In the matter of

Gramercy Funds Management LLC
Gramercy Peru Holdings LLC
Claimants

v.

The Republic of Peru
Respondent

Statement of Rejoinder of the Republic of Peru

13 SEPTEMBER 2019

RUBIO LEGUÍA NORMAND
Lima

WHITE & CASE
Washington, D.C.

Statement of Rejoinder of the Republic of Peru

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Statement of Rejoinder of the Republic of Peru

1. The Republic of Peru ("Peru") hereby submits its Statement of Rejoinder in accordance with Procedural Order No. 1 in this proceeding under the Peru-United States Trade Promotion Agreement (the "Treaty") and UNCITRAL Arbitration Rules (the "Rules").

I. Overview of the Dispute

2. This case arises from a dispute over the payment of Peruvian agrarian reform bonds (the "Agrarian Reform Bonds" or "Bonds"). These Bonds are not like contemporary sovereign debt: they are nominal instruments that originated decades ago, in a currency and under a legal regime that no longer exist, and subsequently lost all value. Apart from this Treaty proceeding, Peru is paying legitimate holders of Agrarian Reform Bonds by means of a payment procedure established in Peru in accordance with Peruvian law (the "Bondholder Process").

3. Claimants in this case are Gramercy Funds Management LLC ("Gramercy Management") and Gramercy Peru Holdings LLC ("Gramercy Holdings," and together with Gramercy Management, "Gramercy"). Gramercy claims to have acquired a number of Agrarian Reform Bonds, but has refused to seek payment through the Bondholder Process. Instead, Gramercy for years has stated it is seeking to effect changes in Peruvian law so as to increase the value of its supposed bondholding, and has engaged in lobbying and pressure tactics. Gramercy now seeks to use the Treaty to obtain a windfall.

4. Peru respectfully reiterates its request that this proceeding be dismissed. Gramercy has failed to establish that the Arbitral Tribunal has jurisdiction or that there has been any breach of the Treaty. Gramercy is not entitled to any compensation under the Treaty and all claims must be dismissed; a Solomonic decision would be grossly unacceptable, a reward to Gramercy's abusive conduct and an offense to the Treaty system.

The Fundamental Facts Regarding the Agrarian Reform Bonds Have Been Confirmed

5. The fundamental facts related to Agrarian Reform Bonds have been clear from the outset of this proceeding, and those facts have been confirmed even as the evidentiary record of the dispute as evolved.

- Unique History: The Agrarian Reform Bonds have unique historical origins that pre-date the Treaty by decades. They are old physical instruments provided decades ago as compensation for land in Peru, in local currency and subject to Peruvian law and jurisdiction. They were not offered publicly, listed on an exchange or issued into the U.S. market, and are not comparable to contemporary sovereign bonds, or their secondary markets or restructurings.

- Uncertain Status: The status of the Agrarian Reform Bonds was uncertain for many years, following currency changes and hyperinflation resulted in uncertainty as to the value of bonds and procedure for recovery. A 2001 ruling left open uncertainties as

to valuation and procedure, as indicated by years of efforts by Gramercy and others to change Peruvian law to establish certainty.

- Legal Resolution: After years of uncertainty, the legal status of the Bonds was settled by a resolution of the Constitutional Tribunal.

- Bondholder Process: Peru duly established and has continued to advance the Bondholder Process for valuation and payment of the Agrarian Reform Bonds.

- Payments to Bondholders: The Bondholder Process is functioning and the files of participating bondholders are being processed and paid.

- Fiscal Responsibility: The Republic of Peru continues to demonstrate fiscal responsibility. It is not in default on the Agrarian Reform Bonds or otherwise. It continues to be a highly respected sovereign for its fiscal discipline.

6. These fundamental elements have been confirmed by witnesses, legal experts, procedural experts, economists, and financial and damages experts, as summarized below and discussed herein.

The Gramercy Farce Has Been Revealed By Documents It Long Withheld

7. In contrast to the confirmation of the fundamental facts about the Agrarian Reform Bonds, the evolving evidentiary record has laid bare the realities about Gramercy and its claim that it long sought to obscure. As discussed herein:

- Gramercy's own documents prove that it knew from the outset that the Agrarian Reform Bonds were speculative, uncertain and subject to dispute.

- Gramercy's own bond contracts confirm that it paid US$ 33 million for the bonds that it now relies upon to seek US$ 1.8 billion, revealing why Gramercy hid those documents and that data for years after launching its propaganda campaign and Treaty claim.

- Gramercy's own scanned copies of bonds on their face fail to satisfy the requirements for the authentication of Agrarian Reform Bonds that would be necessary to support its claim for damages.

- Gramercy's own documents demonstrate that it repeatedly sought to change Peruvian law over years in an effort to enhance the legal certainty and value of the bonds.

- Gramercy's own financial statements reveal that Gramercy valued the bonds closer to the purchase price for years, and never valued them anywhere close to its arbitration claim of US$ 1.8 billion.

- Gramercy's own documents show that it sought American and other investors in Gramercy without revealing material information, and that it told other investors (such as U.S. pension funds) that investing in a Gramercy fund may result in a total loss.

- Gramercy's own documents show that it has a range of American and non-American investors and "beneficial owners" who have interests in the bonds that are subject of this Treaty proceeding.

