

International Centre for Settlement of Investment Disputes

RENÉE ROSE LEVY AND GREMCITEL S.A.

CLAIMANTS

v.

REPUBLIC OF PERU

RESPONDENT

ICSID Case No. ARB/11/17

AWARD

Arbitral Tribunal

Prof. Gabrielle Kaufmann-Kohler, President

Dr. Eduardo Zuleta, Arbitrator

Prof. Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal

Ms. Alicia Martín Blanco

Date of dispatch to the Parties: 9 January 2015

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TABLE OF ABBREVIATIONS

<i>Ad Hoc</i> Commission	Commission created by INC Resolution No. 508/INC of 12 July 2004
BIT / Treaty / France-Peru BIT	Agreement Between the Government of the Republic of France and the Government of the Republic of Peru for the Promotion and Reciprocal Protection of Investments of 6 October 1993
C-Memorial	Claimants' Memorial on the Merits of 17 August 2012
CNTA	National Technical Commission of Archeology Comisión Nacional Técnica de Arqueología
CNTCPA	National Technical Commission of Qualifying Architectural Projects Comisión Nacional Técnica Calificadora de Proyectos Arquitectónicos
C-PHB 1	Claimants' First Post-Hearing Brief of 31 January 2014
C-PHB 2	Claimants' Reply Post-Hearing Brief of 28 February 2014
C-Reply	Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction of 26 March 2013
CWS	Claimants' witness statement
Exh. C-	Claimants' Exhibits
Exh. R-	Respondent's Exhibits
Hearing	Hearing conducted between 7-14 November 2013
Historical Commission	Commission created by INC Resolution No.1260/INC of 26 November 2004
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
INC	National Institute of Culture Instituto Nacional de Cultura
MOC	Ministry of Culture
PO 1	Procedural Order No. 1 of 4 May 2012
R-CM	Respondent's Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits of 21 December 2012
RFA	Claimants' Request for Arbitration of 17 May 2011
R-PHB 1	Respondent's First Post-Hearing Brief of 31 January 2014

R-PHB 2	Respondent's Reply Post-Hearing Brief of 28 February 2014
R-Rejoinder	Respondent's Rejoinder on the Merits and Jurisdiction of 1 July 2013
RWS	Respondent's witness statement
Tr. [page: line]	Transcript of the hearing (English version)

I. INTRODUCTION

1. This is an arbitration brought before the International Centre for Settlement of Investment Disputes (“ICSID”) under the Convention on the Settlement of Investment Disputes between States and Nationals of other States dated 18 March 1965 (“ICSID Convention”) and the Agreement Between the Government of the Republic of France and the Government of the Republic of Peru for the Promotion and Reciprocal Protection of Investments dated 6 October 1993 (“France-Peru BIT” or “BIT” or the “Treaty”).¹

A. THE PARTIES

1. The Claimants

2. The Claimants in this arbitration are Ms. Renée Rose Levy (“Ms. Levy”), a French national, and Gremcitel S.A. (“Gremcitel”), a company organized under the laws of the Republic of Peru, with its offices in Lima (jointly, “the Claimants”).
3. The Claimants have been represented in this arbitration by:

Until 6 May 2014:

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Christian Carbajal Valenzuela
José Salcedo Machado
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¹ Agreement Between the Government of the Republic of Peru and the Government of the French Republic for the Promotion and Reciprocal Protection of Investments, 6 October 1993 (**Exh. C-1-A RFA; Exh. R-060**).

2. The Respondent

4. The Respondent is the Republic of Peru (“Peru” or “the Respondent”).
5. The Respondent has been represented in this arbitration by:

Carlos Valderrama Bernal
Presidente de la Comisión Especial que
Representa al Estado en Controversias
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B. OVERVIEW OF THE DISPUTE

6. This section provides a general statement of the main facts underlying the dispute. It purports to put the dispute in its context, rather than to provide an exhaustive description of all the events relevant for the dispute.

1. The privatization of the land

7. The dispute concerns three parcels of land (called “La Herradura”, “Punta del Sol”, and “La Chira”), located along Peru’s Pacific Coast near Lima, within the Municipality of Chorrillos. The three parcels of land are adjacent to the so-called “Morro Solar”, an area that is claimed to be the site of one of the most important battles in Peruvian history, the Battle of San Juan and Chorrillos, which occurred in 1881 in the Pacific War between Peru and Chile (“the Battle”).

8. On 19 September 1977, as the centennial anniversary of the Battle was approaching, Peru's Ministry of Housing and Construction issued Resolution No. 2019-77-VC-1100 (the "1977 Resolution") declaring the Morro Solar intangible.²
9. On 30 December 1986, Peru's National Institute of Culture ("INC" by its Spanish initials) issued Resolution No. 794-86-ED (the "1986 Resolution").³ Through this Resolution the INC declared as "Monuments" a number of buildings and areas, including the Morro Solar.
10. The scope and import of both the 1977 Resolution and the 1986 Resolution are disputed between the Parties.
11. In 1995, the Municipality of Chorrillos held a public bidding process (which goes by the name of *Concurso de Proyectos Integrales*)⁴ to sell the three parcels of land to private individuals on the basis of the projects that these individuals proposed for the development of the land.⁵ As a result of these procedures, the three parcels were transferred to the winning bidder.
12. On 21 August 1995, La Herradura was awarded to the company JC Contratistas Generales EIRL ("JC Contratistas"). The sales contract for this parcel of the land was concluded on 22 August 1995.⁶ On 8 September 1995, Gremco, a Peruvian company belonging to the Levy Group,⁷ acquired the land from JC Contratistas for US\$ 3 million.⁸ This sales contract was approved by the Municipality of Chorrillos on 12 September 1995.
13. On 7 November 1995, the Municipality of Chorrillos awarded the bid concerning Punta del Sol to Gremco, and the relating sales contract of the land was concluded on

² Resolution Declaring the Morro Solar Intangible, Supreme Resolution No. 219-77-VC-1100, 19 September 1977 (**Exh. C-069; Exh. R-002**) ("RESOLVES: 1. To declare intangible the land of the Morro Solar of Chorrillos and the bordering land indicated in map Nos. 5 and 6 of the General Zoning Plan of Metropolitan Lima 1977-1990 [...]", Tribunal's translation).

³ Resolution Declaring Morro Solar an Historical Monument, Ministerial Resolution No. 794-86-ED, 30 December 1986 (**Exh. C-058; Exh. R-006**).

⁴ C-Memorial, ¶¶ 72-73.

⁵ R-CM, ¶ 53.

⁶ Sales Purchase Agreement Between MCH and JC Contratistas for La Herradura, 22 August 1995 (part of Exh. **C-1-P RFA; Exh. R-062**).

⁷ See C-Memorial, ¶ 5; CWS Levy, ¶ 2.

⁸ Sales Purchase Agreement Between JC Contratistas and Gremco for La Herradura, 8 September 1995 (part of Exh. **C-1-Q RFA; Exh. R-063**), pp. 9-10.

- 15 November 1995. Gremco agreed to pay US\$ 1 million for the land, plus US\$ 3.3 million of in-kind public construction works.⁹
14. On 18 December 1995, Gremco was awarded the third parcel of land, La Chira. The related sales contract was signed on 28 December 1995. Gremco agreed to pay US\$ 1 million for the land, plus US\$ 2.5 million of in-kind public construction works.¹⁰
15. The sales contract for La Herradura contains the following clause:
- “6.03. If necessary, and at the request of the buyer, the Municipality [of Chorrillos] must lend its official support in the requests that the Buyer must effectuate before the Municipality of Lima [...] as well as before any other competent authority for obtaining the authorizations that may be required for an adequate development of the Project [...]”¹¹
16. The sales contracts for La Chira and Punta del Sol contain similar language.¹²
17. The precise legal effects of the three contracts are disputed between the Parties. While according to the Claimants they created the obligation upon Peru to facilitate the execution of the project and to issue the necessary permits to this end,¹³ the Respondent contends that such contracts did not give Gremco the right to develop the land free from the legal restrictions that were applicable to such areas.¹⁴
18. The three projects were later consolidated by Gremco into the “Costazul Project”, a tourism and real estate “urban megaproject”.¹⁵
19. Certain differences between Gremco and the Municipality of Chorrillos over the obligations arising under those sales contracts were submitted to a domestic arbitration pursuant to the arbitration clauses contained in such contracts. The arbitration resulted in an arbitral award of 15 January 2001, which declared the sales contracts valid and ordered the Municipality to comply with its obligations regarding certain registrations in the public registry and the release of a specific part of the land.¹⁶

⁹ Public Deed of Sales Purchase Agreement Between Municipality of Chorrillos and Gremco for Punta del Sol (complete version), 15 November 1995 (**Exh. R-331**), p. 12.

¹⁰ Sales Purchase Agreement Between MCH and Gremco for La Chira, 28 December 1995 (part of Exh. **C-1-S RFA; R-065**), pp. 9-10.

¹¹ Sales Purchase Agreement Between MCH and JC Contratistas for La Herradura, 22 August 1995 (part of Exh. **C-1-P RFA; Exh. R-062**), pp. 15-16 (Tribunal’s translation).

¹² Sales Public Deed of Sales Purchase Agreement Between Municipality of Chorrillos and Gremco for Punta del Sol (complete version), 15 November 1995 (**Exh. R-331**), p. 14; Sales Purchase Agreement Between MCH and Gremco for La Chira, 28 December 1995 (part of Exh. **C-1-S RFA; R-065**), p. 13.

¹³ C-Memorial, ¶ 83.

¹⁴ R-CM, ¶ 58.

¹⁵ C-Memorial, p. 11.

¹⁶ Arbitral Award, Resolution No. 15, *Municipality of Chorrillos v. Gremco*, 15 January 2001 (**Exh. C-018; Exh. R-092**).

20. Between 2003 and 2004 the Peruvian company Gremcitel, one of the two Claimants in this arbitration, acquired the land and the rights relating to the Costazul Project from Gremco. Both Gremcitel and Gremco are, according to the Claimants, part of the Levy Group.¹⁷ The price agreed for the sale of La Herradura and La Chira was set at US\$ 60 million, to be paid from the future cash flow which would result from the projects on the two parcels of land.¹⁸ The contract also provided that Gremco would retain 99% of the future profits from the Costazul Project and Gremcitel would only receive 1% as a project management fee. The payment for these two parcels was later suspended in an agreement between Gremco and Gremcitel.¹⁹ In this respect, the Respondent contends that no price was ever paid for such sale.²⁰
21. The sales contract for Punta del Sol was concluded on 15 January 2004 and provided for a price of S/. (Peruvian *Nuevos Soles*) 42,144,520.00 (equivalent to around US\$ 12 million) to be paid after a 5-year grace period.²¹ The Parties agreed that Gremcitel would pay the value of the land by entering into an advertising agreement that would promote the Costazul Project. The grace period was subsequently extended until 2020.²²

2. The events up to October 2007

22. After Gremco acquired the land from the Municipality of Chorrillos, a number of interactions occurred between Gremco (and later Gremcitel) and various governmental and municipal authorities, in the form of exchanges of correspondence, applications for permits or authorizations, and reports. The aim of many of these exchanges with the Peruvian authorities was for Gremco/Gremcitel to identify potential areas in which development would be restricted. This section summarizes the most important of these exchanges and other occurrences involving the Authority of the Costa Verde Project (a.), the National Institute of Culture (b.) and the Municipality of Chorrillos (c.).

a. The Authority of the Costa Verde Project

¹⁷ C-Memorial, ¶ 5.

¹⁸ Public Registry of 18 February 2003, Sale Agreement Between Gremco and Gremcitel, With Intervention by Townhouse, For the Land in La Herradura and La Chira, 20 January 2003 (**Exh. C-027; Exh. R-017**).

¹⁹ Contract Suspending Payments between Gremco and Gremcitel, 19 February 2008 (**Exh. R-310**).

²⁰ R-CM, ¶ 68.

²¹ Public Registry of 21 April 2006, Sales Contract Between Gremco and Gremcitel for Punta del Sol, 15 January 2004 (**Exh. C-028; Exh. R-025**).

²² Amending Contract of Sale of Punta del Sol of 2004, 1 November 2006 (**part of Exh. C-135; Exh. R-332**).

23. The Authority of the Costa Verde Project ("APCV" by its Spanish initials) is a governmental body entrusted with the preservation, protection and sustainable development of Peru's Pacific Coast ecosystem known as Costa Verde, which includes the three parcels of land owned by the Claimants. In particular, the APCV ensures that any land development along the Costa Verde complies with the Costa Verde Master Plan.²³
24. Once La Herradura, La Chira and Punta del Sol had been consolidated to form the Costazul Project, the APCV granted Gremco the Prior Certification of Compatibility with the Costa Verde Master Plan through Resolution 015-2003/MML/IMP, issued by Lima's Metropolitan Institute of Planning (APCV's technical secretariat) on 18 June 2003.²⁴
25. In August 2006, Gremcitel applied for the Final Certification of Compatibility for part of the land, which has not been issued by the APCV to date. This certification would be granted following an in-depth review of the project and would be the final step in the APCV's evaluation.

b. The National Institute of Culture²⁵

26. In July 2001, Gremco submitted a proposal for the historical delimitation of the Morro Solar to the INC.²⁶ A year later, in May 2002, Gremco and the INC signed an Agreement of Cooperation. The purpose of the Agreement was to "carry out joint actions to delimit the archeological areas" located in the Claimants' property.²⁷
27. Following this Agreement and subsequent archeological investigations, the INC's National Technical Commission of Archeology ("CNTA" by its Spanish initials), issued Decision No. 330 of 25 June 2003. The CNTA determined that there were "no new grounds to lift the intangibility of the Morro Solar [...] and therefore ratif[ied] its monumental nature established by [1977 Resolution]".²⁸ Such decision also established

²³ The APCV's role and the Costa Verde Master Plan are explained in the Regulation for Law 26.306 Recognizing Various Municipalities' Ownership of the Land in Costa Verde (**Exh. C-043; Exh. R-052**).

²⁴ IMP Directorial Resolution No. 015-2003/MML/IMP, 18 June 2003 (part of **Exh. C-050; Exh. R-068**).

²⁵ In 2010, the INC was subsumed into the Ministry of Culture or "MOC". See Law Creating the Ministry of Culture, Law No. 29565, 22 July 2010 (**Exh. R-044**).

²⁶ Proposal to Delimit Historical Morro Solar, 3 July 2001 (**Exh. R-211**).

²⁷ Agreement of Cooperation Between INC and Gremco, May 2002 (*Convenio de Cooperación Interinstitucional*) (**Exh. R-015**), Article 2 (Tribunal's translation).

²⁸ Decision by the National Technical Commission of Archeology Evaluating Archeological Sites in the Morro Solar, Decision No. 330, 25 June 2003 (**Exh. R-021**), at "Resolved", ¶ 2 (Tribunal's translation).

- that "Gremco S.A. should submit and carry out an evaluation project aimed at the delimitation, prospecting and restricted excavation" of part of its land.²⁹
28. The CNTA also referred the file to the National Technical Commission of Qualifying Architectural Projects ("CNTCPA" by its Spanish initials) responsible for the evaluation of historical, as opposed to archeological, cultural heritage in Peru.³⁰ In its Decision No. 1 of 11 August 2003, the CNTCPA stated that it "concur[red] technically with all of the views taken by the [CNTA] in its Decision N° 330" and advised Gremco how to handle the archeological and historical sites found on its land, noting that any urban development plans would have to be submitted to the INC for approval.³¹
 29. Following a re-evaluation request put forward by Gremco, the INC convened a special joint session of the CNTA and the CNTCPA, which issued a Joint Decision on 10 December 2003.³² In this decision, the two Commissions ratified Decision No. 330 and therefore maintained the intangibility of the Morro Solar.
 30. On that same date, Gremco submitted a report to the INC regarding the implementation of their Agreement of Cooperation, containing a delimitation proposal for the archeological and historical areas.³³
 31. Gremco also sent the INC a letter attaching a legal report on 23 December 2003, claiming that Decision No. 330 was null and void.³⁴ Through March and April 2004, Gremco sent several letters to the INC regarding the delimitation of the historical and archeological sites, once again criticizing Decision No. 330 for adopting different delimitation criteria than those applied with regard to other archeological sites in Lima,³⁵ proposing that each

²⁹ *Ibid.*, at "Resolved", ¶ 5 (Tribunal's translation).

³⁰ A distinction must be made between archeological and historical cultural heritage. Peru's legal framework distinguishes between (i) cultural heritage from the pre-Hispanic era (archaeological) and (ii) cultural heritage from the colonial and republican eras (historical). See Regulation on Archaeological Investigations, Supreme Resolution No. 004-2000-ED, 24 January 2000 (part of Exh. **C-045**; Exh. **R-010**); General Law of National Cultural Heritage, Law No. 28296, 21 July 2004 (part of Exh. **C-044**; Exh. **R-034**).

³¹ Decision by the National Technical Commission to Evaluate Architectural Projects, Evaluating the Historical and Archeological Value of the Morro Solar, Decision No. 1, 11 August 2003 (Exh. **R-022**), at "Decided", ¶¶ 1 and 9 (Tribunal's translation).

