.64	504.58	172.90

<sup>a</sup> End of year exchange rates.

<sup>b</sup> Source: *Peru Central Bank of Reserve*

<sup>c</sup> Source: ER-4. Expert report by Dr. Alan Heston.

170. While it is inexplicable that the MEF Guidelines produce a 1981 exchange rate that is 327 times the official rate, it is even more astonishing that this MEF rate is 955 times an actual, well established, and internationally respected parity exchange rate.

171. Obviously, multiplying hyper-inflation by more hyper-inflation is an absurd approach, and it produces absurd results. The point of using a parity exchange rate in the first place was presumably that it would be *lower* than the nominal exchange rate – just as Dr. Heston's analysis proves.<sup>155</sup> That, in turn, should provide bondholders with *more* dollars during the notional conversion from *Soles Oro* to dollars. If the MEF had considered actual pricing information in its analysis it would have seen that fact.

<sup>154</sup> *Id.*, pp. 8-9.

<sup>155</sup> Heston Expert Report, Table 1.

172. But the MEF's Guidelines produce the opposite result. As explained by Dr. Alonso and Dr. Muñoz, the MEF turns a parity exchange rate that was intended to protect value from hyperinflation into an instrument that "rapidly shrinks [the value of the bonds] to almost nothing at an exponential rate during Peru's hyper-inflationary period."<sup>156</sup> The equation is wrong, and cannot serve as a basis for further Government action.

b. *The Guidelines ignore the Tribunal's instructions to use the interest rate of the U.S. Treasury Bonds*

173. The Ruling instructed the Government to use the interest rate of the "U.S. Treasury Bonds."<sup>157</sup> The Guidelines, however, did not do that. Instead, it used the rate of the U.S. Treasury *bills*.

174. There are material differences between U.S. Treasury bonds and T-bills. In essence, they are two discrete species of the same genre. According to U.S. Department of the Treasury, "Treasury bonds pay a fixed rate of interest every six months until they mature. They are issued for a term of 30 years."<sup>158</sup> In contrast, Treasury bills (or notes) are fixed rent instruments with maturity of no more than a year. They are the classic example of a short-term instrument that, accordingly, has a very low interest rate. The U.S. Treasury Bond's interest rate is invariably and materially higher. This fundamental difference between T-bonds and T-bills is so well established that it is part of the basic terminology of finance.<sup>159</sup> Consequently, there is no such thing as a "U.S. Treasury Bond" with a 1-year maturity, as the Guidelines incorrectly presume.

175. The MEF appears to have picked up on this mistake. The first Guideline (January 18, 2014) refers to "fixed term, 1-year U.S. Treasury *Bonds*, in period *t*," but this makes no sense because there are no Treasury bonds with a 1-year maturity. In its second Guideline (January 22, 2014), however, the MEF revised the language to say "fixed term, 1-year *titles* of the U.S. Treasury, in period *t*."<sup>160</sup> The MEF's revision is telling: clearly the MEF is not using the interest rate of the U.S. Treasury bonds as this Tribunal expressly instructed. The MEF thus clearly and intentionally defied the instructions provided by the Constitutional Tribunal.

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<sup>156</sup> *Id.*, p. 10.

<sup>157</sup> Constitutional Tribunal of the Republic of Peru, Case N° 022-96-ITC of July 16, 2013, Foundation 25.

<sup>158</sup> Webpage of the U.S. Department of Treasury, *available at*: [http://www.treasurydirect.gov/indiv/products/prod\\_tbonds\\_glance.htm](http://www.treasurydirect.gov/indiv/products/prod_tbonds_glance.htm).

<sup>159</sup> Downes, John y Goodman, Jordan Elliot, "*Dictionary of Finance and Investment Terms*", 6<sup>th</sup> Ed. 2010, Barron's, pp. 745-46.

<sup>160</sup> Supreme Decree 019-2014-MEF issued on January 22, 2014. Annex 1 "it = nominal annual interest rate of the *securities* of the U.S. Treasury, fixed term, one year, in year *t*." (emphasis added).