- Gramercy's own documents show that it sought to influence the Constitutional Tribunal, and promptly took issue with the Tribunal's Resolution when it did not do what Gramercy wanted.

- Gramercy's own documents reveal that it sought to undermine the Peruvian Bondholder Process in order to undermine the participation of Peruvians and aide its international claim for its own benefit.

- Gramercy's own submissions reveal that it finally has admitted that the Bondholder Process could value its bonds at US$34 million, more than it even paid for them.

- Gramercy's own submissions demonstrate that it seeks a 5500% return on its speculative purchase of uncertain instruments.

- Gramercy's own conduct reveals that it has continued its campaign to aggravate the dispute, despite Tribunal orders, revealing its desperate lack of confidence in its Treaty claims.

The Agreement of Peru and the United States on the Interpretation of the Treaty

8. As a matter of law, Peru's interpretation of the Treaty has been confirmed by the position of the United States. It is important to emphasize that Gramercy chose to pursue claims under the Treaty and forego participation in the Bondholder Procedure established to pay holders of Agrarian Reform Bonds. Having opted for this proceeding, Gramercy is subject to and must respect the terms of the Treaty, the sanctity of the Treaty proceeding and the applicable interpretation of the Treaty.

- The Contracting Parties to the Treaty, Peru and the United States, are longstanding allies and trading partners. As set forth in the Preamble to the Treaty, they entered into the Treaty to strengthen the special bonds of friendship and cooperation between them and facilitate long-term development. The Treaty was not meant to be a *sui generis* tool for a speculator to use a ramming rod to get special treatment.

- In this proceeding, Peru and the United States have confirmed their common interpretation of the Treaty across a range of issues. Peru has done so in its submissions, including previously in its Statement of Defense. The United States, in turn, confirmed its interpretation of the Treaty in its Submission of 21 June 2019 ("US Submission"). In virtually all relevant respects, the Contracting Parties are in agreement, as further addressed herein.

- The consequences are confirmed by Professor Michael Reisman of Yale University: "[t]hese submissions confirm the Contracting Parties' agreed interpretation of the Treaty." As he further explains, and as cited below, "[t]he Contracting Parties' agreed interpretation of the Treaty is an authentic and accurate interpretation." Professor Reisman is the only expert of international law participating in this proceeding. (Gramercy expressly chose not to provide a rebuttal expert, and, indeed, it is too late for it to do so as a procedural matter.) The Contracting Parties' agreed interpretation of applicable Treaty provisions is addressed in each corresponding section below.

- The Tribunal "shall account" for this agreement, as Vienna Convention Article 31(1) provides, and should disregard Gramercy's alternative – and incorrect – interpretations of the Treaty.

Gramercy's Failure to Establish Jurisdiction Under The Treaty

9. In the context of the foregoing factual and Treaty elements, Peru has presented various objections to jurisdiction and admissibility. After having virtually ignored the question of jurisdiction and admissibility in its earlier submissions, despite being on notice since mid-2016 of Peru's key objections and despite bearing the burden of proof, Gramercy dedicates close to 70 pages to this issue in the Reply. Despite this, Gramercy is still unable to meet the burden of proof with respect to the existence of jurisdiction and cannot show it submitted claims in accordance with the Treaty. Part III of this Rejoinder is a self-contained section on jurisdiction and admissibility, addressing the following:

- Gramercy abused the Treaty and cannot be entitled to its protections.
- Gramercy failed to show it complied with the Treaty's preconditions to arbitration, including the Treaty's temporal limitations and waiver requirements.
- Gramercy failed to prove that it is an "investor" under the Treaty, and indeed purports to bring claims with respect to interests beneficially owned by third parties.
- Gramercy failed to prove it made a protected "investment" under the Treaty.

Gramercy Has Failed to Prove the Merits of its Treaty Claims

10. Even assuming, contrary to the record, that the Tribunal had jurisdiction, Gramercy has failed to demonstrate that Peru did not comply with the Treaty or that it is liable thereunder. In particular:

- Gramercy has not met its burden of proof, notwithstanding ample opportunity.
- Gramercy has not shown it has authentic Bonds.
- Gramercy continues to mischaracterize the facts.
- Gramercy fails to prove any expropriation.
- Gramercy fails to prove any violation of the minimum standard of treatment.
- Gramercy fails to prove any violation of national treatment.
- Gramercy fails to prove any violation of most-favored nation treatment, including with respect to an obsolete effective means provision in a third treaty.
- Gramercy is not entitled to any relief because its Gramercy's damages are speculative, remote, and have no causal link to any alleged breach.

Peru Has Provided Substantial Documentation, Witness and Experts

11. While Gramercy has failed to prove its case, Peru has proffered testimony by highly credible witnesses. Peru attaches three statements responding to mischaracterizations and novel allegations in Gramercy's latest submission.

- *Former Minister of Economy and Finance and Ambassador Luis Miguel Castilla* addresses Gramercy's allegations as to the origins of the Constitutional Tribunal's Resolution of 2013 and the MEF's implementation of the Bondholder Process.

- *Vice Minister of Treasury Betty Sotelo* addresses Gramercy's allegations about the history and status of the Agrarian Reform Bonds, including the prior uncertainty and the implementation and status of the bondholder process.