³² Joint Decision of National Technical Commission of Archeology and National Technical Commission to Evaluate Architectural Projects Regarding Archeological and Historical Sites in the Morro Solar, 10 December 2003 (Exh. **R-024**).

³³ Gremco's Report to the INC on the Implementation of the Inter-Institutional Agreement Between the INC and Gremco, 10 December 2003 (Exh. **R-247**).

³⁴ Letter from Gremco to INC Attaching Legal Report, 23 December 2003 (Exh. **R-250**), p. 72.

³⁵ Letter from Gremco to INC Regarding the Delimitation of Archeological Sites, 9 March 2004 (Exh. **R-028**).

of the archeological sites be delimited individually³⁶ and explaining that the Battle did not take place on Gremco's land.³⁷

32. Following this correspondence, the CNTA issued Decision No. 197 of 25 May 2004,³⁸ in which it delimited the individual archeological areas. It thereby reduced the area that was considered intangible for archeological reasons.
33. On 12 July 2004, the INC created an Ad Hoc Commission "to assess and review the status of the land owned by Gremco."³⁹ The Ad Hoc Commission issued a report on 14 October 2004 with recommendations regarding the delimitation of both the archeologically and historically relevant areas within Gremco's land. In particular, the Ad Hoc Commission issued the following "recommendations", the scope and import of which are disputed:

"1. That the National Institute of Culture determine the intangible area, delimiting it to an area corresponding to the historic zone of the Morro Solar declared a Historical Monument, recognizing for the monumental area a zone that surrounds the actual formal commemorations and includes the Monument of the Unknown Soldier, the monument of General Iglesias, the Observatory, the Obus, the Cross of the Morro and the Chapel of the Virgin.

2. As a result of the above, the National Institute of Culture requests that the Ministry of Education, in the exercise of its functions, perfect the Ministerial Resolution No. 794-86-ED and establish the boundaries of the above-mentioned Historical Monument."⁴⁰

34. On 26 November 2004, the INC issued Resolution No. 1260/INC,⁴¹ which provided a number of Certificates of Inexistence of Archeological Artifacts ("CIRA" by its Spanish initials) for those areas free of any archeological remains. Through the years 2005 to 2007, the INC issued further CIRAs.⁴² The Claimants contend that by the time Resolution

³⁶ Letter from Gremco to INC Regarding the Delimitation of Archeological Sites, 2 April 2004 (**Exh. R-029**).

³⁷ Letter from Gremco to INC Regarding the Delimitation of Historical Sites, 15 March 2004 (**Exh. R-263**).

³⁸ Decision by National Technical Commission of Archeology Evaluating Archeological Sites in the Morro Solar, Decision No. 197, 25 May 2004 (**Exh. R-032**).

³⁹ Resolution Creating the Ad Hoc Commission, National Directorial Resolution No. 508/INC, 12 July 2004 (**Exh. C-059**; **Exh. R-033**), Article 1 (Tribunal's translation).

⁴⁰ Report of the Ad Hoc Commission, 14 October 2004 (**Exh. C-033**; **Exh. R-035**), p. 8 (Tribunal's translation).

⁴¹ Resolution Approving CIRAs and Recommending the Creation of an Historical Commission, National Directorial Resolution No. 1260/INC, 26 November 2004 (**Exh. C-051**; **Exh. R-036**).

⁴² Notification No. 216-2005-INC/DREPH/DA-D of 16 February 2005, by which INC notifies Gremcitel three CIRAs (**Exh. C-052**); CIRA No. 2005-00024, 11 February 2005 (**Exh. C-053**); CIRA No. 2005-00025, 14 February 2005 (**Exh. C-054**); CIRA No. 2005-00026, 14 February 2005 (**Exh. C-055**); CIRA No. 2006-49, 2 March 2006 (**Exh. C-056**); National Directorial Resolution No. 1281-2007 of 27 September 2007, by which the INC approved the issuance of an additional CIRA, advised to Gremcitel through notification of 2 October 2007 (**Exh. C-057**).

1342/INC of 2007 was adopted (described below), five CIRAs had been granted in their favor, attesting that around 80% of the Claimants' land was free of archeological artifacts impeding the development of the project.⁴³

35. Resolution No. 1260/INC of 26 November 2004, together with Resolution No. 184/INC of 22 February 2005,⁴⁴ also created a Historical Commission entrusted with "proposing the delimitation of the intangible historical area of Morro Solar".⁴⁵ That Commission issued a Report in July 2005 proposing boundaries of the intangible historical area of the Morro Solar.⁴⁶ The Report was the basis for the subsequent 2007 Resolution issued by the INC, which largely adopted the delimitation resulting from the study by the Historical Commission.⁴⁷ The Respondent claims that the Historical Commission conducted a careful review of historical evidence related to the Battle. The Claimants in turn view the findings of the Historical Commission as arbitrary and claim that the 2005 Report was "a document for the INC's internal use that was not communicated to Gremco or Gremcitel."⁴⁸

c. The Municipality of Chorrillos

36. On 22 March 2006, Gremcitel applied for the so-called Urban Development Permit (*Habilitación Urbana*) for part of the La Herradura parcel. Because the Municipality of Chorrillos did not react (neither approving nor denying the application) within 60 days, Gremcitel considered that the application had been granted by "positive administrative silence" (*silencio administrativo positivo*) and registered the Urban Development Permit at Lima's Public Registry.⁴⁹

3. Resolution No. 1342/INC of 10 October 2007

37. On 10 October 2007, the INC issued Resolution 1342/INC (the "2007 Resolution"), which provided a precise delimitation of the boundaries of the Morro Solar.⁵⁰ According to the

⁴³ C-Memorial, ¶ 110.

⁴⁴ Resolution Creating the Historical Commission to Evaluate the Delimitation of the Historical Site of the Morro Solar, National Directorial Resolution No. 184/INC, 22 February 2005 (**Exh. C-060; Exh. R-037**).

⁴⁵ *Ibid.*, at Article 1 (Tribunal's translation).

⁴⁶ Final Report of the Special Historical Commission, Report No. 060-INC-2005/DREPH-DPHCR July 2005 (**Exh. C-035; Exh. R-039**), p. 28.

⁴⁷ Resolution Delimiting the Intangible Historical Zone of Morro Solar, National Directorial Resolution No. 1342/INC, 10 October 2007 (issued), 18 October 2007 (published) (**Exh. C-047; Exh. R-041**), Recitals.

⁴⁸ C-PHB 2, ¶ 36 (Tribunal's translation).

⁴⁹ C-Memorial, ¶¶ 112-115.

⁵⁰ Resolution Delimiting the Intangible Historical Zone of Morro Solar, National Directorial Resolution No. 1342/INC, 10 October 2007 (issued), 18 October 2007 (published) (**Exh. C-047; Exh. R-041**).

Claimants, this act imposed on the land an intangibility status which did not exist until then and thus rendered the Costazul Project meaningless.⁵¹ For the Claimants, the 2007 Resolution is the measure that gave rise to the dispute.

II. PROCEDURAL HISTORY

A. INITIAL PHASE

38. On 5 November 2010, the Claimants set in motion the 6-month negotiation period pursuant to Article 8(2) of the BIT.⁵² Negotiation efforts were reiterated on 6 December 2010⁵³ and 11 March 2011.⁵⁴
39. On 9 May 2011, the Claimants considered that the negotiation period had expired and manifested their acceptance of the offer to arbitrate contained in the BIT.⁵⁵
40. On 17 May 2011, the Claimants filed their Request for arbitration. On 24 June 2011, the Secretary-General of ICSID registered the Request.
41. On 29 August 2011, following appointment by the Claimants, Eduardo Zuleta, a Colombian national, accepted his appointment as arbitrator. On 21 September 2011, following appointment by the Respondent, Raúl Vinuesa, an Argentinean and Spanish national, accepted his appointment as arbitrator. On 21 November 2011, following appointment by the Chairman of the ICSID Administrative Council, Gabrielle Kaufmann-Kohler, a Swiss national, accepted her appointment as presiding arbitrator.
42. On 22 November 2011, pursuant to ICSID Arbitration Rule 6(1), the Tribunal was deemed to have been constituted and the proceedings to have begun. On the same date, the Centre informed the Parties that Ms. Alicia Martín Blanco, ICSID Legal Counsel, would serve as the Secretary of the Tribunal.
43. On 19 April 2012, the Tribunal and the Parties held a first session in Washington, D.C.
44. On 4 May 2012, the Tribunal issued Procedural Order No. 1 concerning procedural matters and the procedural calendar.

⁵¹ C-Memorial, ¶ 128.

⁵² Letter from the Claimants to Peru's Ministry of Economy and Finance, 5 November 2010 (Exh. C-1-H RFA).

⁵³ Letter from the Claimants to Peru's Ministry of Economy and Finance, 6 December 2010 (Exh. C-1-I RFA).

⁵⁴ Letter from the Claimants to Peru's Ministry of Economy and Finance, 11 March 2011 (Exh. C-1-J RFA).

⁵⁵ Letter from the Claimants to Peru's Ministry of Economy and Finance, 9 May 2011 (Exh. C-1-K RFA).

B. WRITTEN PHASE ON JURISDICTION AND MERITS

45. On 17 August 2012, the Claimants filed their Memorial on the Merits, with one witness statement and three expert reports.
46. On 21 December 2012, the Respondent filed its Memorial on Jurisdiction and Counter-Memorial on the Merits, with six witness statements and three expert reports.
47. The Respondent filed a request for document production on 22 January 2013. The Claimants filed a request for document production on 25 January 2013.
48. On 19 February 2013, the Tribunal issued Procedural Order No. 2 concerning production of documents.
49. On 26 March 2013, the Claimants filed their Reply on the Merits and Counter-Memorial on Jurisdiction, with three witness statements and five expert reports.
50. On 28 May 2013, the Tribunal issued Procedural Order No. 3 concerning new requests for production of documents filed on 24 April 2013 by the Respondent and on 2 May 2013 by the Claimants.
51. By letter dated 1 July 2013, the Respondent filed a Rejoinder on the Merits and Jurisdiction. The Respondent explained that it had included in its brief a section on jurisdiction because it had received through document production, conducted after it had filed its Memorial on Jurisdiction and Counter-Memorial on the Merits, a number of new documents related to jurisdiction that it had previously not had an opportunity to address.
52. By letter of 17 July 2013, the Claimants requested that the Tribunal not bifurcate the proceedings between jurisdiction and merits. On 24 July 2013, the Respondent agreed on a non-bifurcated proceeding. On 30 July 2013, the Tribunal confirmed that the Hearing would thus deal with both jurisdiction and merits issues.
53. On 30 September 2013, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
54. On 2 October 2013, the Tribunal issued Procedural Order No. 4 on the organization of the Hearing.
55. On 24 October 2013, the Tribunal, upon request of the Claimants and after having heard the Respondent, granted the Claimants leave to introduce two new documents into the record.

C. NOVEMBER HEARING AND FURTHER SUBMISSIONS

56. On 7-14 November 2013, the Hearing on jurisdiction and merits was held in Washington, D.C. The following persons attended the Hearing:

A. For the Tribunal

- Prof. Gabrielle Kaufmann-Kohler, President
- Dr. Eduardo Zuleta, Arbitrator
- Prof. Raúl Vinuesa, Arbitrator

B. For the Secretariat

- Ms. Alicia Martín Blanco, Secretary of the Tribunal (ICSID)

C. For the Claimants

- Mr. Carlos Paitán, Estudio Paitán & Abogados
- Mr. Christian Carbajal, Estudio Paitán & Abogados
- Mr. Danny Quiroga, Estudio Paitán & Abogados
- Mr. José Salcedo, Estudio Paitán & Abogados
- Mr. Fernando Olivares, Estudio Paitán & Abogados
- Ms. Renée Rose Levy, Claimant
- Mr. Isy Levy, Representative of the Claimants
- Mr. Jorge Barragán, Witness
- Mr. Dany Chumbes, Witness
- Mr. Guillermo Cock, Witness
- Ms. Claudette Joseph, Expert
- Mr. Ian Sandy, Expert
- Mr. Cristóbal Aljovín, Expert
- Mr. Richard Martin, Expert
- Mr. Martín D’Azevedo, Expert
- Mr. Richard Marchitelli, Expert
- Mr. John Ferro, Damages Expert
- Mr. José Rivas, Damages Expert
- Mr. David Benick, Damages Expert

D. For the Respondent

- Mr. Stanimir Alexandrov, Sidley Austin LLP
- Mr. Andrew Blandford, Sidley Austin LLP
- Mr. Samuel Boxerman, Sidley Austin LLP
- Ms. Marinn Carlson, Sidley Austin LLP
- Mr. Gavin Cunningham, Sidley Austin LLP
- Ms. María Carolina Durán, Sidley Austin LLP
- Ms. Jennifer Haworth McCandless, Sidley Austin LLP
- Ms. Courtney Hikawa, Sidley Austin LLP
- Mr. Trey Hilberg, Sidley Austin LLP
- Mr. Joseph Zaleski, Sidley Austin LLP
- Ms. Anastassiya Chechel, Sidley Austin LLP

- Mr. Ricardo Puccio, Estudio Navarro Ferrero & Pazos
- Mr. Jorge Masson, Estudio Navarro Ferrero & Pazos
- H.E. Harold Forsyth, Peruvian Ambassador to the United States
- Mr. Erika Lizardo, Embassy of the Republic of Peru in Washington D.C.
- Ms. Cecilia Galarreta, Embassy of the Republic of Peru in Washington D.C.
- Mr. Carlos José Valderrama, President of the Special Commission, Ministry of Economy and Finance, Republic of Peru
- Ms. Milagros Miranda, Peruvian Mission to the United Nations in New York
- Mr. Edwin Benavente, Witness
- Ms. Maria Elena Córdova, Witness
- Ms. Ruth Fernández, Witness
- Ms. Ana María Hoyle, Witness
- Ms. Elda Juárez, Witness
- Mr. David de Lambarri, Witness
- Mr. Guillermo Málaga, Witness
- Mr. Nelson Manrique, Witness
- Mr. Daniel Alegre, Expert
- Mr. Guillermo García Montúfar, Expert
- Ms. Sheila Harris, Expert
- Mr. Brent Kaczmarek, Expert
- Ms. Isabel Kunsman, Expert
- Mr. Juan Pablo de la Puente, Expert

57. On 18 November 2013, the Tribunal issued Procedural Order No. 5 concerning the procedural calendar and procedural matters.
58. In accordance with the procedural calendar, the Parties filed simultaneous post-hearing submissions on 31 January 2014 and on 28 February 2014.
59. On 28 March 2014, the Parties submitted their respective costs statements. On 11 April 2014, the Respondent stated that it had no comments on the Claimants' cost statements.
60. On 6 May 2014, the Claimants informed the Tribunal that they were no longer represented by Estudio Paitán & Abogados, and that correspondence should be directed thereafter to Mr. Isy Levy and to the Claimants' new counsel, Mr. Fernando Olivares Plácido.
61. The Tribunal closed the proceedings on 11 November 2014.

III. POSITIONS OF THE PARTIES AND RELIEF REQUESTED

A. THE CLAIMANTS' POSITION AND REQUEST FOR RELIEF

62. In its written and oral submissions, the Claimants have made the following main submissions.

On jurisdiction

63. The Arbitral Tribunal has jurisdiction over the present dispute. The Claimants fulfill the nationality requirements set forth in Articles 25 of the ICSID Convention and 1 of the BIT. In particular, Ms. Levy holds French nationality (and does not hold Peruvian nationality), and has owned and controlled Gremcitel, a Peruvian company, indirectly since 2005 (through the company Hart Industries Ltd., hereinafter “Hart Industries”) and directly since 2007. Ms. Levy’s ownership and control of Gremcitel thus confer French nationality to Gremcitel, pursuant to Article 25(2)(b) of the ICSID Convention and Article 8(3) of the BIT.
64. There is a legal dispute arising directly out of an investment. Article 1 of the BIT defines investment in broad terms, including movable and immovable property, shares, obligations, rights to performance having economic value, and the Claimants’ investment falls within such broad definition.

On the merits

65. The Respondent has breached its obligation to accord fair and equitable treatment pursuant to Article 3 of the BIT. In particular, the Claimants advance the following arguments:
- The Respondent has frustrated the Claimants’ legitimate expectations that they would be able to develop the Costazul Project. The 2007 Resolution rendered their investment meaningless.
 - The Respondent also failed to act transparently when it did not involve the Claimants in the approval process for the 2007 Resolution. Further, the declaration of intangibility contained in the 2007 Resolution as well as the “erratic and contradictory behavior” by the INC were “unpredictable”,⁵⁶ and thus constituted a violation of the obligation to maintain a stable legal framework.
 - Moreover, the issuance of the 2007 Resolution constituted an act which was arbitrary, because it lacked any technical and objective foundation, and was in contradiction with existing provisions and regulations. The Claimants were also discriminated against certain local populations, which despite residing on similarly protected areas of the Morro Solar, were not treated in the same way as the Claimants.

⁵⁶ C-Reply, ¶ 261.