176. But there are also *economic* and *equitable* reasons to reject the MEF's decision to use a short-term interest rate. From an economic point of view, Dr. Alonso and Dr. Muñoz opine that it is "inappropriate" to use the interest 1-year U.S. Treasury notes. This assumes that "bondholders would have invested the original dollar value of their bonds in one-year Treasuries and continually reinvested the full principal value plus accrued interest in similar one-year instruments until the Land Reform Bonds were redeemed."<sup>161</sup> But this assumption is "inconsistent" with the original terms of the Land Reform Bonds, which "were issued with stated maturities of 20, 25 or 30 years."<sup>162</sup> In their opinion, the "appropriate" interest rates are "those that more closely reflect the original stated maturity of the bonds. The U.S. Treasury has, in fact, been issuing 20-year bonds since at least 1962 and 30-year bonds since at least 1977."<sup>163</sup> Obviously, "the choice of a short-term versus a long-term interest rate has a significant effect on the updated value of the bonds."<sup>164</sup>

177. Finally, it would also be fundamentally unfair to the bondholders not to use a long-term rate. The landowners were effectively compelled to make a long-term and risky loan to Peru, during which time they would not have the use of the money they were forced to loan to the State – or of course use of the land that had been taken from them. Any investor making such a loan would naturally expect to receive an interest rate commensurate with those facts, including that the loan was of a long duration, with slow repayment, and considerable risk. In contrast, by using the T-bill rate, the Guidelines offer to pay interest of only what is often considered to be the U.S. short-term, risk-free rate. It is unfair to have forced the bondholder to make long-term, risky loans but to give them interest only of short-term, risk-free loans.

c. *The Guidelines' reconversion at average exchange rate of 2013, without further updating or interest, frustrates the current value principle*

178. The Guidelines also cheat bondholders by directing that the inadequately "updated" dollar value be converted back to *Nuevos Soles* at the "2013 average nominal exchange rate"<sup>165</sup> with no further updating or interest of any kind. This aspect of the Guidelines also contravenes the current value principle.

179. Pursuant to article 1236 of the Civil Code, a defaulted debt's current value should be calculated on the "day of payment."<sup>166</sup> This is a pivotal component of the *current* value principle. The reason article 1236 of the Civil Code provides that the debt's value should be determined on the "date of payment" is simple. That is

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<sup>161</sup> Alonso and Munoz Expert Report, p. 10.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*, p. 11.

<sup>165</sup> Supreme Decree 017-2014-MEF Annex 1.

<sup>166</sup> Civil Code, article 1236.

when the debt becomes discharged.<sup>167</sup> Until then, the debt remains unpaid, and further updating is required.

180. Despite this clear principle of law, the Guidelines propose to lock in an amount at average 2013 exchange rates, but then not actually to pay this amount for an indeterminate time that could be seven years or even longer.<sup>168</sup>

181. As noted by Dr. Alonso and Dr. Muñoz, the MEF's formula should ensure that on the date of payment, "bondholders receive an amount in soles that is equal to the original dollar value of the bonds plus accrued interest." To that effect, they explain that "exchange rate used for converting back into soles should be the rate at which the same amount of dollars can be obtained in the Peruvian bank market at the time of payment."<sup>169</sup> Moreover, the updating "should be extended up until the actual date of redemption."<sup>170</sup>

182. Consequently, the Guidelines compel the bondholders once again to make a loan to the State – this time from the end of 2013 until actual payment and with no interest whatsoever. Thus, the value the state proposes to pay manifestly cannot be the amount to which bondholders are legally entitled.

d. *These flaws expose the Guidelines' true purpose to deprive bondholders of the Bonds' current value*

183. Each of the foregoing flaws in the Guidelines' approach – along with the additional flaws (explained above) in how they treat bonds with clipped coupons and in not providing meaningful compensatory interest in addition to updating the unpaid principal – individually deprive the bondholders of some aspects of current value. Considering those flaws, together, however, indicates the true purpose of the Guidelines: to purposefully, systematically and significantly reduce the Bonds' value, in violation of the current value principle.

184. There is no other way to explain how the MEF – with its economists and other professionals – could produce a parity exchange rate that had nothing to do with pricing parity and that even undermined the very purpose of using a parity rate; could confuse a T-bill with a Treasury bond; or could decide to cease even the most inadequate updating and interest in 2013 rather than at time of payment. The combination of such otherwise inexplicable factors, conspicuously demonstrates that the MEF's true intention was to never pay current value, despite the Tribunal's direction to do so. These recent Guidelines are just the latest elements of the pattern of the judiciary and this Tribunal ordering payment of current value and the Government subverting those orders.

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<sup>167</sup> Civil Code, article 1220.

<sup>168</sup> The U.S.\$/*Nuevo Sol* rate was significantly *lower* in December 2013 than in March 2015.

<sup>169</sup> Alonso and Munoz Expert Report, p. 12.