- *Former Negotiator of the Treaty Carlos Herrera Perret* addresses Gramercy's novel claims as to the negotiation of the Treaty with a particular focus on the definition of investment thereunder and the relevance of the Agrarian Reform Bonds.

12. Peru also attaches three legal opinions by reputed legal authorities that respond to various arguments by Gramercy as well as its evolving cast of legal experts.

- *Professor Michael Reisman* provides a supplement to his unrebutted prior report, and refutes Gramercy's latest arguments as to the Tribunal's jurisdiction *ratione materiae, ratione personae* and *ratione temporis*, as well as abuse of process.

- *Dr. Oswaldo Hundskopf*, addresses Gramercy's arguments regarding the application of the current value principle.

- *Dr. Eduardo Garcia-Godos*, addresses Gramercy's novel arguments regarding the legitimacy of the Bondholder Process and as a matter of Peruvian law.

13. In addition, Peru's attaches three expert reports responding to Gramercy's conceptual and practical errors as well as its belated submission of new experts with its Statement of Reply.

- *Professor Norbert Wühler*, addresses Gramercy's arguments regarding the viability of the bondholder process and reiterates his conclusion that it is well within the standards of accepted practices for claims processes, and which is functioning in a diligent manner.

- *Professor Pablo Guidotti*, addresses Gramercy's arguments regarding the unique characteristics of the Agrarian Reform Bonds and the implications of Gramercy's speculation on the Agrarian Reform Bonds in the secondary market.

- *Quantum Experts Brent Kaczmarek and Isabel Kunsman* addresses Gramercy's arguments and focus on the conceptual and practical errors in the report submitted by Gramercy's quantum expert.

14. The Tribunal has afforded Gramercy every opportunity to prove it is entitled to relief under the Treaty. Gramercy failed, while continuing its parallel efforts to pressure Peru into abandoning its legitimate defenses. For all of these reasons, this case should be dismissed and Peru should be entitled to all of its costs for this abusive proceeding, which is an affront to the system of investment protections.

II. Procedural Status

15. Pursuant to applicable procedural orders, the procedural status of this proceeding is clear: Gramercy, which bears the burden of proof, has completed its submissions on the merits and is not entitled to further submissions. Despite an abundance of due process, Gramercy's case fails, as discussed elsewhere in this submission. Indeed, Gramercy has enjoyed extensive opportunities to present its case, while running roughshod over procedural fairness, at prejudice to Peru.

16. Gramercy's case had trouble taking off from the start. At the outset of the proceeding, Gramercy filed not one but two Notices of Intent, and not one but three Notices of Arbitration, and filed not one but two arbitrators, after the initial arbitrator resigned. Specifically, Gramercy filed a "Notice of Arbitration and Statement of Claim" dated 2 June 2016 immediately prior to the presidential election in Peru. After Peru responded on 5 July 2016, Gramercy then filed an "Amended Notice of Arbitration and Statement of Claim" dated 18 July 2016 without any procedural rationale, which Peru was diligently assessing for weeks. Gramercy then filed a "Second Amended Notice" on 5 August 2016, together with a transmittal letter stating that Gramercy "considers that, at the latest as of today's date, all conditions have been met for the formation of an arbitration agreement between Gramercy and Peru and the claims set forth in the Notice have been properly submitted to arbitration."[1] As discussed elsewhere in this submission, despite three bites at the apple, Gramercy failed to address or resolve basic issues related to its case.[2]

17. In the procedural phase, the Tribunal set out the rules for written submissions in Procedural Order No. 1. The Tribunal ruled, over Gramercy's objection, that Gramercy was required to file the first written submission and include all arguments and evidence on which it wished to rely in its Statement of Claim.

18. Anticipating the first written submission by Gramercy, Peru repeatedly warned that Gramercy was withholding arguments and documents in an attempt to sandbag Peru, and due process, including as to issues of ownership, acquisition and valuation.[3] After Procedural Order No. 1, Peru continued to warn of the risk of sandbagging.[4] Despite the Order and the warnings, Gramercy did it just the same by submitting an anemic Statement of Claim that largely tracked its brief of two years earlier.

19. Anticipating the second written submission by Gramercy, Peru persisted in sounding alarms about sandbagging: "Gramercy is withholding key evidence, arguments,

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[1] *See* Letter from Gramercy to Peru, 5 August 2016 (R-59).

[2] See, e.g., Letter from Peru to Tribunal,

[3] *See, e.g.,* Peru's Response (R-2), 5 July 2016, ¶ 43 ("Gramercy so far has failed to provide even basic substantiation for its allegations that it purchased Agrarian Reform Bonds, much less its manner of doing so."); Peru's Response (R-1), 6 September 2016, ¶ 48 ("Gramercy has not provided evidence as to how much it paid, why those amounts were rational and not exaggerated in the first place, or revealed fundamental related evidence."); Peru's Letter, 8 November 2017 (Doc. R-197) ("Gramercy has not specified how much was paid for the bonds, the identity of investors in Gramercy, or what representations Gramercy made to induce such investments.").