- Finally, the Respondent engaged in acts of bad faith, coercion, or harassment towards the Claimants.
66. For these reasons, in their Reply on the Merits, the Claimants requested that the Tribunal find that “it has jurisdiction on the Claimants’ claim and that such claim is admissible”. The Claimants also requested the Tribunal to accept their claim on the merits and to declare Peru’s international responsibility because of the breach of its obligations in the BIT and award the Claimants the entirety of the damages sought, which their expert, Mr. Ferro, quantified at US \$ 41 billion.⁵⁷
67. In their last request for relief, the Claimants requested the Tribunal to:
- “(1) Assume jurisdiction over all the claims filed by the Claimants against the Republic of Peru on the basis of the Peru-France BIT.
 - (2) Declare that the Peruvian State is liable for the breach of the international obligations assumed under the Peru-France BIT.
 - (3) Establish the damages incurred and interest applied.
 - (4) Require the Respondent to pay the costs and fees incurred by the Claimants throughout the arbitral proceedings.
 - (5) Establish any additional damages and compensation that the Tribunal deems appropriate.”⁵⁸

B. THE RESPONDENT’S POSITION AND REQUEST FOR RELIEF

68. In its written and oral submissions, the Respondent put forward the main following arguments:
- On jurisdiction/abuse of process
69. The Tribunal lacks jurisdiction over this dispute because the Claimants are not “investors” within the meaning of the BIT. Ms. Levy has not put forward reliable evidence as to her shareholding in Gremcitel, and the hurried transfer of shares which allegedly made Ms. Levy the controlling shareholder of Gremcitel constitutes an “abuse of process”, having been carried out for the sole purpose of attracting the France-Peru BIT protection at a time the dispute had either already arisen or was at least entirely foreseeable.
70. The Tribunal also lacks jurisdiction because the Claimants have no “investment” under either the ICSID Convention or the BIT. Indeed, they have no “right to develop” the so-called Costazul Project and Ms. Levy has not established that she made any financial

⁵⁷. C-Reply, p. 79

⁵⁸ C-PHB 1, ¶ 121 (Tribunal’s translation). See also C-PHB 2, ¶ 76.

contribution to acquire the investment. Accordingly she took no risk when she allegedly acquired her shares in Gremcitel.⁵⁹

On the merits

71. For the event that the Tribunal were to find that it had jurisdiction, the Respondent requests the Tribunal to dismiss the claims. In particular: (i) the Claimants could have no legitimate expectations that they could develop their land free from restrictions; (ii) Peru has acted transparently at all times, and the 2007 Resolution should be seen as a mere confirmation of the legal framework established by the previous 1977 and 1986 Resolutions; (iii) the 2007 Resolution's delimitation is not arbitrary, as it was based on a careful historical review; and finally (iv) Peru has not discriminated against the Claimants nor committed any acts of coercion, harassment or in bad faith against them.
72. For these reasons, in its Rejoinder on the Merits and Jurisdiction, the Respondent requested "that (i) the Tribunal dismiss Claimants' claims for lack of jurisdiction; or, in the event that the Tribunal were to find jurisdiction; (ii) dismiss Claimants' claims for lack of merit".⁶⁰
73. Finally, the Respondent also requests an award of costs, including counsel fees, incurred in these proceedings. The Respondent notes that "several events during the hearing – e.g., Claimants' decision not to question Ms. Harris after they demanded her presence at the hearing and to abandon their transparency claims – have materially added to Respondent's costs and provide additional reasons to award costs against Claimants".⁶¹

IV. PRELIMINARY MATTERS

74. Prior to entering the merits of the Parties' positions, the Tribunal will address the relevance of previous decisions or awards (1) and the applicable legal framework (2).

A. RELEVANCE OF PREVIOUS DECISIONS AND AWARDS

⁵⁹ Initially, the Respondent also requested that the Tribunal declare the Claimants' claims inadmissible because in the Respondent's view the same dispute that is before this Arbitral Tribunal was being litigated in the Peruvian courts. See R-CM, ¶¶ 214-223. This objection was later withdrawn by the Respondent. See R-Rejoinder, p. 62, fn. 226 ("Peruvian courts dismissed all of Gremcitel's challenges to Resolution No. 1342/INC. [...] Because Gremcitel's domestic law challenges to Resolution No. 1342/INC are now concluded, Respondent withdraws its objection to the admissibility of Claimants' claims based on the litigation in Peru's courts").

⁶⁰ R-Rejoinder, ¶ 490. The Respondent reiterated these requests for relief, on jurisdiction and the merits, in its post-hearing submissions. See R-PHB 1, ¶ 99; R-PHB 2, ¶ 53.

⁶¹ R-PHB 1, ¶ 100.

75. In support of their positions, both Parties have relied on previous decisions or awards, either to conclude that the same solutions should be adopted in the present case or in an effort to explain why this Tribunal should depart from a solution reached by another tribunal.
76. The Tribunal's view is that it is not bound by previous decisions of ICSID or other arbitration tribunals. At the same time, it is of the opinion that it should pay due regard to earlier decisions of international tribunals. The Tribunal is further of the view that, unless there are compelling reasons to the contrary, it has a duty to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case. By doing so, it will meet its duty to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.⁶²

B. LEGAL FRAMEWORK

77. This arbitration is brought under the ICSID Convention and the France-Peru BIT. The interpretation of these two instruments is governed by customary international law as codified by the Vienna Convention on the Law of Treaties ("Vienna Convention" or "VCLT").

V. JURISDICTION / ABUSE OF PROCESS

A. LAW APPLICABLE TO JURISDICTION

78. The Tribunal's jurisdiction is governed by the ICSID Convention (1. below) and by the BIT (2. below).

1. ICSID Convention

79. Jurisdiction under the ICSID Convention is governed by Article 25, which reads as follows:

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the

⁶² Arbitrator Eduardo Zuleta has a slightly different view only with respect to the text of paragraph 76, which in no way affects his concurrence with, and affirmative vote for, the Award in this case.

parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

2. The BIT

80. The France-Peru BIT was concluded in French and Spanish, both language versions being equally authentic.⁶³ The Parties have mainly referred to the Spanish version of the Treaty, and indeed only the Spanish version has been put in the record.⁶⁴ At the Hearing, the Tribunal asked the Parties about potential differences between the French and Spanish versions of certain Treaty provisions, as a result of which the Respondent referred to the French version of the Treaty in its post-hearing submissions.⁶⁵

81. The main provisions of the BIT are set out in both language versions below. Article 1 of the Spanish version defines "investment", "national", and "company" in the following terms:

"(1) El término "inversión" designa todos los activos tales como bienes, derechos e intereses de toda naturaleza y, en particular, aunque no exclusivamente:

(a) Los bienes muebles e inmuebles, así como todo otro derecho real tales como las hipotecas, privilegios, usufructos, fianzas y derechos similares;

(b) Las acciones, primas en emisión y otras formas de participación, sean minoritarias o indirectas, en las sociedades constituidas en el territorio de una de las partes contratantes;

⁶³ See Article 12, last sentence, of the BIT.

⁶⁴ Agreement Between the Government of the Republic of Peru and the Government of the French Republic for the Promotion and Reciprocal Protection of Investments, 6 October 1993 (**Exh. C-1-A RFA; Exh. R-060**).

⁶⁵ R-PHB 1, fn. 83, referring to the French version of the Treaty.

(c) Las obligaciones, acreencias y derechos a toda prestación que tenga valor económico;

(d) Los derechos de autor, los derechos de propiedad industrial (tales como patentes de invención, licencias, marcas registradas, modelos y diseños industriales), los procedimientos técnicos, los nombres registrados y la clientela;

(e) Las concesiones otorgadas por la ley o en virtud de un contrario, especialmente las concesiones relativas a la prospección, el cultivo, la extracción o la explotación de recursos naturales, incluso aquellas que se encuentran en el área marítima de las Partes Contratantes.

Dichos activos deben ser o haber sido invertidos conforme a la legislación de la Parte Contratante en el territorio o en el área marítima en la cual la inversión es efectuada, antes o después de la entrada en vigencia del presente Convenio.

Toda modificación de la forma de inversión de los activos no afecta su calificación de inversión, siempre que esta modificación no sea contraria a la legislación de la Parte Contratante en el territorio o en la zona marítima en la cual la inversión es efectuada.

(2) El término "nacionales" designa toda persona física que posee la nacionalidad de una de las partes.

(3) El término "sociedades" designa toda persona jurídica constituida en el territorio de una de las Partes Contratantes conforme a la legislación de esta parte y que posee allí su sede social, o es controlada directa o indirectamente por nacionales de una de las Partes Contratantes, o por personas jurídicas que poseen su sede social en el territorio de una de las Partes Contratantes y constituidas conforme a la legislación de esta parte.

[...]

82. The French version of Article 1 of the Treaty reads as follows:

"1. Le terme « investissement » désigne tous les avoirs tels que les biens, droits et intérêts de toutes natures et, plus particulièrement mais non exclusivement :

a) Les biens meubles et immeubles, ainsi que tous autres droits réels tels que les hypothèques, privilèges, usufruits, cautionnements et droits analogues ;

b) Les actions, primes d'émission et autres formes de participation, même minoritaires ou indirectes, aux sociétés constituées sur le territoire de l'une des Parties contractantes ;

c) Les obligations, créances et droits a toutes prestations ayant valeur économique ;

d) Les droits d'auteur, les droits de propriété industrielle (tels que brevets d'invention, licences, marques déposées, modèles et maquettes industrielles), les procédés techniques, les noms déposés et la clientèle ;

e) Les concessions accordées par la loi ou en vertu d'un contrat, notamment les concessions relatives a la prospection, la culture, l'extraction ou

l'exploitation de richesses naturelles, y compris celles qui se situent dans la zone maritime des Parties contractantes.

Lesdits avoirs doivent être ou avoir été investis conformément à la législation de la Partie contractante sur le territoire ou dans la zone maritime de laquelle l'investissement est effectuée, avant ou après l'entrée en vigueur du présent Accord.

Toute modification de la forme d'investissement des avoirs n'affecte pas leur qualification d'investissement, à condition que cette modification ne soit pas contraire à la législation de la Partie contractante sur le territoire ou dans la zone maritime de laquelle l'investissement est réalisé.

2. Le terme de « nationaux » désigne toute personne physique possédant la nationalité de l'une des Parties contractantes.

3. Le terme de « sociétés » désigne toute personne morale constituée sur le territoire de l'une des Parties contractantes, conformément à la législation de celle-ci et y possédant son siège social, ou contrôlée directement ou indirectement par des nationaux de l'une des Parties contractantes, ou par des personnes morales possédant leur siège social sur le territoire de l'une des Parties contractantes et constituées conformément à la législation de celle-ci.

[...]

83. The Spanish version of Article 8 on the settlement of investment disputes reads as follows:

“(1) Toda controversia relativa a una inversión entre una parte y un nacional o sociedad de la otra Parte Contratante será amigablemente dirimida entre las partes en la controversia.

(2) Si tal controversia no hubiese podido ser solucionada en un plazo de seis meses a partir del momento en que cualquiera de las partes en la controversia la hubiera planteado, será sometida, a pedido de cualquiera de las partes, al arbitraje del Centro Internacional de Arreglo de Diferencias Relativas (CIADI), creado por la Convención para el Arreglo de Diferencias Relativas a Inversiones entre Estados y nacionales de otros Estados, firmada en Washington el 18 de marzo de 1965.

(3) Una persona jurídica constituida en el territorio de una de las Partes Contratantes y que antes del surgimiento de la controversia estuviera controlada por los nacionales o sociedades de la otra Parte Contratante será considerada, para los efectos del artículo 25 (2) (b) de la convención mencionada en el párrafo (2) anterior, como sociedad de esa parte contratante.

(4) Cada parte contratante otorga su consentimiento incondicional para someter las controversias al arbitraje internacional, de conformidad con las disposiciones de este artículo.

(5) El laudo arbitral será definitivo y obligatorio.”

84. The French version of Article 8 reads as follows:

"1. Tout différend relatif aux investissements entre l'une des Parties contractantes et un national ou une société de l'autre Partie contractante est réglé à l'amiable entre les deux Parties concernées.

2. Si un tel différend n'a pas pu être réglé dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des parties au différend, il est soumis à la demande de l'une ou l'autre de ces parties à l'arbitrage du Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.), créé par la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, signée à Washington le 18 mars 1965.

3. Une personne morale constituée sur le territoire de l'une des Parties contractantes et qui, avant que le différend ne soit soulevé, est contrôlée par des nationaux ou des sociétés de l'autre Partie contractante est considérée pour l'application de l'article 25 (2, b) de la Convention mentionnée au paragraphe 2 ci-dessus comme une société de l'autre Partie contractante.

4. Chacune des Parties contractantes donne son accord sans réserve au règlement des différends par recours à l'arbitrage international conformément aux dispositions de cet article.

5. Les sentences arbitrales sont définitives et obligatoires."

B. OUTLINE

85. The Respondent has put forward the following objections relating to the jurisdiction of the Arbitral Tribunal:⁶⁶

- *First*, the Respondent contends that the Tribunal lacks jurisdiction under the ICSID Convention and the BIT because the Claimants have not demonstrated that they were "investors" under the BIT at the time the events occurred that gave rise to the dispute. For the Respondent, the documents that the Claimants have submitted purporting to show Ms. Levy's direct and indirect ownership of Gremcitel in 2005 and 2007 are rife with inconsistencies, hand-written corrections, and unverifiable claims. In addition, Gremcitel does not qualify as an investor under Article 8(3) of the BIT because it was not controlled by a French national before the dispute at issue in this case emerged.
- *Second*, the Respondent argues that the Claimants' investment is an abuse of process. In the Respondent's view, the irregularities of the documents purporting to show Ms. Levy's alleged ownership and the testimony at the Hearing demonstrate that Ms. Levy attempted to acquire interest in Gremcitel in a hurry, when key actions of the government were taken or were about to be taken. Such conduct is evidence

⁶⁶ The Tribunal notes that the order and the presentation of the Respondent's objections has somewhat varied throughout its pleadings. The Tribunal has chosen to discuss the objections in the order which the Respondent has adopted in its first post-hearing submission. See R-PHB 1, ¶¶ 25-67 (where the Respondent argues firstly that "Claimants are not investors", secondly that "Claimants' alleged investment is an abuse of process", and thirdly that "Claimants have no investment").

that Ms. Levy acquired her alleged interest in Gremcitel for the sole purpose of internationalizing an existing or foreseeable, and otherwise purely domestic, dispute, which constitutes an abuse of process.

- *Third*, the Respondent argues that the Claimants have no “investment” under either Article 25 of the ICSID Convention or the BIT. First, the Claimants have failed to demonstrate that they ever had a “right to develop” the Costazul project, on which they base their claim. Furthermore, they have failed to produce any evidence that they have made any monetary contribution and thus have not undertaken any risk in their alleged investment.

86. The Claimants have rebutted the Respondent’s objections with the following arguments:

- *First*, Ms. Levy, a French national, acquired indirect control over Gremcitel in 2005 (when she acquired 33.3% of the shares in Hart Industries, which was the main shareholder of Gremcitel) and direct control over Gremcitel in 2007 (when she acquired 58.82% of the shares in Gremcitel). Therefore, Gremcitel should also be considered a French company as it was under French control before the dispute arose (in accordance with Article 8(3) of the BIT and Article 25(2)(b) of the ICSID Convention).
- *Second*, the Claimants submit that an allegation of abuse of process requires a high standard to be met. The Respondent has not established that the Claimants had foreseen the event which gave rise to the dispute (*i.e.*, the issuance of the 2007 Resolution), and that they accordingly manipulated Gremcitel’s nationality to gain access to ICSID.
- *Third*, the Claimants have made an investment by acquiring the land and the relating right to develop it, by holding rights and interests related to the land, as well as licenses and other types of authorizations. These assets fall within the broad definition of investment contained in Article 1 of the BIT as well as within Article 25 of the ICSID Convention. Furthermore, the Claimants contend that, while the 2005 transfer of shares occurred free of charge, this was due to the intra-family nature of the corporate restructuring. In addition, Ms. Levy’s 2007 acquisition of the Gremcitel shares occurred in exchange of a payment in kind (through the exchange of shares which she held in a company called “Holding XXI”).

87. The Parties’ detailed positions are summarized in the following paragraphs.

C. FIRST OBJECTION: THE CLAIMANTS ARE NOT INVESTORS UNDER THE ICSID CONVENTION AND THE BIT

88. The positions of the Parties with respect to this objection are presented as follows. First, the Claimants' main allegations of fact are set out (1. below). Second, the Respondent's position is presented (2. below). Finally, the Claimants' rebuttal to the Respondent's objections is dealt with (3. below).

1. The Claimants' main allegations

89. The Claimants contend that they fulfill the requirements *ratione personae* and *temporis* pursuant to the BIT and the ICSID Convention. For the Claimants, the dispute arose on 18 October 2007 when the 2007 Resolution, which was issued on 10 October 2007, was published in Peru's Official Journal (*Diario Oficial El Peruano*).⁶⁷ On this date, they contend, the BIT was in force and Ms. Levy was an indirect and direct shareholder in Gremcitel. More specifically, the Claimants allege that Ms. Levy became an indirect shareholder in Gremcitel in 2005 when she acquired shares in Hart Industries, one of Gremcitel's shareholders, and that she became direct shareholder by acquiring an interest in Gremcitel in October 2007.