<sup>170</sup> *Id.*

185. But enough is enough. The Government should not be given further opportunities to devise schemes based on dollar indexation or any method other than CPI plus compensatory interest. After all these years, it should now be evident that a clear and direct order is the only way in which the bondholders will finally receive justice.

#### **B. The Rulings violate the right to effective judicial protection**

186. This Tribunal must also protect the bondholders' right to pursue the payment of their bonds before the judiciary, allowing the courts to make independent determinations on the amount owed to each bondholder, based on each particular case. Anything else would violate the constitutional right to an effective judicial protection and the principle of non-interference.

187. *First*, the right to access the judiciary is an essential component of effective judicial protection. In the words of the Tribunal, it "guarantees the access to an independent, impartial, and competent court of justice for purposes of (...) determining their rights and obligations."<sup>171</sup>

188. The Tribunal's August 2013 Ruling, however, violates this right by providing that "from now on, the claim to collect said debt can only be made through the aforementioned [administrative] procedure and not before a judicial one."<sup>172</sup> In violation of even its own precedent under Emergency Decree N° 088-2000, the MEF took advantage of the Tribunal's instruction and issued Guidelines that effectively make the bondholders follow the unfair, lengthy and administrative procedure set forth therein, *expressly excluding* trial courts. This requirement prevents bondholders who have not yet commenced judicial proceedings from updating and collecting their bonds through the judiciary, and thereby clearly violates the principle that "no one can be averted from accessing courts previously established by law."<sup>173</sup>

189. *Second*, characterizing the Guidelines' updating methodology as mandatory for trial courts – meaning that those courts are now forced to abide by the substance of the Guidelines in its decisions – interferes with the principle of independence of the judicial function. The Tribunal and the MEF are basically telling the courts what to do and how to do it, even when a court might have already ordered a valuation expert to calculate the value of the Bonds and the expert has already done so.

190. This is not permitted under Peruvian law. Article 139(2) of the Constitution prohibits any authority from "interfere[ing] with the exercise of jurisdictional authority's functions"; "leav[ing] without effect decisions with *res*

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<sup>171</sup> Constitutional Tribunal of the Republic of Peru, Case N° 010-2001-AI/TC, from August 26, 20013. Foundation 10.

<sup>172</sup> Constitutional Tribunal of the Republic of Peru, Case N° 00022-1996-PI/TC, August 8, 2013, Foundation 16.

<sup>173</sup> Constitution, article 139(2). *See also* American Convention on Human Rights, article 8.1.

*judicata* effect”; “modify[ing] decisions”; and “delay[ing] the enforcement [of jurisdictional decisions].”<sup>174</sup>

191. At a minimum, making the Guidelines’ formula mandatory to ongoing judicial proceedings would delay the enforcement of decisions in cases where experts have, for instance, already calculated the value of a bond using the CPI methodology. In such a hypothetical case, a bondholder will have to wait for the valuation expert to analyze the Guidelines, hopefully figure out all that is wrong with them, but then render a report offering to pay a trivial amount of *Nuevos Soles* to the bondholder who has already spent years or decades in court. This is, to say the least, manifestly unfair – and certainly not what this Tribunal could have intended.

192. *Third*, making the Guidelines mandatory also means that the courts are now forced to apply a mathematically incorrect formula that produces absurd results – as the expert report of Drs. Alonso and Muñoz demonstrates.

193. From a practical point of view this will put all courts, and all bondholders, in an impossible situation. As soon as courts figure out the absurdity of the Guidelines’ formulas, and how wrong and unfair they are, the courts will be forced to misapply them. Claims and appeals will flourish and permeate through the judicial system. Presumably this Tribunal too will be flooded with countless petitions and claims asking it to review the Guidelines.

194. These problems could all be avoided, however, by at least simply holding that the Guidelines are optional rather than mandatory.

195. Taking the proposed approach would be consistent with this Tribunal’s holding in an earlier case. It is certainly not the first time that the State is attempting to force the bondholders to accept an unreasonable updating method created by the MEF. When the Executive issued Emergency Decree N° 088-2000, this Tribunal defended the bondholders’ independent right to file legal collection actions. In its August 2, 2004 judgment, this Tribunal held that the bondholders had the option of “going to court to demand payment of the adjusted amount of the debt, plus applicable interest. (...)” The Tribunal held that updating the Bonds’ value through the administrative proceedings proposed in Emergency Decree N° 088-2000 would be valid only insofar as it did not exclude “the option to go to court to obtain a decision regarding the performance of the obligation” and that said decree merely constituted “an alternative” method that the bondholder could “freely accept or reject.”<sup>175</sup>

196. The Constitutional Tribunal must reach the same conclusion in this case. Both cases involve the same subject matter, and the facts are similar enough to conclude that, although the MEF may propose an updating method, that method cannot be mandatory and the bondholders must retain the right to take the matter to courts.