[4] *See, e.g.*, Peru's Submission on Procedural Safeguards (R-20), 1 June 2018, ¶ 34 ("If Gramercy seeks to sandbag Peru with such arguments at this point, it certainly would be an attempt to deflect attention from its own conduct."); Peru's Second Submission on Procedural Safeguards (R-27), 15 June 2018, ¶ 20 ("While Gramercy cannot change the fact of its failure to address these issues at the appropriate time, *Gramercy also has exhibited a pattern of wanting to invert due process and proper order*.") (emphasis added).

and expert support to dump into the record at a later stage, at great prejudice to Peru and the integrity of this proceeding."[5] Yet, once again, Gramercy did it just the same by submitting a Statement of Reply that was late, that was far beyond twice as long as its prior brief, and sandbagged Peru (and due process) with new arguments, documents, witnesses and experts, almost all of which could and should have been filed prior to Peru's Statement of Defense. A month later, Gramercy submitted a corrected submission.

20. In sum, Gramercy's violation of Procedural Order No. 1 with its Statement of Reply submission deprived Peru of a full and fair opportunity to prepare its case, in violation of fundamental principles of due process. Respectfully taking note of the Tribunal's positions in this regard,[6] Peru has permanently reserved all of its rights. In any event, at this point of the proceeding, Gramercy's case on the merits is over. There can be no further new arguments, no further withheld witnesses, no further shuffling of experts, no further surprise documents. Gramercy's record has been established and is concluded.

21. Finally, with respect to jurisdiction and admissibility, the Tribunal established in Procedural Order No. 1 that "Claimants shall file, if applicable, a Rejoinder on Respondent's counterclaims and objections," and "[t]he scope of this pleading shall be limited to replying to the argumentation regarding the counterclaims brought and objections raised by Respondent."[7] Procedural Order No. 1 is clear that any rejoinder by Gramercy on jurisdiction and admissibility is strictly circumscribed. Peru addresses jurisdiction and admissibility in a focused manner in the present submission. Gramercy's rejoinder is circumscribed accordingly. Peru reserves all of its rights with respect to any further deviation from the Tribunal's orders and any further infringement on due process.

III. Jurisdiction And Admissibility

22. Gramercy objects to what it characterizes as Peru's "'kitchen sink' approach to meritless jurisdictional objections."[8] To the contrary, the comprehensive and highly merited objections presented in the Statement of Defense and this submission are a necessary response to Gramercy's fundamentally flawed Treaty claims. After initially claiming that it could avail itself of the Treaty merely because it "holds" Bonds, supported by little more than unauthenticated images of certificates, Gramercy attempts to make a fuller showing on jurisdictional issues – as it should have from the outset. Gramercy's arguments, however, are contrary to the Treaty, as reinforced by the Contracting Parties' subsequent agreement, and well-established principles of international law. Gramercy's own previously withheld evidence, moreover, underscores the multiple manifest failings in its jurisdictional case.

23. That evidence reinforces, as Peru previously established, that (A) Gramercy abused the Treaty from the outset of its alleged "investment"; (B) Gramercy failed to comply with mandatory Treaty preconditions to arbitration; (C) Gramercy is not an "investor" as defined and protected by the Treaty; and (D) Gramercy did not make an "investment" as

[5] Peru's Statement of Defense, (R-34), ¶ 165.

[6] Procedural Order No. 9.

[7] Procedural Order No. 1, ¶ 14.

[8] Statement of Reply ¶ 200.

defined and protected by the Treaty. Accordingly, as addressed in detail below, the Tribunal lacks jurisdiction and the claims must be dismissed.

A. Gramercy's Own Evidence Proves That It Abused The Treaty

1. Gramercy Assessed That The Bonds Were Burdened With A Preexisting Domestic Dispute Prior To Its Alleged Acquisitions

24. Peru has established that Gramercy's entire alleged investment in Agrarian Reform Bonds constitutes an abuse of the Treaty because the essence of Gramercy's case – a dispute over Bond valuation and payment – had already arisen and was subject to ongoing legal proceedings when Gramercy acquired the Bonds.[9] As Professor Reisman concluded in his First Opinion, following an assessment of *Phoenix Action v. Czech Republic* and other cases dismissed on abuse grounds, Gramercy abused the Treaty because it acquired the Bonds "decades after the dispute as to payment of the Bonds already had arisen, in order to avail itself of the avenue of international arbitration to profit, by means of a modality foreclosed to the original bondholders and other domestic bondholders."[10] This requires dismissal on either jurisdictional or admissibility grounds.[11]

25. Gramercy does not dispute that its claims must be dismissed if they constitute an abuse of the Treaty. Instead, Gramercy makes several attempts to distinguish its alleged Bond acquisitions from what it describes as the "*Phoenix Action* doctrine."[12] Each such attempt is unfounded – as a matter of law, fact, or both.

26. *First*, Gramercy contends that it did not "seek[] to turn a purely domestic dispute into an international one by some sleight of corporate organization, which is what the *Phoenix Action* doctrine seeks to safeguard against."[13] This mischaracterizes the law. A number of tribunals, which Peru and Professor Reisman previously addressed, have focused on the issue of abusive corporate reorganization to access treaty jurisdiction.[14] *Phoenix Action*, however, involved a different application of abuse principles. In particular, the tribunal found that the local companies in which the claimants invested were "already burdened with [] civil litigation as well as [] problems with the tax and customs authorities," and thus that the "unique goal of the 'investment' was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration."[15] As Professor Reisman

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[9] Statement of Defense ¶¶ 189-194.