90. First, the Claimants argue that Ms. Levy acquired indirect ownership of Gremcitel in 2005, when she acquired 33.3% of the capital of Hart Industries, a Grenadian company which owned 57,460 out of 64,000 shares in Gremcitel, *i.e.*, 84.5%, until 9 October 2007. The Claimants have produced the following documents to establish Ms. Levy's ownership of shares in Hart Industries:

(i) *Hart Industries corporate resolution dated 7 February 2005*.⁶⁸ The Claimants submit that through this resolution, Mr. Levy, then sole shareholder and director of Hart Industries, resolved to amend Article 7(2) of the Memorandum and Articles of Association of Hart Industries in order to divide the 1000 shares into three groups, one of which would be a group of 333 "preferred shares" that would exercise exclusive control over the company.

(ii) *Hart Industries corporate resolution dated 9 February 2005*.⁶⁹ It is the Claimants' contention that this corporate resolution approved the transfer of the preferred shares from Mr. Levy to his sister Ms. Levy.

(iii) *Hart Industries corporate resolution dated 7 March 2005*.⁷⁰ According to the Claimants, through this resolution, the 9 February 2005 transfer of the shares was ratified

⁶⁷ C-Reply, ¶ 16.

⁶⁸ Corporate Resolution of Hart Industries Ltd, 7 February 2005 (part of Exh. C-110; Exh. R-293).

⁶⁹ Corporate Resolution of Hart Industries Ltd, 9 February 2005 (part of Exh. C-110; Exh. R-294).

⁷⁰ Corporate Resolution of Hart Industries Ltd, 7 March 2005 (Exh. C-108; Exh. R-292).

and all powers and rights in the company were transferred to Ms. Levy “until all legal proceedings concerning resolutions dated February 7th 2005 and February 9th 2005 are finished”.

91. Second, the Claimants contend that on 9 October 2007 Ms. Levy acquired from Hart Industries 40,000 shares in Gremcitel, *i.e.*, 58.82%. It is the Claimants’ argument that Ms. Levy received the 40,000 Gremcitel shares in exchange for her shareholding in the company Holding XXI (a company registered in Panama).⁷¹ The Claimants refer, amongst other documents, to the registration of the sale of the shares in Gremcitel’s Shareholders’ Registry Book of 9 October 2007,⁷² as well as to the Share Transfer Agreement for Holding XXI, bearing the same date.⁷³

2. The Respondent’s position

92. The Respondent argues that the Tribunal lacks jurisdiction to hear the dispute because the Claimants have not shown that they were protected investors under the France-Peru BIT *at the time of the events allegedly giving rise to the dispute*.⁷⁴ For the Respondent, the Claimants “must show that they owned or controlled a protected investment at the time when the events about which they complain occurred”.⁷⁵ More specifically, “Ms. Levy must prove that any ownership interest she acquired in Gremcitel was acquired before the challenged act occurred”.⁷⁶

a. Ms. Levy has not proven that she owned Gremcitel directly or indirectly at the time of the 2007 Resolution

93. Even if it were correct (which the Respondent disputes) that the 2007 Resolution is the measure which gave rise to the dispute (as the Claimants argue), the Respondent contends that the Claimants have not discharged their burden to prove Ms. Levy’s ownership of Gremcitel, be it direct or indirect, at the time when the 2007 Resolution was

⁷¹ Share Transfer Agreement for Holding XXI, 9 October 2007 (**Exh. C-1-N RFA; Exh. R-070**).

⁷² Registration of Sale of 40,000 Gremcitel Shares Between Renée Rose Levy and Hart Industries, 9 October 2007 (**Exh. C-014; Exh. R-069**).

⁷³ Share Transfer Agreement for Holding XXI, 9 October 2007 (**Exh. C-1-N RFA; Exh. R-070**).

⁷⁴ R-CM, ¶ 163.

⁷⁵ R-PHB 2, ¶ 26 (discussing *Alasdair Ross Anderson et al. v. Republic of Costa Rica; Cementownia “Nowa Huta” S.A. v. Republic of Turkey; Libananco Holdings Co. Ltd. v. Republic of Turkey; Vito G. Gallo v. Government of Canada*). See also R-CM, ¶ 164; R-Rejoinder, ¶ 246.

⁷⁶ R-PHB 2, ¶ 29.

issued. According to the Respondent, the documents allegedly supporting the share acquisitions are “questionable”⁷⁷ or “highly suspicious”.⁷⁸

i. Indirect shareholding in Gremcitel

94. The Respondent takes issue with the documents on which the Claimants rely to show Ms. Levy’s acquisition of an indirect interest in Gremcitel in 2005, specifically with the corporate resolutions of Hart Industries of 7 February 2005,⁷⁹ 9 February 2005,⁸⁰ and 7 March 2005.⁸¹
95. First, the Respondent contends that the *Hart Industries corporate resolution of 7 February 2005*, by which Mr. Levy purportedly resolved to amend the Memorandum and Articles of Association of Hart Industries in order to divide the 1000 shares into three groups, one of which would be a group of 333 “preferred shares” that would exercise exclusive control over the company, is invalid because it has not been registered in the Grenadian public registry.⁸² The Respondent refers to its expert on Grenadian law, Ms. Sheila Harris, who explained in her expert report and at the Hearing that under Grenadian law any amendment to a company’s Memorandum of Association must be registered to come into effect.⁸³ The Respondent underscores that at the Hearing, Ms. Harris testified that the amendment was never registered in Grenada,⁸⁴ and therefore, under Grenadian law, the amendment – and thus also the subsequent share transfer to Ms. Levy made pursuant to that amendment – never came into effect.⁸⁵ According to the Respondent, this means that Ms. Levy never became a shareholder in Hart Industries.⁸⁶ Because the Claimants had no answer to Ms. Harris’ testimony and declined to cross-examine her, the Respondent submits that such testimony remains unrebutted.
96. Second, with regard to the *Hart Industries corporate resolution dated 9 February 2005* approving the transfer of the certificate representing the preferred shares from Mr. Levy to his sister Ms. Levy, the Respondent identifies a discrepancy between the date of the

⁷⁷ R-CM, ¶ 165.

⁷⁸ R-Rejoinder, ¶ 280.

⁷⁹ Corporate Resolution of Hart Industries Ltd, 7 February 2005 (part of Exh. C-110; Exh. R-293).

⁸⁰ Corporate Resolution of Hart Industries Ltd, 9 February 2005 (part of Exh. C-110; Exh. R-294).

⁸¹ Corporate Resolution of Hart Industries Ltd, 7 March 2005 (Exh. C-108; Exh. R-292).

⁸² R-PHB 1, ¶ 30.

⁸³ Expert Opinion of Sheila Harris, 30 June 2013 (Exh. RWS-021), ¶¶ 7-8; Tr. (Harris), at 835:3-20.

⁸⁴ Tr. (Harris), at 839:9-16.

⁸⁵ *Ibid.*

⁸⁶ R-PHB 1, ¶ 30.

notarization of the document, which is 7 February 2005, and the date on the document transferring the shares, which is 9 February 2005. According to the Respondent, a notary public cannot witness signatures two days before the signatures were made.⁸⁷ Further, the Respondent notes that the stamp used by the notary public, Ms. Claudette Joseph, for the notarization of the 9 February 2005 resolution indicated that her commission would expire on 13 October 2011. Because in Grenada the duration of a notary's commission is 5 years, the Respondent submits that the corporate resolution could only have been notarized after 13 October 2006, and not on 9 February 2005.⁸⁸

97. In response to these objections, the Claimants produced an undated "rectification" to the notarization of the corporate resolution of Hart Industries of 9 February 2005.⁸⁹ The rectification reads as follows:

"I Claudette Joseph Notary Public in and for the state of Grenada, West Indie hereby certify that this document was acknowledged [sic] ~~executed~~ before me by Mr. Isy Levy and ~~witnessed before me~~ by Mr. Teddy R. St. Lou on the 9th day of February 2005.

I certify further that the date shown by me being 7th February 2005, was a genuine error on my part."

98. For the Respondent, this rectification does nothing but heighten suspicions about the unreliable nature of the corporate documents invoked by the Claimants. In fact, the Respondent sees a number of issues:

(i) the rectification must have occurred at least seven years after the original notarization. While it is undated, the notary stamp records the expiration date of the notary's commission, which is 4 April 2017. Because of the 5-year duration of a notary's commission already mentioned, the rectification must, in the Respondent's view, have occurred after 2012.⁹⁰

(ii) the unreliability of the rectification is also evidenced by the struck-through words written by the notary, which evidence her confusion as to what she actually acknowledged;⁹¹

⁸⁷ R-CM, ¶ 169.

⁸⁸ R-Rejoinder, ¶ 258.

⁸⁹ Rectification to Corporate Resolution of Hart Industries Ltd of 9 February 2005, undated (part of Exh. **C-110; Exh. R-295**).

⁹⁰ R-Rejoinder, ¶ 255.

⁹¹ R-Rejoinder, ¶ 256.

(iii) it is unclear how the notary public exactly “acknowledged” Mr. Isy Levy’s signature, when, the Respondent argues, Mr. Levy was not in Grenada at that time, as shown by a Report of the Ministry of Interior of Peru;⁹² and

(iv) the very notary public’s reliability is, in the Respondent’s view, questionable as she issued a legal opinion about the Claimants’ compliance with Grenadian corporate law having herself been involved in the transaction.⁹³

99. The Respondent further argues that, at the Hearing, Ms. Joseph was confronted under cross-examination with some of these issues. According to the Respondent, she admitted that she backdated her notarization of the corporate resolution of 9 February 2005. She also conceded that she did not see the document until 2010 (*i.e.*, 5 years after the document was allegedly signed):

“the Resolution was presented to me sometime in 2010. The specific date I can’t remember. And it was presented by Mr. St Louis and Mr. Levy, both appearing in person before me ...”⁹⁴

100. Therefore, the Respondent contends, Ms. Joseph had no way of knowing when the document was created or signed.⁹⁵ Ms. Joseph also added that “[n]ow, a specific request was made for the document to be dated as of the date it was prepared and signed, which is 2005”.⁹⁶ The Respondent underscores that she also stated that she would never have backdated the document had she known that it would be submitted to an international arbitral tribunal.⁹⁷

101. Thus, according to the Respondent, “evidence on the record and testimony from the hearing suggest that the second resolution, while nominally dated 9 February 2005, was likely created in 2010 (well after the dispute arose) and backdated to 2005 for the purposes of this arbitration”.⁹⁸

102. With regard to the rectification, the Respondent notes, Ms. Joseph explained that sometime between April 2012 and March 2013, Mr. Levy came back to Ms. Joseph and requested that she “correct” her initial backdated notarization so that it would be consistent with the date when the document was allegedly executed.⁹⁹

⁹² R-Rejoinder, ¶ 257.

⁹³ R-Rejoinder, ¶ 259.

⁹⁴ Tr. (Joseph), at 749:17-20.

⁹⁵ R-PHB 1, ¶ 32.

⁹⁶ Tr. (Joseph), at 750: 2-4.

⁹⁷ Tr. (Joseph), at 758: 3-11.

⁹⁸ R-PHB 1, ¶ 31.

⁹⁹ Tr. (Joseph), at 754: 17 to 757: 18.

103. Therefore, according to the Respondent, “Ms. Joseph’s testimony made it clear that neither the original February 9, 2005 resolution nor the more recent ‘rectification’ is at all credible, because there is no way to verify when the actual execution of the document occurred”.¹⁰⁰
104. Third, the Respondent submits that it is unclear why the *Hart Industries corporate resolution of 7 March 2005*, which approved the 9 February 2005 transfer of the shares “until all legal proceedings concerning resolutions dated February 7th 2005 and February 9th 2005 are finished”, also transferred to Ms. Levy all the corporate powers and rights, if she already had them as owner of the preferred shares.¹⁰¹ Furthermore, in the Respondent’s submission the reference to “legal proceedings” must be read as a reference to the future BIT proceedings.¹⁰²

ii. Direct shareholding in Gremcitel

105. The Respondent also disputes the accuracy and probative value of the documents allegedly showing Ms. Levy’s acquisition of direct ownership in Gremcitel in 2007.
106. First, the Respondent contends that Gremcitel’s Shareholder Registry is inconsistent with the Minutes of a Gremcitel Shareholders’ Meeting, which fail to record a number of relevant share transfers.¹⁰³ The Respondent further contends that the transfer of the 40,000 Gremcitel shares from Hart Industries to Ms. Levy did not comply with Peruvian law. The Respondent submits that, among other alleged irregularities, Gremcitel’s corporate documents record inconsistent dates of the transfer. The Respondent notes that Hart Industries and Ms. Levy notified Gremcitel of the share transfer by way of a letter dated 10 October 2007,¹⁰⁴ whereas Gremcitel had already registered the transfer the day before, on 9 October 2007.¹⁰⁵ For the Respondent, this is illogical and contrary to Gremcitel’s own bylaws.¹⁰⁶
107. Further, the Respondent submits that Gremcitel did not register in its books, nor report to the tax authorities, the transfer of shares to Ms. Levy when the transfer allegedly

¹⁰⁰ R-PHB 1, ¶ 34.

¹⁰¹ R-Rejoinder, ¶¶ 261-262.

¹⁰² R-Rejoinder, ¶ 263. In addition, the reference to “legal proceedings” is, in the Respondent’s view, evidence of the Claimants’ abuse of process, on which see *infra* paragraph 175.

¹⁰³ R-CM, ¶ 172.

¹⁰⁴ Letter from Hart Industries and Renée Levy to Gremcitel Regarding Transfer of Shares, 10 October 2007 (**Exh. C-116; Exh. R-303**).

¹⁰⁵ Registration of Sale of 40,000 Gremcitel Shares Between Renée Rose Levy and Hart Industries, 9 October 2007 (**Exh. C-014; Exh. R-069**).

¹⁰⁶ R-Rejoinder, ¶ 272.

occurred.¹⁰⁷ The Respondent points in particular to a 2012 BDO report, which found that for approximately two years – between January 2007 and December 2008 – Gremcitel’s tax returns failed to mention that the shares had been transferred from Hart Industries to Ms. Levy.¹⁰⁸ Only in March 2013, so notes the Respondent, did Gremcitel amend its tax returns to reflect the transfer of shares of Gremcitel to Ms. Levy.¹⁰⁹ However, in the correction, the transfer of shares was recorded to have occurred on yet another date, 7 October 2007,¹¹⁰ *i.e.*, two days before the Share Transfer Agreement between Ms. Levy and Hart Industries¹¹¹ and the entry in Gremcitel’s shareholder registry.¹¹²

108. The Respondent further argues that “Claimants failed to address [those alleged inconsistencies and irregularities] at the hearing. Thus, Respondent’s evidence and arguments stand unrebutted, and the Tribunal should not rely on any of the documents put forward by Claimants as evidence of an alleged 2007 investment by Ms. Levy in Gremcitel”.¹¹³

109. In conclusion, the Respondent submits that based on the documents on record and testimony at the Hearing, the Claimants have failed to prove either that Ms. Levy became an indirect investor in Gremcitel in 2005 or a direct investor in Gremcitel in 2007.

110. Finally, the Respondent alleges that Ms. Levy has not proven “foreign control” over Gremcitel for the purposes of Article 25(2)(b) ICSID Convention and Article 8(3) BIT. Citing to ICSID cases *Vacuum Salt v. Ghana*, *LETCO v. Liberia*, and *Caratube v. Kazakhstan*, the Respondent contends that ownership in a company is not *per se* sufficient to meet the foreign control requirement, but that “actual control” is required, something that Ms. Levy is not shown to have ever exerted.¹¹⁴

b. The Claimants were not investors when the alleged breaches occurred

¹⁰⁷ R-Rejoinder, ¶¶ 275-279.

¹⁰⁸ Audit Report by BDO Pazos, Lopez de Romaña, Rodríguez, 5 March 2012 (part of Exh. **C-117; R-307**), at p. 1 (noting that “Durante el periodo comprendido entre el 1 de enero de 2007 y 31 de diciembre de 2008 no fue anotada en los registros contables la transferencia de 40,000 acciones realizadas de Hart Industries a favor de Renee Rose Levi”).

¹⁰⁹ Sworn Statements of Corrections to Gremcitel’s Annual Income Tax Return for 2007 and 2008, 13 March 2013 (part of Exh. **C-117; Exh. R-308**), at pp. 1, 27.

¹¹⁰ Sworn Statements of Corrections to Gremcitel’s Annual Income Tax Return for 2007 and 2008, 13 March 2013 (part of Exh. **C-117; Exh. R-308**), at p. 27.

¹¹¹ See Share Transfer Agreement for Holding XXI, 9 October 2007 (**Exh. C-1-N; Exh. R-070**).

¹¹² See Registration of Sale of 40,000 Gremcitel Shares Between Renée Rose Levy and Hart Industries, 9 October 2007 (**Exh. C-014; Exh. R-069**).

¹¹³ R-PHB 1, ¶ 35.

¹¹⁴ R-CM, ¶¶ 199-203.