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<sup>174</sup> Constitution, article 139(2).

<sup>175</sup> Constitutional Tribunal of the Republic of Peru. Case No. 0009-2004-AI/TC from August 2, 2004. Foundation 7.

197. *Finally*, depriving bondholders of their right to initiate judicial proceedings now in pursuit of the current value of their Bonds generates a profoundly unjust result: those bondholders who actually trusted the government and waited decades for it to come up with a coherent and fair plan to pay current value – bondholders who presumably did not have the resources to spend years in court – are now barred from doing so and are hopelessly stuck with a formula that offers to pay less than 0.5% of the debt. As some of the cases cited above indicate, litigious bondholders actually collected the value of their bonds, which is something that non-litigious bondholders are now deprived of on the basis of the Guidelines. This is not only a clear violation of the right to access to justice, but also has a clear discriminatory effect, which bolsters the discrimination argument presented below. There is, simply put, no reason why some bondholders should have a better chance to collect than others.

198. Accordingly, this Tribunal should at the very least protect the effectiveness of the bondholders’ due process rights by making absolutely clear that no Supreme Decree or similar administrative act – past or future – may interfere with the ability of bondholders to seek independent remedies before the Peruvian courts.

**C. The Guidelines impose an administrative proceeding that is unduly burdensome**

199. Furthermore, this Tribunal must invalidate the Guidelines because the administrative procedures contained therein are unduly burdensome and complicated – without there being any explanation on the part of the MEF as to why these administrative processes were chosen.

200. *First*, imposing a mandatory requirement on all bondholders to participate in a registration procedure is unreasonably burdensome for the bondholders who have spent years litigating this matter, and whose ownership of the Bonds has already been confirmed by court judgments.<sup>176</sup> This violates basic principles of due process and would lead to an unjust result. Making bondholders go through another “recognition” process would violate due process simply because they would have to try their case all over again. This is fundamentally unfair. This would also violate the principle of judicial independence because the Executive would be ignoring final or pending judicial decisions on this score, in violation of the *res judicata* principle.

201. *Second*, there is no clarity as to when the bondholders would ultimately collect the updated amounts. Although the Guidelines establish a procedure for registering the legitimate holders of the Land Reform Bonds – creating a five-year period for bondholders to submit their registration application,<sup>177</sup> and 18 months to approve or reject bondholders’ registration applications – the order of priority

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<sup>176</sup> Supreme Decree N° 017-2014-EF, article 4.

<sup>177</sup> *Id.*, Article 6.2.

established by those very same Guidelines raises the question of *when* – if ever – the bondholders that are not at the top of that order will eventually collect their money.

202. For example, it is not clear what would happen if a legal entity (which, let's suppose, acquired the Bonds as payment of legal obligations) submitted its application for registration on January 1, 2015, and obtained an administrative decision recognizing it as the legitimate bondholder 18 months later. Let us further suppose that one month after that (month 19), an *individual* files his application for registration. In this case, it is not clear whether the legal entity would have to wait until the completion of the procedures for the individual's registration for updating and for payment of the debt to all individuals who hold bonds before moving on to the updating process. It is also unclear, for instance, what would happen if the recognition of a group of individuals is denied, and they file contentious-administrative actions against said decision. Must the legal entity wait until those claims are finally resolved before being able to move forward with its own updating process? These are simple questions that show the unacceptably ambiguous way in which the Guidelines have been written.

203. *Third*, even for those bondholders who follow the procedure established therein, the Guidelines are plagued with obstacles. There are at least four instances in which the administrative procedure could be suspended indefinitely, meaning the debt would not be collected for decades.

204. The first obvious stumbling block is the so-called “expert handwriting analysis.”<sup>178</sup> For instance, the Guidelines are confusing with regard to what remedies are available in the event said expert analysis declares that the bondholder is not the legitimate owner of the Bonds. It is also unclear what the purpose of the expert analysis is and what signature or handwriting will be analyzed. The Guidelines only state, very generally, that the Bonds will be “returned” to the individual if their ownership cannot be verified. There is also no clarity on the nature of that expert report, which leaves open the question of what claims may be filed against it, or what procedure should be used to challenge it.