[10] Reisman I ¶ 23; *see also id.* ¶¶ 76-86, 92.

[11] Statement of Defense ¶ 194; *see also, e.g.*, *Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 Jan. 2015 (RA-135) ¶¶ 181, 195 (dismissing on the basis of abuse and reasoning 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," because, "[u]nder the circumstances of this dispute, such differentiation is . . . a distinction without a difference, in the sense that it would have no impact on the outcome").

[12] *See, e.g.*, Statement of Reply ¶¶ 208, 215.

[13] Statement of Rely ¶ 215.

[14] Statement of Defense ¶¶ 190-191; Reisman I ¶¶ 76-86.

[15] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (RA-100) ¶¶ 136, 142.

confirms, "a decisive issue in *Phoenix* was that the *investments themselves* were subject to a preexisting domestic dispute at the time the claimants acquired them. Those facts are directly analogous to the circumstances of Gramercy's investment, as I previously explained."[16]

27. Gramercy's acquisition of Bonds that were "already burdened" with local litigation and other problems is confirmed repeatedly by Gramercy's own documents. Indeed, Gramercy's entire investment was *expressly predicated* on the idea that it could profit from a longstanding dispute among Peruvians over facially worthless Bonds which were the subject of ongoing debate in the political branches and ongoing litigation in the courts. Gramercy's assessments both before and after purchase reflect, for example:

- *Robert Koenigsberger*: "Peru had defaulted on the Bonds long before I learned about the Bonds. . . . The face value of the Land Bonds as denominated in Soles de Oro was worthless even in 2005, as the conversion factor from Soles de Oro to Soles is one to one billion (1:1,000,000,000). . . . Yet, because of positive developments in Peru with regard to the resolution of outstanding debts, I thought the Land Bonds might be a good opportunity . . . ."[17]

- *Gramercy Due Diligence Memo, January 2006*: "[T]he Land Bonds remain in arrears"; "[O]riginal nominal value and original currency are now worthless"; "Why Now?" "There were many laws that protected the state . . . . ADAEPRA has fixed this problem through a series of landmark court rulings"; "Only in the last few years, have the Peruvian courts ruled in favor of bondholders . . . ."[18]

- *Gramercy Monthly Overview, February 2012*: reporting that "[redacted]," Gramercy was [redacted]," and projecting that Gramercy would "[redacted]."[19]

28. *Second*, in the face of its own contemporaneous evidence that it saw the longstanding Peruvian dispute over the Bonds – the "[redacted]" – as a "good opportunity," Gramercy contends that its arbitration claim is not an abuse of the Treaty because it "did not acquire its investment in the Land Bonds with the 'sole purpose' of bringing an arbitration claim against Peru."[20] This purported distinction is both contravened by the evidence and legally irrelevant.

29. With respect to the evidence, Gramercy has acknowledged that it incorporated Claimant Gramercy Holdings specifically – and solely – for the purpose of Bond

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[16] Reisman II ¶ 49 (emphasis in original); *see also, e.g.*, Reisman I ¶ 85 ("Claimants' pleadings indicate that Gramercy, founded in 1998 'to exploit distressed investment opportunities in emerging markets,' knew that domestic bondholders were embroiled in a prolonged dispute with the Government regarding the valuation and method of payment for the Agrarian Reform Bonds at the time that Gramercy chose to make its alleged investment.").

[17] Second Amended Koenigsberger (CWS-3) ¶ 21.

[18] Doc. CE-114.

[19] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[20] Statement of Reply ¶ 211.

acquisitions, only five days after the signing of the Treaty.[21] Gramercy also has represented that it *did* account for resort to the Treaty when deciding to purchase Bonds. For example:

- *Third Amended Statement of Claim*: the Treaty was among "specific and general assurances . . . *essential* in Gramercy's decision to purchase the Land Bonds."[22]
- *Robert Koenigsberger*: the signing of the Treaty, just days before Gramercy incorporated Gramercy Holdings to acquire Bonds, "reassure[ed] Gramercy that it would – given that ratification of the Treaty was expected to occur – enjoy the protection of the Treaty over its investment in the Land Bonds."[23]
- *Koenigsberger Reply*: "[O]f course we knew that there was an investment treaty likely to come into force between the United States and Peru, and believed that it would provide a valuable safety net . . . ."[24]

30. Gramercy's admissions thus confirm that it was focused on making a Treaty claim – or, at minimum, having the ability to threaten a Treaty claim – at the time of its alleged Bond acquisitions. This belies Gramercy's contention that its "principal investment strategy was to serve as a 'catalyst' for the fair restructuring of the Land Bond debt through negotiations."[25] In fact, contrary to this depiction of itself as a constructive problem-solver working for the benefit of all, Gramercy's investment strategy, in reality, relied from the beginning on a two-part approach – lobbying and legal claims – to pressure Peru to make a bigger payout to Gramercy. That strategy is reflected in Gramercy's own documents and continues to this day, as detailed below.[26] Even assuming for the sake of argument, moreover, that Gramercy's strategy was to serve as a "catalyst," that only reinforces that the domestic dispute existed well before Gramercy allegedly acquired any Bonds.