111. In the Respondent's submission, the dispute arose much earlier than the 2007 events discussed above. It has proposed several possible dates.
112. The Respondent's general thesis is that the status of the Morro Solar as intangible and historically valuable was established with the 1977 and 1986 Resolutions, the 2007 Resolution being a mere confirmation of the previous ones. For the Respondent, the dispute over the status of the Morro Solar thus crystallized well before the Claimants made their investment. In 1977 and 1986, the Claimants held no interest in the land or the proposed project, Gremcitel having acquired the land from Gremco in 2003-2004 and Ms. Levy's earliest involvement going back to 2005 when she allegedly acquired indirect ownership over Gremcitel.¹¹⁵ At the time of the 1977 and 1986 Resolutions, the Respondent adds, not only were the Claimants not investors, but the France-Peru BIT was not in force yet. The BIT entered into force on 30 May 1996 and thus the Tribunal has no jurisdiction over this case. According to the Respondent, the conclusion that disputes which predate the treaty's entry into force are outside of a treaty's temporal scope of application, should also be confirmed in the absence of an express clause in the BIT to this effect. The Respondent refers to ICSID case law and to the non-retroactivity principle (as expressed in both the VCLT and the ILC Articles on State Responsibility).¹¹⁶
113. Alternatively, the Respondent argues that the dispute arose no later than 2004, but likely as early as 2001, when Gremco started disputing the land's archeological and historical delimitation.¹¹⁷ The Respondent relies on the following events to show that there was a dispute "long before Ms. Levy was allegedly injected into the corporate structure of Gremcitel, either in 2005 or 2007":¹¹⁸
- The 3 July 2001 "Proposal of Historical Delimitation – Morro Solar" submitted by Gremco to the INC,¹¹⁹ which, in the Respondent's view, shows that Gremco was requesting the INC to redefine the Morro Solar more narrowly (that is, as encompassing only the so-called "Chorrillos Peak"), and thus from then on "began disputing the land's historical protection".¹²⁰

¹¹⁵ R-CM, ¶ 184.

¹¹⁶ See R-CM, ¶ 191.

¹¹⁷ R-PHB 1, ¶ 46; R-Rejoinder, ¶¶ 290-315.

¹¹⁸ R-PHB 1, ¶ 47.

¹¹⁹ Proposal to Delimit Historical Morro Solar, 3 July 2001 (**Exh. R-211**).

¹²⁰ See R-Rejoinder, ¶¶ 283, and also 281, 291, 294; R-PHB 1, ¶ 46.

- The May 2002 “Agreement of Cooperation Between INC and Gremco”,¹²¹ which in the Respondent’s submission represents an attempt by the INC and Gremco to amicably resolve the “dispute” between the parties.¹²²
- A number of subsequent exchanges between Gremco and/or Mr. Levy, on the one side, and the INC, on the other,¹²³ in which Gremco contested the INC’s position that the entire promontory should be protected.¹²⁴
- The 2004 creation of the Ad Hoc Commission to obtain an opinion on the Parties’ diverging views on the delimitation. The Respondent contends that, even if the discussions within that framework were harmonious, the parties had opposing views – *i.e.*, they disagreed about the proper delimitation of the historical area of the Morro Solar.¹²⁵
- The creation of the Historical Commission by the end of 2004, entrusted with the task of proposing a delimitation of the historical area, which in the Respondent’s submissions shows that, by late 2004, the Levys knew that the INC still had not adopted Gremco’s position on a narrow delimitation of the historical area of the Morro Solar, and were on notice that the INC may issue a conclusive delimitation of the historical area of the Morro Solar including Gremcitel’s land.¹²⁶

3. The Claimants’ position

a. The Claimants have standing to bring this dispute under the ICSID Convention and the BIT

114. The Claimants contend that they have standing to bring this dispute under the ICSID Convention and the BIT. Ms. Levy is a French national and does not hold a Peruvian nationality. Gremcitel is a Peruvian corporation which at the time when the dispute arose was controlled by Ms. Levy. It thus qualifies as a French entity pursuant to Article 25(2)(b) of the ICSID Convention and Article 8(3) of the BIT.¹²⁷

¹²¹ Agreement of Cooperation Between INC and Gremco, May 2002 (**Exh. R-015**).

¹²² R-PHB 1, ¶ 46.

¹²³ See Letter from Gremco to INC Attaching Legal Report, 23 December 2003 (**Exh. R-250**); Letter from Gremco to INC Regarding the Delimitation of Archeological Sites, 9 March 2004 (**Exh. R-028**); Letter from Gremco to INC Regarding the Delimitation of Historical Sites 15 March 2004 (**Exh. R-263**); Letter from Gremco to INC Regarding the Delimitation of Archeological Sites, 2 April 2004 (**Exh. R-029**).

¹²⁴ R-Rejoinder, ¶¶ 296-301.

¹²⁵ R-PHB 1, ¶ 46.

¹²⁶ R-PHB 2, ¶ 40.

¹²⁷ C-Memorial, ¶¶ 21-22; C-PHB 1, ¶¶ 43-44.

115. On the Tribunal's jurisdiction *ratione temporis*, the Claimants emphasize that the BIT's dispute settlement clause refers to "any dispute relating to an investment". Its text is unambiguous: while it contains limitations *ratione personae* ("between a party and national or company of the other Contracting Party") and *ratione materiae* ("relating to an investment"), it contains no restrictions related to time.¹²⁸ The Claimants argue that, if the Contracting Parties to the BIT had intended to introduce a temporal limitation, they could have said so.¹²⁹

b. The dispute arose on the date of publication of the 2007 Resolution

116. In any event, in the Claimants' submission the dispute arose on 18 October 2007 when the 2007 Resolution was published in Peru's Official Journal (*Diario Oficial El Peruano*).¹³⁰ On this date, the BIT was in force and Gremcitel was directly owned and controlled by a French national (Ms. Levy).¹³¹

117. For the Claimant, the previous resolutions and reports invoked by the Respondent cannot be the true source for the dispute. The 1977 Resolution had an "urbanistic" character ("carácter urbanístico")¹³² and did not purport to have any "historical" value, because the issuing body (the Ministry of Housing and Construction) had no authority in this respect and because it was not based on historical methods. The fact that the 2007 Resolution does not refer to the 1977 Resolution in any way confirms that the latter is not an "antecedent" of the former.¹³³

¹²⁸ C-PHB 1, ¶ 61.

¹²⁹ It is not entirely clear to the Tribunal what time limitations the Claimants had in mind. See C-PHB 1, ¶ 63 ("Si Perú y Francia hubieran querido introducir en el APRRI restricciones temporales tales como la prohibición de que el inversionista plantee controversias que estuvieran apoyadas en hechos o actuaciones sucedidos antes de su ingreso en la inversión protegida, así lo hubieran hecho"); C-PHB 1, ¶ 66 ("la ausencia de una cláusula de exclusión en el Artículo 8(1) del BIT confirma que Perú y Francia no quisieron prohibir expresamente las controversias preexistentes con una cláusula de exclusión simple, ni controversias relacionadas con hechos que datan antes de la entrada del inversionista extranjero en la inversión."). *But see* C-Memorial, ¶¶ 27 ("En el presente caso, se acredita a continuación que nacionales franceses ejercieron control de la inversión en el Perú y que dicho control en Gremcitel fue *antes de los actos estatales denunciados*", emphasis added), 30 ("En ambos casos, ya sea como controlante indirecta, por medio de Hart Industries, ó como controlante directa en Gremcitel; el control francés de la compañía en el Perú ya se ejercía *antes del surgimiento de los actos estatales que afectaron la inversión*", emphasis added), and 46 ("En lo que se refiere al requisito *Ratione Temporis* para acceder a la jurisdicción del CIADI, *específicamente en relación al momento en que surgen los actos denunciados [...]*", emphasis added). In light of the Tribunal's determination of the time when the dispute arose, the limitations addressed in C-PHB 1, ¶¶ 63, 66 do not come into play whatever they may be and, hence, the exact meaning of the Claimants' argument can be left undecided.

¹³⁰ C-Reply, ¶ 16.

¹³¹ C-PHB 1, ¶ 5.

¹³² C-Reply, ¶ 46.

¹³³ C-Reply, ¶ 48.

118. With regard to the 1986 Resolution, the Claimants underscore the “declarative character” of such resolution, which simply purported to include a list of “historical monuments” without carrying out any delimitation of the protected areas. Also, the 1986 Resolution does not make any reference to the 1977 Resolution.¹³⁴ The Claimants also rely on other documents to show that the dispute about the delimitation for *historical* reasons arose only with the 2007 Resolution.¹³⁵
119. For the Claimants, it is clear that the dispute arose only with the 2007 Resolution because only at that moment was there (i) a formal position by the INC signaling that specific geographical coordinates constituted the delimitation of the intangible historic area of the Morro Solar (which included Gremcitel’s land); (ii) a formal position by Gremcitel opposing the INC’s determination; and (iii) the communication between the two parties of their antagonistic positions.¹³⁶
120. All the exchanges between Gremco and the Peruvian authorities up to the 2007 Resolution should be viewed as evidencing normal relations of coordination, without conflicts or differences of positions.¹³⁷ This is also the case of the 2002 Agreement on Cooperation, which was based on the collaboration of both Parties (and can thus not be viewed as an act giving rise to a dispute).¹³⁸ Moreover, the exchanges which occurred thereafter between the parties should be considered as “proposals” within the framework of the Cooperation Agreement with a view to arriving at an agreed delimitation.¹³⁹
121. With regard to the Ad Hoc Commission’s Report of 2004, the Claimants underscore that its nature was that of a recommendation, which is thus unsusceptible of constituting a state’s antagonistic position required for the existence of a dispute.¹⁴⁰ Thus, the fact that Ms. Levy became a shareholder of Hart Industries a few months after the institution of the Historical Commission in 2005 is irrelevant, because the creation of such Commission was part of the execution of the Cooperation Agreement and its Report

¹³⁴ C-Reply, ¶¶ 49-53.

¹³⁵ C-Reply, ¶¶ 54-62.

¹³⁶ C-PHB 2, ¶ 61.

¹³⁷ C-Reply, ¶ 63.

¹³⁸ C-PHB 2, ¶ 18.

¹³⁹ See C-PHB 2, ¶ 62. See also C-PHB 2, ¶¶ 19-28, discussing the Decision by the National Technical Commission of Archeology Evaluating Archeological Sites in the Morro Solar, Decision No. 330, 25 June 2003 (**Exh. R-021**); Decision by the National Technical Commission to Evaluate Architectural Projects, Evaluating the Historical and Archeological Value of the Morro Solar, Decision No. 1, 11 August 2003 (**Exh. R-022**); Joint Decision of National Technical Commission of Archeology and National Technical Commission to Evaluate Architectural Projects Regarding Archeological and Historical Sites in the Morro Solar, 10 December 2003 (**Exh. R-024**).

¹⁴⁰ C-PHB 2, ¶ 33.

could not bind the INC, which was the exclusive authority competent to proceed with the delimitation.¹⁴¹

122. Similarly, the Claimants underscore that also the Historical Commission's findings were issued in the form of a recommendation, and were thus incapable of creating a definitive position on the part of the State.¹⁴² Further, the Historical Commission's Report of 2005 was a purely internal document, which was never communicated to either Gremco or Gremcitel. The Claimants contend that they acquired knowledge of this document only through the 2007 Resolution. Finally, the argument that Mr. Cock, one of the Claimants' consultants and witnesses, had knowledge of the Resolution through its contacts at the INC is, in the Claimants' view, entirely speculative.¹⁴³
123. In conclusion, according to the Claimants, it is only the formal act taken through the 2007 Resolution that gave rise to the dispute between the Parties.¹⁴⁴

c. Ms. Levy has owned Gremcitel indirectly since 2005 and directly since 2007

124. The Claimants contend that Ms. Levy validly acquired indirect shareholding in Gremcitel in 2005 (through ownership of Hart Industries) (i) and direct shareholding in Gremcitel in 2007 (ii).

i. Indirect shareholding in Gremcitel

125. The Claimants accept that the shares in Hart Industries were transferred to Ms. Levy in 2005 without compensation, but emphasize that the transfer was part of an intra-family corporate reorganization in accordance with the decisions of Isy's and Renée's father, David Levy.¹⁴⁵ The Claimants point to the minutes of the Levy Group meeting of 15 July 2005, which record that Ms. Levy would assume the presidency of the Group's meetings from then on.¹⁴⁶ Thereafter, according to the Claimants Ms. Levy was an active participant in the operations of Gremcitel, as can be seen from the minutes of the Levy Group meetings in the years 2005, 2006, 2007.¹⁴⁷

¹⁴¹ C-PHB 2, ¶ 63.

¹⁴² C-PHB 2, ¶ 35.

¹⁴³ C-PHB 2, ¶¶ 36-37.

¹⁴⁴ C-PHB 1, ¶¶ 67-74.

¹⁴⁵ C-PHB 1, ¶ 48.

¹⁴⁶ See Levy Family Meeting Minutes, 15 July 2005 (Exh. C-082; Exh. R-071), pp. 1-2.

¹⁴⁷ See Levy Family Meeting Minutes (several dates) (Exh. C-109).

126. With regard to the three Hart Industries corporate resolutions (of 7 February, 9 February and 7 March 2005 respectively), the Claimants rebut the Respondent's objections as follows:
127. First, with regard to the *Hart Industries corporate resolution dated 7 February 2005*, the Claimants contend that, unlike what the Respondent and its expert, Ms. Harris, argue, this resolution is valid and the validity is not affected by the fact that it was not registered as required under Grenadian law. According to the Claimants, the object of this resolution was not to modify Hart Industries' Memorandum of Association or its Articles of Association, but to divide the existing shares in different classes. For that purpose, it was not necessary to proceed to such amendment, because Article 7(3) of the Memorandum of Association provided that the shares are divided in such number and classes as determined by the Directors.¹⁴⁸ In the Claimants' submission, this is what happened through said resolution, which thus complied with the applicable corporate norms and Grenadian law, and did not constitute an amendment or modification of the corporate norms.¹⁴⁹
128. Second, with regard to the *Hart Industries corporate resolution dated 9 February 2005*, the Claimants contend that the Respondent's position that the transfer of shares occurred (or is likely to have occurred) after the date indicated in the document is entirely speculative.¹⁵⁰ With regard to Ms. Joseph's testimony, the Claimants argue that it was sufficient for her to acknowledge that the person appearing before her would attest that the date appearing on the document was the one in which the person executed the document.¹⁵¹
129. Furthermore, in the Claimants' view, this resolution should not be viewed in isolation, but in conjunction with other documents which attest that the transfer of the shares effectively occurred in 2005.¹⁵²
130. In any event, the Claimants submit that in accordance with Grenadian law, corporate resolutions need not be notarized in order to be valid.¹⁵³

¹⁴⁸ Memorandum and Articles of Association of Hart Industries Ltd., 22 October 1998 (**Exh. R-297** (Full version)).

¹⁴⁹ C-PHB 2, ¶¶ 43-50.

¹⁵⁰ C-PHB 2, ¶ 51.

¹⁵¹ *Ibid.*

¹⁵² See C-Reply, ¶¶ 18, 23 and C-PHB 2, ¶¶ 52-54, discussing Hart Industries Share Register (**Exh. C-107**) and Certificate of Registered Agent Teddy St. Louis, 25 February 2013 (**Exh. C-112**).

¹⁵³ C-PHB 2, ¶¶ 55-56.

131. Third, in connection with the *Hart Industries corporate resolution of 7 March 2005*, the Claimants do not accept that the reference to “legal proceedings” in such resolution is a reference to the future ICSID proceedings. Referring to the testimony of Ms. Joseph, the Claimants submit that the term “legal proceedings” should not be interpreted strictly. Because the resolution was drafted by Mr. Levy, who is not familiar with the laws of Grenada, the reference to “legal proceedings” should be interpreted widely (as meaning proceedings in general, including administrative and notary).¹⁵⁴

ii. Direct shareholding in Gremcitel

132. With regard to the 2007 transfer of Gremcitel shares to Ms. Levy, the Claimants contend that such transfer was carried out following all applicable legal requirements.¹⁵⁵ The Claimants note that Gremcitel’s other shareholders were notified of the intended transfer in September 2007, and asked whether they wished to exercise their right of first refusal.¹⁵⁶ As can be seen from those letters, the transfer was set in motion (through the request to the shareholders to exercise such right) as of 4 September 2007, which renders the Respondent’s argument on the transfer having occurred “the day before the issuance of 2007 Resolution” untenable.¹⁵⁷ Furthermore, as in the case of the 2005 transfer, the Levy Group Meeting Minutes evidence, according to the Claimants, Ms. Levy’s active participation in Gremcitel both before and after the issuance of the 2007 Resolution.¹⁵⁸

133. The Claimants further rely on the 2012 BDO report referred to earlier,¹⁵⁹ which found as follows:

“During the period January 1, 2007-December 31, 2008, the transfer of 40,000 shares from Hart Industries to Renée Rose Levi was not registered in the accounting records. Also, the sworn statement filed with the tax authorities in 2007 does not mention the names or the shareholding of the main shareholders.”¹⁶⁰

¹⁵⁴ C-PHB 2, ¶¶ 58-59.

¹⁵⁵ C-PHB 1, ¶ 58.

¹⁵⁶ See the letters addressed to the shareholders between 4-8 September 2007 (**Exh. C-114; Exh. C-115**).

¹⁵⁷ C-PHB 1, ¶ 58.