205. A third obstacle is that the time it takes to conclude the handwriting analysis, pursuant to the Guidelines, is not “taken into account for calculating the maximum term of the administrative proceeding” set forth in Law N° 27444 – General Administrative Procedure Law. Without imposing any deadline on the handwriting expert to make a determination, these procedures could be delayed indefinitely without any sort of protection for the bondholder.

206. Another obstacle is that there are at least three additional instances where the Government may cause the administrative procedure to be suspended indefinitely and give way to contentious-administrative proceedings. These are: (i) upon the completion of the registration process for the bondholders;<sup>179</sup> (ii) upon the

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<sup>178</sup> *Id.*, Article 7.

<sup>179</sup> *Id.*, Article 9.

completion of the administrative update of the debt;<sup>180</sup> and (iii) upon the completion of the proceeding to determine the form of payment.<sup>181</sup> At each of these points, the Government could issue an administrative decision with which the bondholders disagree, and the result would be a number of long and complicated contentious-administrative proceedings that could take years.

207. Lastly, there is no clarity with regard to the so-called “payment options” of the debt’s updated value. The Guidelines simply mention that the MEF, “bearing in mind the principles of fiscal equilibrium and financial sustainability” and “fiscal rules and the multi-year macroeconomic framework,” will define the “options among which the Land Reform Bondholders may select one or a combination of options for payment.”<sup>182</sup>

208. But the MEF does not explain what options for payment would be available, or how the nebulous “principles” of “fiscal equilibrium” or “financial sustainability” will be defined, much less how they will impact the availability of the so-called “payment options.” The MEF also fails to indicate which “fiscal rules” are relevant, or how the so-called “multi-year economic framework” fits into the equation. Further, although the MEF specifies that it “must have a minimum number of legitimate Land Reform Bond bondholders duly registered with their debt updated” in order to proceed with the so-called “payment options,” the MEF clearly does not explain what that minimum number is, nor what criteria it will use to determine such number. With so much discretion, one could presume that if the MEF decides that there are other budget priorities, it could simply choose to not pay certain bondholders. Such wide discretion and lack of clarity cannot be permitted by this Constitutional Tribunal.

#### **D. The Guidelines are unconstitutional because they are discriminatory**

209. In its November 2013 Ruling, this Tribunal made clear that the order of payment set forth in the Ruling “only appl[ies] for cash payments, and not for other forms of payments” such as “the issuance of new bonds.”<sup>183</sup> If the government committed promptly to pay all bondholders at current value – calculated as explained herein – through the issuance of new bonds, any discrimination argument would be moot, as it is clear that such order of payment is not applicable.

210. However, to the extent that the Government contemplates paying in cash pursuant to the Guidelines’ substantive and procedural provisions, the Guidelines violate the equal protection principle by discriminating against bondholders who are in the same situation. This distinction does not seek to further a constitutionally

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<sup>180</sup> *Id.*, Article 14.

<sup>181</sup> *Id.*, Article 18.

<sup>182</sup> *Id.*, Article 17.

<sup>183</sup> Constitutional Tribunal of the Republic of Peru. Case N° 00022-1996-PI/TC. November 4, 2013. Section 8.

protected interest and is irrational; there is also a lack of proportionality between the Guidelines and the ends they seek to attain.

211. The right to equal protection of the law is enshrined in article 2(2) of the Constitution.<sup>184</sup> Under Peruvian law, the notion of equal protection under the law has two components. First, it is a principle that governs the conduct of the State, and works as a limitation to the abuse of power; second, it is also a fundamental individual right. As this Tribunal has held, “*it is a core element of the democratically-based constitutional system.*”<sup>185</sup> As a right, it is premised on the universally accepted notion that individuals deserve equal treatment in like circumstances.<sup>186</sup> Equality, therefore, evolves into the subjective right to obtain equal treatment and avoid privileges and arbitrary inequalities.<sup>187</sup> The Constitutional Tribunal has held that there exists discriminatory treatment when an individual is denied access to a benefit or privilege that others enjoy, without a reasonable and objective justification for the difference in treatment.<sup>188</sup>

212. There is simply no basis to discriminate, for instance, between original and secondary bondholders, or between natural and juridical entities. This could result in absurd and even economically dangerous situations. If original Bonds were given to legal entities that were landowners, there is no reason why they should wait longer to collect. The same is also true for those who acquired the Bonds from original bondholders. If the Land Reform Bonds were created as freely transferable instruments, it would be unfair to punish those who acquired them. This could have calamitous consequences for Peru’s vibrant economy – where the bonds’ secondary market is crucial. The right to equal protection enshrined in article 2(2) of the Constitution proscribes this, and thus the Guidelines should be corrected by the Tribunal.