31. In any event, as Professor Reisman explains, even if Gramercy had other motives beyond the pursuit of Treaty claims, this is irrelevant as a legal matter:

> Gramercy rests its demonstration of the innocence of its motives on a single word: 'sole.' . . . Even if some element of Gramercy's strategy included the prospect of negotiations with the Government, as Gramercy claims, *this does not change the fundamental fact that Gramercy acquired the Bonds in order to transform the preexisting Peruvian dispute into an international dispute* from which Gramercy might profit. I reaffirm that this is an abuse of the protections provided under the Treaty.[27]

32. *Third*, Gramercy suggests that *Phoenix Action* is distinguishable because, despite Gramercy's full awareness of the preexisting dispute in Peru as to the Bonds, this was

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[21] *See, e.g.*, Lanava ¶ 19 ("We established GPH on April 17, 2006, for the sole purpose of being the exclusive owner of the Land Bonds that we planned to purchase in Peru.").

[22] Third Amended Statement of Claim ¶ 187 (emphasis added).

[23] Second Amended Koenigsberger ¶ 24.

[24] Koenigsberger Reply ¶ 35.

[25] Statement of Reply ¶ 212 (citing Second Amended Koenigsberger ¶¶ 11-19, 34-35, 42-47, 70) .

[26] *See infra* Section III.A.2.

[27] Reisman II ¶¶ 48, 50 (emphasis added).

not the same "dispute between Gramercy and Peru."[28] Gramercy attempts to draw parallels to *Tidewater v. Venezuela* and *Pac Rim v. El Salvador*, where tribunals ruled that the claimants could not have foreseen a treaty dispute when conducting corporate restructurings. Those decisions, however, only further undermine Gramercy's case. In *Tidewater*, the tribunal held that the "critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter."[29] They did not in that case: a prior "ordinary commercial dispute" between a claimant subsidiary and State entity concerned unpaid amounts under service contracts, and was not "part of the same dispute" concerning the separate expropriation of assets under a new law.[30] In *Pac Rim*, the tribunal found that the claimant could not have foreseen a treaty dispute at the time of a restructuring because the *de facto* ban on mining operations that was the subject of the arbitration was not even announced until after the restructuring took place.[31] Here, by contrast, the preexisting dispute in Peru concerned the same essential subject matter at issue in this Treaty proceeding – *i.e.*, valuation and payment of the Bonds – and it is undisputed that Gramercy had in-depth knowledge of the dispute when it decided to acquire the Bonds.

33. Gramercy's unfounded efforts to detach the preexisting Peruvian bondholder dispute in Peru from the Treaty "dispute between Gramercy and Peru," moreover, do not alter the analysis. The preexisting litigation and regulatory problems that burdened the investment in *Phoenix Action* were not originally a dispute between the claimant and respondent. The tribunal determined that the claimant had committed an impermissible abuse, depriving the tribunal of jurisdiction, because it had bought into that preexisting domestic dispute (to which it was not a party) in order to elevate it to an international treaty case (to which it was a party).[32] That is precisely what Gramercy has done here.

34. *Fourth*, Gramercy argues that its reliance on the Treaty's "safety net" when it acquired Bonds already embroiled in a longstanding dispute was merely "legitimate corporate planning that tribunals have repeatedly affirmed is *not* abusive."[33] Again, however, the cases on which Gramercy relies prove Peru's point. In *Tidewater v. Venezuela*, for example, the tribunal determined that the treaty dispute was not reasonably foreseeable at the time of the claimant's restructuring, and thus that there was no abuse, because "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."[34] Likewise, in

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[28] Statement of Reply ¶ 214.

[29] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013 (CA-189) ¶ 149 (citation omitted).

[30] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013 (CA-189) ¶ 190, 192.

[31] *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 (CA-154) ¶ 2.109.

[32] *See Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (RA-100) ¶¶ 136, 142.

[33] Statement of Reply ¶ 216 (emphasis in original).

[34] *Tidewater Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013 (CA-189) ¶ 184 (emphasis added).

Venezuela Holdings v. Venezuela, the tribunal ruled that the aim of a restructuring to secure treaty protections "was a perfectly legitimate goal *as far as it concerned future disputes*."[35]

35. Accordingly, as Professor Reisman confirms, this jurisprudence reinforces that planning is not "legitimate" when done in view of the specific risk of a known dispute:

> That is not the case here. Gramercy did not acquire Agrarian Reform Bonds, rely on the Treaty as protection against a general risk of disputes, and then, later, based on subsequent events, find itself in a dispute with the Government as to the payment of the Bonds. Rather, Gramercy bought the Bonds at a time when the Bonds were already subject to dispute (and had been so for decades), and with the understanding that the Treaty afforded Gramercy dispute resolution mechanisms not available to Peruvian bondholders.[36]

36. None of Gramercy's attempts to skirt these indisputable facts and relevant jurisprudence can transform Gramercy's abuse of the Treaty dispute mechanism into a *bona fide* investment subject to the Treaty's protection and the Tribunal's jurisdiction.