¹⁵⁸ C-PHB 1, ¶ 59, referring to Levy Family Meeting Minutes (several dates) (**Exh. C-082; Exh. R-071**) and Levy Family Meeting Minutes (several dates) (**Exh. C-109**).

¹⁵⁹ See C-Reply, ¶¶ 30-34. See *supra* paragraph 107.

¹⁶⁰ Audit Report by BDO Pazos, Lopez de Romaña, Rodríguez, 5 March 2012, “Informe de los auditores independientes” (part of **Exh. C-117; R-307**), p. 1. Tribunal’s translation.

134. The audit report recommended to file a “Sworn Statement of Correction” to rectify the missing transfer of shares and the correct names of the shareholders.¹⁶¹ As a consequence thereof, the Claimants note that on 13 March 2013, Gremcitel filed with the tax authorities “Sworn Statements of Corrections” to rectify the details concerning its shareholding,¹⁶² and on 15 March 2013 Gremcitel’s Shareholders’ Meeting implemented the audit’s recommendations.¹⁶³ As a result of those corrections, the Claimants contend that there is no contradiction in the corporate documents as to the shareholders nor any doubt as to the veracity of the information provided in relation to Ms. Levy’s ownership in Gremcitel.¹⁶⁴

4. Analysis

a. Relevant issues

135. At the outset, the Tribunal notes that Gremcitel is both a claimant in its own name through the mechanism of Article 25(2)(b) of the ICSID Convention and Article 8(3) of the BIT, and part of Ms. Levy’s alleged investment under Article 1(1)(b) (which comprises shares in a company constituted in the territory of one of the Contracting Parties). Although, as will be seen, the resolution of the issues relating to the Tribunal’s jurisdiction *ratione personae* and *ratione temporis* over Ms. Levy and Gremcitel requires addressing facts which are closely intertwined with each other, for the sake of clarity the Tribunal deems it appropriate to first set out the requirements which each of the two Claimants must fulfill under the ICSID Convention and the BIT to have the standing to bring this arbitration.

136. Ms. Levy must fulfill the following jurisdictional requirements:

- a. Under Article 25(2)(a) of the ICSID Convention, Ms. Levy must be a national of one of the ICSID Contracting States on the dates she consented to submit the dispute to arbitration and when the request for arbitration was registered under Article 36(3) of the ICSID Convention. She must not be a Peruvian national on either one of these dates.
- b. Under Article 1(1) of the BIT, Ms. Levy must fulfill the definition of “national”, *i.e.*, she must be a French national.

¹⁶¹ See Audit Report by BDO Pazos, Lopez de Romaña, Rodríguez, 5 March 2012, Anexo IV (part of Exh. **C-117**; **R-307**).

¹⁶² See Sworn Statements of Corrections to Gremcitel’s Annual Income Tax Return for 2007 and 2008, 13 March 2013, at pp. 1, 27 (part of Exh. **C-117**; **Exh. R-308**).

¹⁶³ See Gremcitel’s Shareholders’ Meeting Minutes, 15 March 2013 (part of Exh. **C-117**; **Exh. R-305**).

¹⁶⁴ C-Reply, ¶ 35.

137. While in principle these propositions are uncontroversial, it is a matter of contention whether, in addition, Ms. Levy had to own or control her investment on a critical date.
138. In turn, the following jurisdictional requirements must be met for Grencitel to bring claims in its own name:
- a. Under Article 25(2)(b) of the ICSID Convention:
 - i. Grencitel “had the nationality of the Contracting State party to the dispute” on the date of consent;
 - ii. “the parties have agreed [that it] should be treated as a national of another Contracting State for the purposes of [the ICSID Convention]”;
 - iii. “because of foreign control”.
 - b. Under Article 8(3) of the BIT, Grencitel was controlled by a national of the other Contracting Party (*i.e.*, a French national) on a critical date (“*antes del surgimiento de la controversia*” in the Spanish version of the Treaty; “*avant que le différend ne soit soulevé*” in the French version).

139. With these issues in mind, the Tribunal will now address whether Ms. Levy (b. below) and Grencitel (c. below) fulfill the requirements *ratione personae* and *temporis* under the ICSID Convention and the BIT. By contrast, the Tribunal will not deal in this context with the requirement of the existence of an “investment” under Articles 25 of the ICSID Convention and 1 of the BIT, as this issue is the subject of a separate jurisdictional objection.

b. Whether Ms. Levy fulfills the requirements *ratione personae* and *temporis* under the ICSID Convention and the BIT

140. It is undisputed that Ms. Levy is a French national and that she held French nationality on both dates set forth in Article 25(2)(a) of the ICSID Convention, *i.e.*, the date of consent and the date of registration of the request for arbitration. It is further undisputed that she is not a Peruvian national. It is equally common ground that Ms. Levy fulfills the definition of “national” under Article 1(2) of the BIT.¹⁶⁵

141. The Parties disagree, however, on whether Ms. Levy had to own and control her investment on a certain date under the BIT. The relevant question is on which date a

¹⁶⁵ The Tribunal notes that the BIT does not refer to an “investor”, but rather speaks of a “national” or a “company” (see the BIT provisions quoted *supra* at paragraphs 81-84). Thus, the Tribunal understands the Respondent’s references to the Claimants not being “investors” under the BIT to mean nationals/companies who have made an investment or who own/control an investment, depending on the context.

“national” or “company”, as defined in Article 1 of the BIT, must have acquired its investment in order to be entitled to claim under the BIT. As stated above, while the Respondent contends that Ms. Levy must show that she owned or controlled her investment “when the event about which she complains occurred”, the Claimants argue that the BIT contemplates no such temporal limitation.¹⁶⁶

142. The Tribunal starts by recalling the principles that govern treaty interpretation. According to Article 31 of the VCLT, a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The “ordinary meaning” of the text must be ascertained in the light of the context and the treaty’s object and purpose, any subsequent agreement or practice of the Contracting Parties related to the interpretation of the treaty, and any other relevant rules of international law applicable in the relations between the Contracting Parties.¹⁶⁷

143. The jurisdiction of the Tribunal derives from Article 8 of the BIT, which provides that “[a]ny dispute relating to an investment between of the Contracting Parties and a national or a company of the other Contracting Party” shall be submitted to ICSID arbitration. The dispute settlement clause does not expressly elucidate at what time a national or company must have acquired their investment to have the right to bring an arbitration under the BIT.

144. It is true that Article 8(3) and Article 1(1) of the BIT provide certain temporal indications. They are however unhelpful for the purpose of the present question. Article 8(3), which will be analyzed below when dealing with Grencitel’s standing, is only applicable to locally incorporated companies under foreign control. As concerns Article 1(1), second paragraph, this provision reads as follows:

“Said assets must be or have been invested, in accordance with the legislation of the Contracting Party in the territory or maritime area in which the investment is effected, before or after the entry into force of the present Treaty”.¹⁶⁸

145. This provision clarifies that an investment may have been made either before or after the entry into force of the Treaty. It does not say, however, whether the “national” or

¹⁶⁶ See *supra* paragraphs 92, 114-115.

¹⁶⁷ Article 31 of the VCLT.

¹⁶⁸ Article 1(1), second sentence, of the BIT (Tribunal’s translation).

“company” must have acquired its investment before the treaty breach occurred for the Tribunal to have *ratione temporis* jurisdiction.¹⁶⁹

146. Despite the lack of an explicit answer to this question in the Treaty, it is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty’s substantive standards, a tribunal’s jurisdiction is limited to a dispute between the host state and a national or company which has acquired its protected investment before the alleged breach occurred. In other words, the Treaty must be in force and the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty’s substantive standards affecting that investment.
147. This conclusion follows from the principle of non-retroactivity of treaties,¹⁷⁰ which entails that the substantive protections of the BIT apply to the state conduct that occurred after these protections became applicable to the eligible investment. Because the BIT is at the same time the instrument that creates the substantive obligation forming the basis of the claim before the Tribunal and the instrument that confers jurisdiction upon the Tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.¹⁷¹

¹⁶⁹ See also *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A.v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 82, 104-105 (interpreting a similar clause in the France-Dominican Republic BIT).

¹⁷⁰ See Article 28 of the VCLT. See also Article 13 of the ILC Draft Articles on State Responsibility.

¹⁷¹ See *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 17 September 2009, ¶¶ 112-114 (“It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred”); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶¶ 121-128 (“It is common ground between the Parties that the Tribunal’s jurisdiction over the merits depends on whether Libananco owned ÇEAŞ and Kepez shares at the time of the alleged expropriation ... In order to establish jurisdiction, the Claimant must prove that it owned ÇEAŞ and Kepez shares during the time at which it claims the acts constituting a violation of the ECT were committed by the Respondent”); *Vito G. Gallo v. The Government of Canada*, NAFTA/UNCITRAL, Award, 15 September 2011, ¶ 328 (“Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.”); *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A.v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 106-107 (“...the Treaty was designed to protect only the nationals and companies of the Contracting Parties, in this case France. The investment of AES, a company incorporated in the United States, is not protected by the terms of this Treaty. Thus, the investment could not be protected by this Treaty until both this Treaty entered into force and Claimant, as a French company, acquired the investment and it became a French investment. Accordingly, the Tribunal lacks jurisdiction over acts and events that took place before the Claimant acquired the investment, that is on 12 November 2004, at which time both the Treaty had entered into force and the investor had become a qualifying French national.”); *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, ¶ 170 (“The Tribunal agrees with Ukraine that in order for the Tribunal to hear the Claimant’s claims, the Claimant must have

148. Consequently, the BIT's substantive protection which Ms. Levy invokes started applying to her when she made an investment and not before. She must therefore prove that she had already acquired her investment at the time of the impugned conduct.
149. The determination of the critical date is thus essential for the assessment of the Tribunal's jurisdiction *ratione temporis*.¹⁷² In the Tribunal's view, the critical date is the one on which the State adopts the disputed measure, even when the measure represents the culmination of a process or sequence of events which may have started years earlier. It is not uncommon that divergences or disagreements develop over a period of time before they finally "crystallize" in an actual measure affecting the investor's treaty rights.
150. Here, the disagreements between the Parties find their origin in earlier events, in particular, in the Historical Commission's creation and its 2005 Report, which formed the basis for the subsequent 2007 Resolution. However, it was only when the 2007 Resolution was adopted and published that the rights of the Claimants were allegedly affected. Only at this moment were the precise boundaries of the Morro Solar's intangible area determined through a binding administrative act. Furthermore, prior to the enactment of the 2007 Resolution, there was still a possibility that the INC would decide not to adopt the Resolution. The Claimants would then have had no act to complain about. Thus, the Tribunal concludes that Ms. Levy was to have acquired her investment by the date of the 2007 Resolution, more precisely by the date of the latter's publication in the Official Journal, *i.e.*, 18 October 2007.

held an interest in the alleged investment before the alleged treaty violations were committed."). See *also recently*, confirming the same approach, *ST-AD GmbH v. Bulgaria*, Award on Jurisdiction, 18 July 2013, ¶ 300 ("It is an uncontested principle that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country. [...] According to the well-known principle of non-retroactivity of treaties in international law, a BIT cannot apply to the protection of an investor before the latter indeed became an investor under said BIT"). See *also* Zachary Douglas, *The International Law of Investment Claims* (Cambridge, 2009), ¶ 330 ("The act of making a qualified investment is also controlling for the scope of the arbitral tribunal's adjudicative power in several respects. [...] the timing of the investor's acquisition of its investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope for the tribunal's adjudicative power over claims based upon an investment treaty obligation.").

¹⁷² The Parties have discussed the issue of the critical date by sometimes referring interchangeably to "the moment where the challenged acts occur" and the moment "when the dispute arises", possibly because the latter is the moment expressly contemplated by Article 8(3) of the BIT with respect to the time at which a locally incorporated company must be under foreign control, an issue to which the Tribunal will revert later. As noted *infra* at paragraphs 167-168, the moment when an alleged breach of the treaty occurs is not necessarily the same as the moment in which the dispute arises.

151. Having determined the critical date, the Tribunal will next address whether Ms. Levy owned or controlled her investment in Gremcitel before 18 October 2007, be it directly or indirectly.
152. The Claimants argue that Ms. Levy acquired an indirect interest in Gremcitel in 2005 through the acquisition of shares in Hart Industries. Upon review of the documentary evidence and testimony at the Hearing, the Tribunal cannot agree with this proposition. The documents proffered by the Claimants to prove this acquisition are so full of inconsistencies that they cannot be relied upon to establish that a transfer actually took place on the alleged date.
153. The Tribunal starts by noting that the amendment of the Articles of Association of Hart Industries was not registered in Grenada, which affects the effectiveness under Grenadian law of the subsequent transfer of shares to Ms. Levy made pursuant to such amendment. The Respondent's expert on Grenadian law, Ms. Sheila Harris, testified that without such registration the resolution would be ineffective according to Grenadian law.¹⁷³ The Claimants decided not to cross-examine Ms. Harris (despite having called her).¹⁷⁴ The Tribunal has no reason to doubt the expertise of Ms. Harris and the veracity of her testimony.
154. More importantly (and even if, contrary to what the Tribunal believes, the amendment of the Articles of Association were effective), the evidence addressed at the Hearing established that the dates shown on the relevant corporate resolutions cannot be relied upon. The Claimants' expert, Ms. Joseph, who is also the notary public who certified ("acknowledged") the signatures appearing on the resolution, admitted that she did not see the 9 February 2005 resolution on 7 February 2005 as she had initially stated in the resolution. She also conceded not having been presented with the resolution on 9 February 2005, as she had certified in her undated, hand written "rectification" made on the resolution. In fact, Ms. Joseph admitted that *in 2010, i.e.*, five years after the alleged transfer of the shares and three years after the enactment of the 2007 Resolution, she backdated the notarization of the 9 February 2005 resolution upon request of Mr. Isy Levy.¹⁷⁵ She also admitted that "sometime after April 2012", *i.e.*, when the ICSID proceedings had already started, she acceded to a further request by Mr. Levy that she

¹⁷³ See Expert Opinion of Sheila Harris, 30 June 2013 (**Exh. RWS-021**), ¶¶ 6-10; Tr. (Harris), at 839: 6-20.

¹⁷⁴ Tr. (Claimants' counsel), at 842: 14-16.

¹⁷⁵ See Tr. (Joseph), at 749: 17-20 ("the Resolution was presented to me sometime in 2010. The specific date I can't remember. And it was presented by Mr. St Louis and Mr. Levy, both appearing in person before me [...]"), at 750: 2-4 ("Now, a specific request was made for the document to be dated as of the date it was prepared and signed, which is 2005").

- “correct” her initial backdated notarization to make it consistent with the date when the document was allegedly executed.¹⁷⁶ Thus, Ms. Joseph backdated the document a second time, this time however to a different date (9 February instead of 7 February 2005).
155. It is clear that the Tribunal cannot attach any probative value to documents of this kind. In light of Ms. Joseph’s own admissions, it is thus impossible to ascertain when the resolutions documenting the alleged 2005 transfer were created. Pondering all the circumstances, it seems likely to the Tribunal that they were created well after 2005. Under these circumstances, the Tribunal has no hesitation in concluding that the Claimants have not discharged their burden to prove their assertion that Ms. Levy acquired indirect control over Gremcitel in 2005.¹⁷⁷
156. It is the Claimants’ further submission that Ms. Levy became a direct shareholder in Gremcitel in 2007. For the following reasons, the Tribunal is satisfied that this second transfer effectively occurred before the critical date, *i.e.*, before 18 October 2007.
157. First, the Tribunal notes that the transfer process of the Gremcitel shares from Hart Industries to Ms. Levy was set in motion through a number of letters sent by Gremcitel to its shareholders between 4 September to 8 September 2007, following a letter from Hart Industries to Gremcitel notifying Gremcitel of its intention to sell its shares to Ms. Levy.¹⁷⁸ In subsequent letters, Gremcitel asked its shareholders whether they wished to exercise their right of first refusal over the shares. These letters are notarized and the Respondent has not questioned their authenticity or reliability. The Tribunal thus accepts the probative value of these letters.
158. Second, the share transfer agreement for the 40,000 Gremcitel shares was concluded between Ms. Levy and Hart Industries on 9 October 2007.¹⁷⁹ There are no facts on record casting doubts on the validity of this agreement.
159. Third, the sale of the shares was registered on Gremcitel’s shareholder’s registry on 9 October 2007.¹⁸⁰ For the exclusive purpose of its inquiry on its jurisdiction *ratione*

¹⁷⁶ See Tr. (Joseph), at 754: 17 to 757: 18.

¹⁷⁷ Furthermore, the Tribunal does not deem the so-called “Levy Group” minutes to be reliable evidence to prove the Claimants’ standing. Because this entity is a private organization, its book does not require, by the Claimants’ own admission, to be notarized. See Claimants’ Letter to Respondent Regarding Document Production, 19 March 2013 (**Exh. R-252**), Request No. 4, p. 4.

¹⁷⁸ See the letters addressed to the shareholders between 4-8 September 2007 (**Exh. C-114; Exh-C-115**).

¹⁷⁹ See Share Transfer Agreement for Holding XXI, 9 October 2007 (**Exh. C-1-N; Exh. R-070**).