## **V. Substantiation of These Proceedings**

213. Petitioners request that this Tribunal adjust the procedural requirements set forth in the Constitutional Procedural Code to encourage the MEF to respond to the arguments and the evidence contained herein. Should the MEF answer, Petitioners further request an opportunity to reply to the MEF’s arguments within a reasonable time to be determined by this Tribunal.

214. On the basis of articles II and III of the Constitutional Procedural Code, this Tribunal has the power, and the duty, to “adjust the requirements” contained therein to “guarantee the preeminence of the Constitution and the effectiveness of the

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<sup>184</sup> Peru’s Political Constitution 1993, article 2(2).

<sup>185</sup> Constitutional Tribunal of the Republic of Peru. Case N° 0261-2003-PI/TC of March 26, 2003. Conclusion 3.1 (emphasis added).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

constitutional rights.”<sup>189</sup> The constitutional rights that need to be protected in this case are the right to property and due process, among others.

215. This Tribunal should make all efforts to fully understand the economic, financial and legal arguments presented here. It may assist the Tribunal in developing the necessary tools to fairly and efficiently resolve this conflict to foster a high-level debate on this matter. Even at this advanced stage, this case is replete with important legal and economic issues. A cursory fiscal analysis of those questions is unlikely to yield a rigorous legal and economic decision.

216. Fortunately, this Tribunal now has a unique opportunity to evaluate the evidence presented. This may include scheduling an oral hearing and calling the experts to explain their reports, evaluating their opinions and examining the validity of the legal arguments from each side.

217. The Petitioners look forward to a serious debate on the issues presented here. Therefore, Petitioners ask this Tribunal to invite the MEF to answer to these arguments within three months starting on the date on which this brief is filed, and to give the Association an opportunity to respond to any such arguments.

## **VI. Conclusion**

218. Petitioners have demonstrated that the MEF’s Guidelines breach the right to property as they offer to pay an amount that is so low that it can be equated to no payment at all. Despite the MEF’s attempts to camouflage it with complicated formulas, what the Guidelines propose is the embodiment of nominal payment, which the Tribunal has rejected time and time again.

219. Given the evidence showing the Guidelines’ absurd and unfair results, the Tribunal should once again safeguard all bondholders’ constitutional rights to property, due process and access to the judiciary. Peru’s achievement of a strong and stable economy makes it capable of at long last honoring the land reform debt, and doing so would actually reassure investors everywhere that Peru will stand behind its commitments and thereby benefit the economy. The new bench of the Constitutional Tribunal has thus a unique opportunity to once and for all put an end to this longstanding pattern of broken promises and injustice, and to ensure that Peru finally closes the chapter on a regrettable part of its past.

### **THEREFORE:**

Petitioners request the Constitutional Tribunal to process this request.

**FIRST ADDITIONAL REQUEST:** ABDA expressly declares that the lawyers that signed this petition, Domingo Garcia Belaunde, Humberto Medrano Cornejo, José Tam, Luis Bedoya Escurra, and Mario Seoane Linares, are accredited as the Association’s attorneys and, consequently,

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Constitutional Procedural Code, articles II and III of Preliminary Title.

they are authorized to represent and defend the Association with all the attributes conferred by Law.

In this same vein, according to article 80 of the Civil Procedure Code, ABDA grants them general faculties of representation and therefore ratifies the judicial address provided in the introduction of this brief. ABDA also declares that it knows the scope and effects of the representation that it has granted them.

**SECOND ADDITIONAL REQUEST:** Petitioner is attaching sufficient copies of this brief and its correspondent exhibits so that the MEF can be notified.

**THIRD ADDITIONAL REQUEST:** Petitioner requests that this brief is reviewed by the entire bench of the Tribunal.

**FOURTH ADDITIONAL REQUEST:** Petitioner authorizes the following people to carry out the necessary proceedings: Luis Pachas Peña, Wilfredo Chumpitazi Negrón, Jessica Ramos Cano.

**FIFTH ADDITIONAL REQUEST:** Petitioners request the Tribunal to transmit this brief to the MEF, and to invite or instruct the MEF to respond to it. In case the MEF responds, Petitioners request an opportunity to reply.

Lima, March 16, 2015