2. Gramercy Leveraged The Preexisting Domestic Dispute And Pressured Peru Under Threat Of Treaty Claims

37. Building on these abusive origins, Gramercy's strategy as to its alleged Bond "investment" demanded a multifaceted effort to politicize the dispute and influence changes in Peruvian law; to damage Peru in the eyes of partner States, international organizations, and international markets; and to pressure Peru to pay Gramercy exorbitant sums, including under threat of Treaty claims. That strategy, reflected in Gramercy's contemporaneous documents and in its ongoing campaign of aggravation, years after initiating arbitration, underscores Gramercy's abuse of the Treaty. Indeed, it is the antithesis of the good-faith investment, promoting cooperation and economic development, which the Treaty is meant to protect.

38. As noted, Gramercy contends that Treaty arbitration was not its "sole" motivation for purchasing Bonds because it wanted "to serve as a 'catalyst' for the fair restructuring of the Land Bond debt through negotiations."[37] Robert Koenigsberger states that Gramercy "devote[d] considerable time, effort, and expense to *consensual resolution* options."[38] As explained above, this is legally irrelevant, because even Gramercy's alleged negotiation strategy concerned Bonds that were already the subject of a longstanding dispute.

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[35] *Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 19 June 2010 (CA-207) ¶ 204 (emphasis added); *see also, e.g.*, *Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 Jan. 2015 (RA-135) ¶¶ 184-185 (recognizing that "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," but that "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") (emphasis added).

[36] Reisman II ¶ 50.

[37] Statement of Reply ¶ 212 (citing Second Amended Koenigsberger ¶¶ 11-19, 34-35, 42-47, 70).

[38] Koenigsberger Reply ¶ 35 (emphasis added).

Further, the Treaty rights that Gramercy hoped to gain by purchasing Bonds were integral to any alleged negotiation strategy. In any event, Gramercy's documents tell a different story.

39. Even before any of its alleged Bond purchases, Gramercy's January 2006 due diligence memorandum highlighted (under the heading "Potential Recovery Analysis") a "parallel strategy" involving a "transactional solution, negotiating a settlement with the government of Peru; and a judicial track demanding payment."[39] The so-called "transactional path," the memorandum elaborated, involved pressing for changes to Peruvian law through lobbying timed to leverage the Peruvian election cycle:

> [W]e see good value in this option. One potential strategy would be to lobby a congress representative to call for a vote between the elections in April and the inauguration at end of July. During this lame duck period, a congress representative may be willing to call for a vote knowing that he/she will be leaving congress within weeks and has little to lose.[40]

40. In the years that followed, as the due diligence memorandum prescribed, Gramercy implemented a parallel strategy of lobbying and lawsuits to pressure Peru. In a December 2009 Monthly Overview, for example, Gramercy stated:

[redacted][41]

41. In January 2010, Gramercy clarified that the priority for so-called "negotiations" remained its lobbying campaign to change Peruvian law to its benefit, and that any direct engagement efforts with the Executive were merely a "[redacted]":

[redacted].[42]

42. Later that same year, Gramercy began to "engage" the Executive by initiating conciliation proceedings to demand payment, not negotiations. Gramercy also made barely-veiled threats as to international Treaty claims – just as it had anticipated even before its first alleged Bond purchase – by repeatedly stating in a series of letters that "this document hereby communicates to the Peruvian State that the [Bonds] constitute a

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[39] Gramercy Due Diligence Memorandum, January 2006 (Doc. CE-114) at 3.

[40] Gramercy Due Diligence Memorandum, January 2006 (Doc. CE-114) at 3.

[41] [redacted] (emphasis added) [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[42] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

recognized and foreseen investment under Article 10.28 of the Free Trade Agreement between the Republic of Peru and the United States of North America."[43]

43. In fact, on Gramercy's own account, in the lead-up to the July 2013 Constitutional Tribunal decision, the culmination of Gramercy's touted efforts to "negotiate" a "consensual resolution" was one meeting between UBS and the MEF in which Gramercy did not participate, Gramercy did not reveal that it was even indirectly involved, and the Bonds were barely discussed.[44] Gramercy's documents thus confirm that it did not seriously pursue "consensual options," but instead focused on ways to change Peruvian law – a focus that belies claims in this arbitration that the law was already "certain" – or to pressure Peru to offer payment terms not provided by law.

44. Underlying all such efforts was, in the words of Mr. Koenigsberger, the "valuable safety net" of the Treaty.[45] After the July 2013 Constitutional Tribunal decision clarified the Peruvian legal framework for the first time, and confirmed that Gramercy had failed to manipulate the law in its favor, Gramercy reached out to Peru to offer a "consensual, non-conflictive solution."[46] Notably, in that very same letter claiming to seek "collaboration," Gramercy again made barely-veiled threats regarding Treaty claims.[47]

B. Gramercy Fails To Prove Compliance With Treaty Preconditions To Arbitration

45. Gramercy's disregard for Treaty norms and requirements also is reflected in its noncompliance with mandatory Treaty preconditions to arbitration. As Peru has demonstrated, consent is the cornerstone of arbitral jurisdiction; the Treaty contains preconditions to a Contracting Party's consent; Gramercy bears the burden of proof as to these (and all other) jurisdictional issues; and Gramercy's failure to comply with the Treaty's preconditions means that Peru did not consent to arbitrate the dispute.[48] The United States

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[43] *See, e.g.*, Gramercy Letter to Peru, 1 September 2010 in Conciliation Proceeding No. 547-2010, at 21 (Doc. R-266); Gramercy Letter to Peru, 1 September 2010 in Conciliation Proceeding No. 562-2010, at 27 (Doc. R-273); Gramercy Letter to Peru, 1 September 2010 in Conciliation Proceeding No. 577-2010, at 23 (Doc. R-282); Gramercy Letter to Peru, 1 September 2010 in Conciliation Proceeding No. 600-2010, at 23 (Doc. R288); Gramercy Letter to Peru, 1 September 2010 in Conciliation Proceeding No. 659-2010, at 37 (Doc. R-294).