¹⁸⁰ See Registration of Sale of 40,000 Gremcitel Shares Between Renée Rose Levy and Hart Industries, 9 October 2007 (**Exh. C-014; Exh. R-069**).

temporis, the Tribunal does not attach weight to the fact that the registration occurred one day before Gremcitel was formally notified of the transfer.¹⁸¹ Because of the intra-family nature of the transaction, it is reasonable to assume that Gremcitel learned of the transfer on 9 October 2007 and immediately proceeded with the registration in the shareholder's registry, whereas the formal notification occurred one day later. While this circumstance has no impact on the Tribunal's jurisdiction *ratione temporis*, it evinces that the Claimants acted as if they were pressed by time, a matter to which the Tribunal will revert in its assessment of the abuse of process.

160. Finally, the Tribunal does not consider that the allegations of fiscal irregularities connected with the 2007 transfer and the related evidence are such that they change its conclusion about the validity of the transfer. In particular, the Respondent's reliance on the report dated 5 March 2012¹⁸² and on the Sworn Statements of Corrections to Gremcitel's Annual Income Tax Return for 2007 and 2008, dated 13 March 2013,¹⁸³ are, in the Tribunal's view, inconclusive, as they could be explained in various ways not calling into question the fact that Ms. Levy became a majority shareholder of Gremcitel on 9 October 2007.

161. The Tribunal thus concludes that, based on the evidence in the record, Ms. Levy has not established that she acquired her indirect shareholding in Gremcitel in 2005. By contrast, she has discharged her burden to prove that she acquired her direct shareholding in Gremcitel on 9 October 2007, *i.e.*, shortly before the challenged act occurred on 18 October 2007. For these reasons, and without prejudice to the Tribunal's later findings on abuse of process, the Tribunal concludes that Ms. Levy has satisfied the requirements *ratione personae* and *ratione temporis* under the ICSID Convention and the BIT.

c. Whether Gremcitel fulfills the requirements *ratione personae* and *temporis* under the ICSID Convention and the BIT

162. Under the ICSID Convention, a locally incorporated company is considered a "national of another Contracting State" if it is a juridical person which had the nationality of the Contracting State party to the dispute on the date on which the parties consented to submit such dispute to arbitration and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of

¹⁸¹ Compare Letter from Hart Industries and Renée Levy to Gremcitel Regarding Transfer of Shares, 10 October 2007 (**Exh. C-116; Exh. R-303**) with Registration of Sale of 40,000 Gremcitel Shares Between Renée Rose Levy and Hart Industries, 9 October 2007 (**Exh. C-014; Exh. R-069**).

¹⁸² Audit Report by BDO Pazos, Lopez de Romaña, Rodríguez, 5 March 2012, (part of **Exh. C-117; R-307**), at p. 1.

¹⁸³ Sworn Statements of Corrections to Gremcitel's Annual Income Tax Return for 2007 and 2008, 13 March 2013, at p. 27 (part of **Exh. C-117; Exh. R-308**).

this Convention.¹⁸⁴ Under Article 8(3) of the BIT, a juridical person constituted in the territory of one of the two Contracting Parties and which – in the original treaty languages – “*antes del surgimiento de la controversia*” or “*avant que le différend ne soit soulevé*” is controlled by nationals or companies of the other Contracting Party, shall be considered, for the purposes of Article 25(2)(b) of the ICSID Convention, as a company of the other Contracting Party. Accordingly, for the Tribunal to have jurisdiction *ratione personae* and *temporis* over Gremcitel, the latter must establish (i) that it is a Peruvian company, (ii) which on the critical date (iii) was under foreign control, and that (iv) there is an agreement to treat it as foreign. The Tribunal will review these four elements in turn.

163. In respect of the first requirement, the Tribunal notes that Gremcitel is a company incorporated in the Contracting State party to the dispute, *i.e.*, Peru. In this respect, the Tribunal also notes that it held such nationality on the date of consent, *i.e.*, when the request for arbitration was filed, as the ICSID Convention requires.¹⁸⁵
164. Second, the Tribunal must ascertain the critical date as set forth in the BIT. Article 8(3) of the BIT mentions “*antes surgimiento de la controversia*” and “*avant que le différend ne soit soulevé*”. At the Hearing, the Tribunal inquired about potential differences in the Spanish and French versions of Article 8(3) of the BIT and invited the Parties to present their views in their post-hearing briefs.¹⁸⁶ Only the Respondent addressed this issue in its post-hearing submissions.
165. Both versions of the BIT are authentic.¹⁸⁷ In accordance with Article 33 of the VCLT on the interpretation of multilingual treaties, the terms of the treaty are presumed to have the same meaning in each authentic text.¹⁸⁸ Furthermore, when a comparison of the authentic texts discloses a difference of meaning which the application of Article 31 and 32 of the VCLT does not remove, the meaning which best reconciles the texts must be adopted, having regard to the object and purpose of the treaty.¹⁸⁹
166. The Spanish version of the BIT (“*antes del surgimiento de la controversia*”) has only one possible meaning, which is “before the emergence of the dispute”. By contrast, the French version of the Treaty (“*avant que le différend ne soit soulevé*”) could have two

¹⁸⁴ Article 25(2)(b) of the ICSID Convention.

¹⁸⁵ The Tribunal notes that the critical date specified in Article 25(2)(b), 2nd sentence, of the ICSID Convention (“on that date”) relates to “the nationality of the Contracting State party to the dispute”. The question as to whether this is also the critical date with respect to “foreign control” can be left open, as the answer is not outcome-determinative and the Parties have not specifically dealt with this question.

¹⁸⁶ See Tr. (Pres. Kaufmann-Kohler), at 1742: 10 - 1743: 13.

¹⁸⁷ See France-Peru BIT, Article 12 *in fine*.

¹⁸⁸ Article 33(3) of the VCLT.

¹⁸⁹ Article 33(4) of the VCLT.

meanings, that is, either “before the dispute is brought before an international arbitral tribunal” or “before the dispute is raised with the other side”. The Tribunal agrees with the Respondent that the only harmonious interpretation of the two authentic texts is to say that the locally incorporated company must be under foreign control “before the dispute is raised with the other side”. Indeed, this understanding coincides with the Spanish wording and with one of the two meanings of the French formula.

167. Third, it must be asked whether Grencitel was under French control before the dispute emerged, or, differently put, whether Ms. Levy acquired control over Grencitel before that date. The issue has largely been dealt with above when addressing the issue of Ms. Levy’s own standing as claimant, when it was inquired whether she acquired her investment at the time the challenged acts occurred. For the sake of clarity, the Tribunal wishes to note that, in theory, the moment when the challenged acts occurred is not necessarily the same as the one when the dispute arose - the latter being the moment which Article 8(3) of the BIT expressly contemplates. It has rightly been noted that “[t]he time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminated acts must have occurred some time before the dispute”.¹⁹⁰ In the Tribunal’s view, a breach or violation does not become a “dispute” until the injured party identifies the breach or violation and objects to it.¹⁹¹
168. In this case, the Claimants have accepted 18 October 2007 as the date on which the dispute arose, which shows that they themselves considered that they were in dispute with the Respondent from that time on. Starting then there was “a disagreement on a point of law or fact, a conflict of legal views or interests between parties”,¹⁹² and the Claimants considered their claim to be “positively opposed”¹⁹³ by Peru. The Tribunal will therefore regard 18 October 2007 as the date when the dispute arose for the purposes of Article 8(3) of the BIT.
169. The facts surrounding Ms. Levy’s control over Grencitel on the relevant date have already been discussed in the context of Ms. Levy’s standing and need not be repeated

¹⁹⁰ Christoph H. Schreuer with Loretta Malintoppi, August Reinisch, and Anthony Sinclair, *The ICSID Convention: A Commentary* (2d ed., 2009), p. 96.

¹⁹¹ The Tribunal finds confirmation in *Teinver SA and Others v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, ¶ 110. See also *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 203 (“the dispute over such nationalisation measures can only be deemed to have arisen after the measures were taken”).

¹⁹² See *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

¹⁹³ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russia), I.C.J., Judgment on Preliminary Objections, 1 April 2011, ¶ 30 (citing to other ICJ cases).

here.¹⁹⁴ The Tribunal has concluded that, while the Claimants did not prove that Gremcitel was under Ms. Levy's control in 2005, they have established that the company was under her control in 2007.

170. The Tribunal thus finds that the requirement of "foreign control" under both Article 25(2)(b) of the ICSID and Article 8(3) of the BIT is satisfied in this case.
171. The Respondent raised the additional issue whether "foreign control" under Article 25(2)(b) and Article 8(3) of the BIT requires actual control. The Tribunal notes that neither Article 25(2)(b), 2nd sentence, nor Article 8(3) of the BIT specify that actual or effective control is required. The Tribunal considers that Ms. Levy acquired the majority of the shares in Gremcitel on 9 October 2007. In the present circumstances, and without excluding whether in other instances an inquiry as to the "effectiveness" of the control may be warranted, the Tribunal considers Ms. Levy's ownership of the shares sufficient to establish "foreign control" under Article 25(2)(b) of the ICSID Convention and Article 8(3) of the BIT.¹⁹⁵
172. Fourth and last, Article 25(2)(b) of the ICSID Convention requires an agreement to "treat[] [the locally incorporated company] as a national of another Contracting State for the purposes of this Convention". It is undisputed that such agreement is found in Article 8(3) of the BIT.
173. In conclusion, Gremcitel fulfills the requirements *ratione personae* and *temporis* pursuant to Article 25(2)(b) of the ICSID Convention and Article 8(3) of the BIT.

D. SECOND OBJECTION: THE INVESTMENT IS AN ABUSE OF PROCESS

1. The Respondent's position

174. As a second jurisdictional objection, Peru invokes an abuse of process. Even if the Claimants' documents concerning Ms. Levy's investment were reliable, it submits that Ms. Levy was inserted into Gremcitel's ownership structure for no purpose other than to obtain BIT protection due to her French nationality, at a time when the dispute had already arisen or was at least foreseeable. Because Ms. Levy acquired her alleged interest in Gremcitel for the sole purpose of internationalizing an otherwise purely domestic dispute, her investment is abusive. Citing ICSID cases *Phoenix v. Czech*

¹⁹⁴ See *supra* paragraphs 151-160.

¹⁹⁵ See also *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, ¶ 264 (interpreting a provision on "control" in the Netherlands-Bolivia BIT); *Autopista Concesionada de Venezuela, CA. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, ¶ 110 ("Article 25(2)(b) [of the ICSID Convention] does not specify the nature, direct, indirect, ultimate or effective, of the foreign control.").

Republic, Pac Rim v. El Salvador, and *Tidewater v. Venezuela*, the Respondent posits that an abuse of process occurs where a domestic company restructures its ownership to internationalize an existing or *foreseeable* dispute.¹⁹⁶

175. As already explained, the Respondent's position is that the dispute arose no later than 2004 and likely before.¹⁹⁷ However, it agrees that even if the dispute arose later, the Claimants restructured the corporate ownership at a time - from 2005 onwards - when the dispute was "within the[ir] reasonable contemplation".¹⁹⁸ Indeed, the INC had set up the Historical Commission a few months before and the outcome of the process was expected. The Respondent finds further evidence of an abuse of process in Hart Industries' corporate resolution of 7 March 2005, which states that Isy Levy Calvo and Jacques Levy Calvo decide to transfer all political powers and rights to direct the Company to Renée Rose Levy de Levi "until all legal proceedings concerning resolutions dated February 7th 2005 and February 9th 2005 are finished".¹⁹⁹ The Respondent takes the reference to "legal proceedings" to mean the future BIT proceedings.
176. Hence, according to the Respondent, the only reason why the Claimants injected Ms. Levy into the ownership structure of Gremcitel was her French nationality. The Respondent insists that Mr. Levy was unable to provide any business rationale for the alleged 2005 transfer of Hart Industries shares to his sister. Mr. Levy's only explanation for the transfer was that it was his father's decision.²⁰⁰ There was no business rationale either, so says the Respondent, behind the 2007 transfer of Gremcitel shares to Ms. Levy.²⁰¹ Finally, the Respondent argues that it is more than likely that Mr. Cock, one of the Claimants' consultants and witnesses, learned of the INC's impending resolution through his "connections at the INC" and that Gremcitel responded by introducing Ms. Levy directly into the ownership structure to benefit from the BIT protection.²⁰²

2. The Claimants' position

177. The Claimants deny any allegations of abuse of process. They submit that an allegation of abuse of process must meet a high standard involving proof of bad faith,²⁰³ which the

¹⁹⁶ R-Rejoinder, ¶¶ 285-289.

¹⁹⁷ See *supra* paragraphs 111-113.

¹⁹⁸ R-Rejoinder, ¶¶ 312, 314, quoting *Tidewater et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, ¶ 148.

¹⁹⁹ R-Rejoinder, ¶ 263; R-PHB 1, ¶ 50.

²⁰⁰ R-PHB 1, ¶ 49.

²⁰¹ R-PHB 1, ¶ 51.

²⁰² *Ibid.*

²⁰³ C-PHB 1, ¶ 77.

Respondent does not meet. Furthermore, before the 2007 Resolution was issued, it could not be foreseen that a delimitation of the protected area of the Morro Solar would be ordered that would include Gremcitel's land.²⁰⁴ The Claimants point to an internal INC document dated 10 October 2007,²⁰⁵ which mentions that the boundaries proposed by the Historical Commission had not been adopted. They note that this internal document was issued on 10 October 2007, but was "presented/submitted only on 15 October 2007" ("*fue emitido el 10 de Octubre de 2007, pero presentado recién el 15 de Octubre*"). Thus, they note that "only the civil servant who drafted this memo could foresee the promulgation of RD 1342".²⁰⁶

178. For the Claimants, the Respondent has not established that the Claimants had foreseen the event which gave rise to the dispute, *i.e.*, the issuance of the 2007 Resolution. Hence, it has not shown that the Claimants manipulated Gremcitel's nationality to gain access to ICSID.²⁰⁷ In this respect, the Claimants point to the tribunal's statement in *Pac Rim* that "the dividing line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy", which in their view is not the case here.²⁰⁸

179. Rather, the 2007 transfer of the shares was set in motion already on 4 September 2007 with the notification of the intended transfer to the other shareholders.²⁰⁹ It was due to good faith family reasons at a time where the occurrence of the critical fact negatively affecting the investment was unforeseeable.²¹⁰ Therefore, in the Claimants' submission, the Respondent has failed to establish that an abuse of process has occurred.

3. Analysis

180. At the outset, the Tribunal notes that the Parties have not expressly discussed the characterization of this objection. Is it a matter of jurisdiction, admissibility, or something else? The Respondent has grouped all of its objections, including this one, under one single heading being either "Jurisdictional Objections"²¹¹ or "Jurisdiction/Abuse of Process"²¹². The Claimants, in turn, have discussed abuse of process, in at least one of

²⁰⁴ C-PHB 1, ¶¶ 5, 78.

²⁰⁵ Informe No. 249-2007-DPHCR-DREPH/INC, 10 October 2007 (**Exh. C-142**).

²⁰⁶ C-PHB 1, ¶ 80 (Tribunal's translation).

²⁰⁷ C-PHB 1, ¶ 82.

²⁰⁸ *Ibid.* (citing to *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.99).

²⁰⁹ C-PHB 1, ¶ 80.

²¹⁰ C-PHB 1, ¶ 83.

²¹¹ R-Rejoinder, Section III.

²¹² R-PHB 1, Section IV; R-PHB 2, Section III.

their memorials, under a heading entitled “Admissibility”.²¹³ As noted, neither Party has engaged in a detailed discussion of the nature of the abuse of process objection. Both have rather focused on the legal test required to find an abuse, and above all, on the facts of the dispute.

181. The Tribunal considers that the characterization of the abuse of process objection as a jurisdictional or as an admissibility issue can be left open in the present case. Under the circumstances of this dispute, such differentiation is, to use the words of the *Pac Rim* tribunal, “a distinction without a difference”,²¹⁴ in the sense that it would have no impact on the outcome of the case.
182. As a further threshold matter, the Tribunal considers that an abuse of process objection must be distinguished from a *ratione temporis* objection.²¹⁵ If a claimant acquires an investment after the date on which the challenged act occurred, the tribunal will normally lack jurisdiction *ratione temporis* and there will be no room for an abuse of process. Here, the Tribunal has established that Ms. Levy acquired her investment prior to the challenged measure, even if it was just slightly before. In such a situation, a tribunal has jurisdiction *ratione temporis* but may be precluded from exercising its jurisdiction if the acquisition is abusive.
183. In the context of investor-state arbitration, arbitral tribunals have indeed applied the doctrine of abuse of process (or abuse of rights) in cases involving disputed corporate restructurings. In particular, in *Phoenix Action v. The Czech Republic*, the ICSID tribunal put emphasis on the objectives of investment protection:

“[...] the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration. If it were accepted that the Tribunal has jurisdiction to decide Phoenix's claim, then any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek

²¹³ C-PHB 1, Section IV (“Sobre la admisibilidad”).

²¹⁴ See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶¶ 2.10. (“the Tribunal has noted that the Respondent's jurisdictional objection based on Abuse of Process by the Claimant does not, in legal theory, operate as a bar to the existence of the Tribunal's jurisdiction; but, rather, as a bar to the exercise of that jurisdiction, necessarily assuming jurisdiction to exist. For present purposes, the Tribunal considers this to be a distinction without a difference”).

²¹⁵ See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶¶ 2.101, 2.107 (distinguishing between a *ratione temporis* objection and an abuse of process objection). See also *recently*, confirming this approach, *Lao Holdings NV. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, ¶ 76 (“if a company changes its nationality in order to gain ICSID jurisdiction at a moment when things have started to deteriorate so that a dispute is highly probable, it can be considered an abuse of process, but for an objection based on *ratione temporis* to be upheld, the dispute has to have actually arisen before the critical date to conform to the general principle of non-retroactivity in the interpretation and application of international treaties”, bold omitted).

protections under a BIT. Such transfer from the domestic arena to the international scene would *ipso facto* constitute a “protected investment” – and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. It is indeed the Tribunal’s view that to accept jurisdiction in this case would go against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties. The Tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed for to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism.”²¹⁶

184. In the Tribunal’s view, it is now well-established, and rightly so, that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate *per se*, including where this is done with a view to shielding the investment from possible future disputes with the host state. Or, in the words of the *Tidewater* tribunal,

“it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host state in this way”.²¹⁷

185. However, a restructuring carried out with the intention to invoke the treaty’s protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.²¹⁸ In this respect, the Tribunal agrees with the test suggested in *Pac Rim* whereby “a specific future dispute” must be “foresee[able] [...] as a very high probability and not merely as a possible controversy”.²¹⁹ In the Tribunal’s view, this test

²¹⁶ *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 144.

²¹⁷ *Tidewater et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, ¶ 184. See also *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, ¶ 330 (“[...] it is not uncommon in practice and – absent a particular limitation – not illegal to locate one’s operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.”); *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 204 (“As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes”); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, ¶ 2.47 (“The Tribunal does not dispute [...] that if a corporate restructuring affecting a claimant’s nationality was made in good faith before the occurrence of any event or measure giving rise to a later dispute, that restructuring should not be considered as an abuse of process.”).

²¹⁸ As clarified *supra* at paragraph 182, if a claimant acquires an investment after the date on which the challenged act occurred (or, *a fortiori*, when the dispute arose, see *supra* paragraph 167), the tribunal will normally lack jurisdiction *ratione temporis* and there will be no room for an abuse of process.

²¹⁹ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, ¶ 2.99. The Tribunal notes that the tribunals in *Tidewater* and *Lao Holdings* have articulated analogous tests. See *Tidewater et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, ¶ 194, 197 (where the tribunal asked whether there was “a reasonable prospect, either [in December 2008,

strikes a fair balance between the need to safeguard an investor's right to invoke a BIT's protection in the context of a legitimate corporate restructuring and the need to deny protection to abusive conduct.

186. As for any abuse of right, the threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume an abuse,²²⁰ and will affirm the evidence of an abuse only "in very exceptional circumstances".²²¹ Furthermore, as the Tribunal in *Mobil v. Venezuela* stated, "[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, *taking into account all the circumstances of the case*".²²²
187. Having thus set out the principles which will guide its decision, the Tribunal starts by assessing whether the present dispute was foreseeable as a very high probability, and not as a mere possibility, at the time when Ms. Levy acquired Gremcitel. It is clear that the closer the acquisition of the investment is to the act giving rise to the dispute, the higher the degree of foreseeability will normally be.
188. In this case, the Tribunal has found that the events giving rise to the dispute occurred on 18 October 2007.²²³ The acts that set in motion Ms. Levy's investment in Gremcitel occurred just about over a month before, when the letters notifying the other shareholders of their right of first refusal were sent. The actual transfer of the shares occurred on 9 October 2007, only one day before the 2007 Resolution was issued and 9 days before it was published. A review of the record shows that such striking proximity of events is not a coincidence.
189. To the contrary, if one reviews the unfolding of events which led to the 2007 Resolution, it is clear that the Claimants could foresee that the 2007 Resolution was forthcoming. In

when the claimants commenced their restructuring] or in March 2008 when the restructuring was consummated, that such a nationalization *was imminent*, and found that "the acts of expropriation that give rise to the present dispute were not *reasonably foreseeable* by the Claimants either in December 2008 when they began restructuring, or in March 2009 when the restructuring took effect", emphasis added); *Lao Holdings NV. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, ¶ 76 (where the tribunal articulated the standard for abuse of process by referring to "a moment when things have started to deteriorate so that a *dispute is highly probable*", bold omitted, emphasis added).

²²⁰ See *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v. Poland), 1926 P.C.I.J. (Ser. A) No. 7 (25 May), at 30 (noting that "misuse [of right] cannot be presumed"); *Case of the Free Zones of Upper Savoy and the District of Gex*, 1932 P.C.I.J. (Ser. A/B) No. 46 (7 June), at 167 (noting that "an abuse cannot be presumed by the Court").

²²¹ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, ¶ 143.

²²² *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 177 (emphasis added).

²²³ See *supra* paragraph 150.

2005, the Historical Commission issued the report, on which the delimitation implemented through the 2007 Resolution was largely based. Although the 2005 Report was never officially communicated to the Claimants, and the Claimants assert that they only became aware of it when the 2007 Resolution was issued, *i.e.*, two and a half years later,²²⁴ Mr. Isy Levy admitted at the Hearing that he knew that the Historical Commission had been created “at the end of 2004”.²²⁵ More importantly, Mr. Guillermo Cock, one of the Claimants’ witnesses, confirmed at the Hearing that he had seen the Historical Commission’s Report shortly after it was issued.²²⁶ It should be recalled here that Mr. Cock had been managing the administrative procedures with the INC on behalf of Gremco and Gremcitel throughout the years. He had, for example, appeared before the Ad Hoc Commission in 2004 to present arguments on behalf of Gremco and before the Peruvian Congress in 2008 on behalf of Gremcitel.²²⁷ Although Mr. Cock testified that he did not recall discussing the document with Mr. Levy himself,²²⁸ in response to the Tribunal’s question of whether he had discussed the Report “with someone else within Gremcitel in 2005”, he answered: “I don’t recall. *It is likely, it is probable*, but I don’t recall”.²²⁹ To the Tribunal, it is clear that Gremcitel and Mr. Levy learned about the 2005 Report and its content around the time of its issuance in 2005.

190. It is equally clear that foreseeability increased as time passed. The Tribunal is satisfied that, due to his connections at the INC,²³⁰ sometime in 2007 Mr. Cock learned that the INC was about to formalize the land delimitation and, in the ordinary course of events, must have informed the Levys accordingly. The transfer of the shares was then set in motion in a great hurry, as is evidenced by the fact that Gremcitel registered the transfer before it had been formally notified of it.²³¹ The fact that the transfer was perfected only one day before the INC enacted the decision leaves no doubt about the correlation between the change in Gremcitel’s ownership and the 2007 Resolution of which the Claimants would then complain.

191. In the Tribunal’s view, the only reason for the sudden transfer of the majority of the shares in Gremcitel to Ms. Levy was her nationality. The Claimants were unable to furnish any

²²⁴ C-PHB 2, ¶ 36. See also Tr. (Mr. Levy), at 274:15 to 278:12.

²²⁵ Tr. (Mr. Levy), at 273:16-21.

²²⁶ Tr. (Cock), at 419:6-19.

²²⁷ Tr. (Cock), at 358:11-19

²²⁸ Tr. (Cock), at 419:20 - 421:6.

²²⁹ Tr. (Cock), at 430:11-15 (emphasis added).

²³⁰ See, *e.g.*, Tr. (Cock), at 418:10-14;430:16-19.

²³¹ Compare Letter from Hart Industries and Renée Levy to Gremcitel Regarding Transfer of Shares, 10 October 2007 (**Exh. C-116; Exh. R-303**) with Registration of Sale of 40,000 Gremcitel Shares Between Renée Rose Levy and Hart Industries, 9 October 2007 (**Exh. C-014; Exh. R-069**).

reasonable explanation why Ms. Levy became a shareholder and why that happened by then. At the Hearing, Mr. Levy explained that this had been a family decision²³² and that the transfer was motivated by the intention to internationalize the project.²³³ The Tribunal does not see how transferring shares to a family member with a foreign nationality would internationalize *the project*. What was sought to be internationalized was the soon-to-be-crystallized *domestic dispute*. In other words, the only purpose of the transfer was to obtain access to ICSID/BIT arbitration, which was otherwise precluded. To substantiate their argument that the dispute was not foreseeable, the Claimants also rely on the internal INC memorandum of 10 October 2007,²³⁴ which is referenced in the preamble of the 2007 Resolution. According to the Claimants, the internal memorandum is dated 10 October 2007, but was submitted only on 15 October 2007. The Claimants' argument on the second date is not entirely clear. In any event, the Tribunal notes that the 2007 Resolution is dated 10 October 2007, thus rendering the 15 October 2007 date in the memorandum irrelevant. Beyond that, the record contains no indication that contradicts the Tribunal's conclusion. The Claimants also note that "only the civil servant who drafted this memorandum could foresee the promulgation of RD 1342".²³⁵ Whatever the civil servant who drafted that memorandum did or did not know about the 2007 Resolution, the Tribunal is convinced that *the Levys* could foresee the 2007 Resolution as a very high probability when Ms. Levy was inserted into Gremcitel's ownership, which is what matters for the Tribunal's inquiry as to the foreseeability of the dispute.

192. The fact that the only motivation to add Ms. Levy into the Gremcitel ownership structure was her French nationality is confirmed by the language contained in the corporate resolution of Hart Industries dated 7 March 2005. While the Tribunal has clarified that it cannot attach any probative value to the corporate resolutions allegedly showing a 2005 transfer, it notes that the resolution of 7 March 2005 provides that the transfer of the powers and rights to Ms. Levy would last "until all legal proceedings concerning resolutions dated February 7th 2005 and February 9th 2005 are finished".²³⁶ Because there were no legal proceedings in Grenada concerning these resolutions at the time

²³² See Tr. (Mr. Levy), at 299:11-15 (with regard to the alleged 2005 transfer, referring to his father's will), and 302:10-11 (with regard to the 2007 transfer, stating that "this was a familial decision").

²³³ Tr. (Mr. Levy), at 302:3-11.

²³⁴ Informe No. 249-2007-DPHCR-DREPH/INC, 10 October 2007 (**Exh. C-142**).

²³⁵ C-PHB 1, ¶ 80 (Tribunal's translation).

²³⁶ Corporate Resolution of Hart Industries Ltd, 7 March 2005 (**Exh. C-108; Exh. R-292**).

when these documents were allegedly created,²³⁷ the Tribunal is convinced that the reference to “legal proceedings” refers to these ICSID proceedings.

193. In addition to these circumstances, the Tribunal considers that a global evaluation of the facts of this case patently confirms that the Claimants’ restructuring constitutes an abuse. The Tribunal wishes in particular to revert to the 2005 transfer, which it has already extensively addressed in the context of the *ratione temporis* objection.²³⁸
194. The Tribunal finds it extremely serious that the Claimants have attempted to establish the Tribunal’s jurisdiction by way of documents which have turned out to be untrustworthy, if not utterly misleading. The Tribunal recalls that the Claimants asked notary Joseph, who accepted, to backdate corporate resolutions by 5 years. This fact was conclusively established at the Hearing, as it was plainly admitted by notary Joseph herself.²³⁹ Mr. Levy then returned to see Ms. Joseph sometime after April 2012, when this arbitration was already underway, requesting the “rectification” of the backdated notarization to ensure that the date of the alleged 2005 transfer was well documented. Thus, Mr. Levy attempted to correct false information with further false information, on which the Claimants then relied to establish the Tribunal’s jurisdiction. Furthermore, the Tribunal has noted that the Claimants’ own position in respect of the corporate resolutions is that a notarization was not required for a share transfer to be valid under Grenadian law.²⁴⁰ If this is so, it is obvious that the only reason the Claimants sought to backdate the documents was to manufacture the Tribunal’s jurisdiction. A global evaluation of the facts relating to the Claimants’ attempts to establish jurisdiction thus evinces a pattern of manipulative conduct that casts a bad light on their actions.²⁴¹
195. In light of the foregoing facts, the Tribunal cannot but conclude that the corporate restructuring by which Ms. Levy became the main shareholder of Gremcitel on 9 October

²³⁷ See Expert Opinion of Sheila Harris, 30 June 2013 (**Exh. RWS-021**), ¶¶ 17-18; Results of Search of Grenada Supreme Court Registry, 28 June 2013 (**Exh. R-291**).

²³⁸ See *supra* paragraphs 152-155.

²³⁹ Ms. Joseph also admitted that she would not have backdated the documents had she known that the documents would be used in an international proceeding. See Tr. (Joseph), at 758:3-11

²⁴⁰ See C-PHB 2, ¶ 55.

²⁴¹ The Tribunal notes that in the case of *Renée Rose Levy de Levi v. Republic of Peru* (ICSID Case No. ARB/10/17), the Tribunal denied an abuse of process objection. See Award, 26 February 2014, ¶¶ 153-154. The award was handed down just two days before the second and final round of the Parties’ post-hearing submissions, and it was referred to by the Claimants in a footnote of their last brief. See C-PHB 2, ¶ 4, fn. 1. The Tribunal notes that the factual circumstances of that case (as the Tribunal can appreciate them from reading the Award, as the Parties have not elaborated upon them) are distinct from those of the present proceedings. The reference to that case is thus unhelpful for the present purposes.

2007 constitutes an abuse of process. Therefore, the Tribunal is precluded from exercising jurisdiction over this dispute.

E. THIRD OBJECTION: THE CLAIMANTS HAVE NO INVESTMENT

196. The Respondent presented a third objection, according to which the Claimants do not possess a protected investment under the ICSID Convention and the BIT because (i) they have not acquired the “right to develop” the Costazul Project and (ii) they have not made a contribution, nor assumed a risk.
197. The Tribunal has reached the conclusion that the Claimants’ abuse of process precludes the Tribunal from exercising jurisdiction over this dispute. Considerations of judicial economy suggest that the Tribunal may dispense with dealing with arguments which have no impact on the award.²⁴² In this case, given the Tribunal’s holding on abuse of process, the outcome of the case would not be affected by the Respondent’s third objection, whatever the answer to such objection might be. Under these circumstances, it is thus unnecessary to address the Respondent’s third objection.

VI. COSTS

198. The Claimants’ total costs incurred in connection with these proceedings amount to USD 2,146,858.72, comprising legal fees and expenses of USD 1,571,858.72 and payments to ICSID of USD 575,000. The Respondent’s costs in connection with this arbitration were USD 5,874,978.96, comprising legal fees and expenses of USD 5,299,978.96 and payments to ICSID of 575,000.
199. Each Party has requested that its costs be borne by the other Party. Under Article 61(2) of the ICSID Convention, “the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.” This provision establishes the Tribunal’s discretion in allocating ICSID arbitration costs and the Parties’ costs, including legal fees.

²⁴² See *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on the Application for Annulment, 19 October 2009, ¶ 67 (“The obligation in Article 48(3) of the Washington Convention to deal with every question applies to every argument which is relevant and in particular to *arguments which might affect the outcome of the case*. On the other hand, it would be unreasonable to require a tribunal to answer each and every argument which was made in connection with the issues that the tribunal has to decide [...]. [T]he tribunal must address all the parties’ “questions” [...] *but is not required to comment on all arguments when they are of no relevance to the award*”, emphasis added).

200. Two approaches may be discerned in ICSID costs awards. Some tribunals apportion ICSID costs in equal shares and rule that each party should bear its own costs. Others apply the principle pursuant to which “costs follow the event”, with the result that the party that does not prevail bears all or part of the costs of the proceedings, including those of the other party.
201. The Tribunal is of the view that a finding of abuse of process justifies an award of costs against the unsuccessful party. Thus, the Claimants shall pay for the entirety of the costs of the proceedings, *i.e.*, for the costs of the Arbitral Tribunal and for the costs of the proceeding. The Claimants shall thus reimburse the advances that the Respondent has made to ICSID. In this latter respect, it is noted that the ICSID Secretariat will provide the Parties with a statement of the case account in due course.
202. With regard to the legal fees and expenses borne by the Parties in connection with the arbitration, the Tribunal notes that the Claimants sought to minimize the costs of the proceedings, which is not the case of their opponent, as the disparity of the costs figures shows. In these circumstances, the Tribunal finds it fair that the Claimants pay to the Respondent the amount of USD 1,571,858.72, *i.e.*, the sum which they themselves considered necessary to present their case, as a contribution to the Respondent’s fees and expenses.

VII. DECISION

203. For the reasons set forth above, the Tribunal unanimously decides as follows:
- a. The Tribunal is precluded from exercising jurisdiction over this dispute;
 - b. The Claimants shall reimburse to the Respondent the amounts which the Respondent has deposited with ICSID for the costs of the arbitration;
 - c. The Claimants shall pay USD 1,571,858.72 to the Respondent, as a contribution to the legal fees and other expenses which the Respondent incurred in connection with the arbitration;
 - d. All other requests for relief are dismissed.

[SIGNED]

Dr. Eduardo Zuleta
Arbitrator
22 December 2014

[SIGNED]

Prof. Raúl Emilio Vinuesa
Arbitrator
29 December 2014

[SIGNED]

Prof. Gabrielle Kaufmann-Kohler
President
5 January 2015