[44] *See, e.g.*, Second Amended Koenigsberger ¶¶ 46, 49; Gramercy Email, 23 October 2012 (Doc. CE-172) ("As we agreed, in their meeting with Castilla [UBS] discussed the subject of the Agrarian Bonds as another topic on a broader agenda. Also as agreed they did not represent that they were negotiating an engagement with us or that we are ready to make a formal proposal."); Castilla (RWS-2) ¶ 29 ("During a meeting that focused on other topics, a UBS representative unexpectedly raised the issue of the Agrarian Reform Bonds as an aside. . . . The meeting was not represented to me as focusing on Gramercy or being on behalf of Gramercy, and I do not recall discussing Gramercy at the meeting.").

[45] Koenigsberger Reply ¶ 35.

[46] *See* Gramercy (R. Koenigsberger) Letter to President of the Council of Ministers, 31 December 2013 (Doc. CE-185) at 2-3 (stating that "[w]e have analyzed our rights with respect to the Land Reform Bonds under Peruvian law, the [Treaty], and the applicable principles of international law," and that "we must reserve all our rights under the TPA, international law, and Peruvian legislation").

[47] *See* Gramercy (R. Koenigsberger) Letter to President of the Council of Ministers, 31 December 2013 (Doc. CE-185) at 2-3 (stating that "[w]e have analyzed our rights with respect to the Land Reform Bonds under Peruvian law, the [Treaty], and the applicable principles of international law," and that "we must reserve all our rights under the TPA, international law, and Peruvian legislation").

[48] Statement of Defense ¶¶ 168-169.

agrees that "[a] State's consent to arbitration is paramount,"[49] and that "the Parties to this Agreement have only consented to arbitrate investor-State disputes where an investor submits a claim in accordance with this Agreement, including the requirements . . . set out in Articles 10.16 and 10.18."[50] The United States further confirms that "the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction."[51]

46. Gramercy offers an erroneous alternative interpretation of the Treaty preconditions that cannot salvage Gramercy's failures with respect to two requirements: prescription and waiver. Accordingly, it remains the case that Peru has not consented to arbitrate, the Tribunal does not have jurisdiction, and the claims must be dismissed.

1. Gramercy's Own Evidence Shows That It Failed To Observe The Treaty's Temporal Limitations

47. Peru previously demonstrated that the Treaty conditions consent to arbitrate on temporal limitations which delineate the scope of Treaty coverage and prevent undue delay in recourse to dispute mechanisms.[52] The United States reaffirms that the Treaty "limitations period is a '*clear and rigid' requirement* that is not subject to any 'suspension,' 'prolongation,' or 'other qualification,'"[53] and that the Contracting "Parties did not consent to arbitrate an investment dispute" if claims fall outside of the mandatory period.[54]

48. Peru has shown that Gramercy's claims run afoul of the Treaty's temporal requirements in two respects. *First*, the claims turn on critical acts and facts from a longstanding dispute that predates the Treaty, and thus violate Article 10.1.3's limitation that the Treaty "does not bind any Party in relation to any act or fact that took place" before entry into force of the Treaty. *Second*, even assuming for the sake of argument that the claims exclusively concern measures beginning in 2013, as Gramercy alleges, the claims violate Article 10.18.1 because Gramercy submitted them to arbitration more than three years after it first acquired knowledge of the alleged Treaty breach and resulting alleged loss or damage.

49. Gramercy selectively picks and chooses from an array of facts spanning decades in an unfounded attempt to fit its claims within the Treaty's well-defined limits. Gramercy discounts as mere "factual background" the pre-Treaty acts and facts on which its claims are predicated.[55] Gramercy instead pretends that its claims suddenly materialized with a 16 July 2013 Constitutional Tribunal decision – but, even then, minimizes the importance of that decision to the allegations because it occurred outside of the three-year prescription window.[56] In each respect, Gramercy's efforts to circumvent the Treaty's "clear and rigid" temporal requirements are transparent and meritless.

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[49] US Submission ¶ 2.

[50] US Submission ¶ 3.

[51] US Submission ¶ 5.

[52] Statement of Defense ¶¶ 178-188.

[53] US Submission ¶ 6 (emphasis added) (quoting *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 ¶ 29).

[54] US Submission ¶ 5.

[55] *See* Statement of Reply ¶ 204; *see also id.* ¶¶ 199-206.

[56] *See* Statement of Reply ¶¶ 174-197.

a. Gramercy's Documents Confirm That The Claims Are Founded On A Dispute That Predated The Treaty's Entry Into Force

50. Gramercy's claims violate the limitations of Article 10.1.3 because they are founded on – and thus seek to "bind" Peru in relation to – acts and facts that took place before the Treaty even entered into force.[57] As addressed above in the context of Gramercy's Treaty abuses, Gramercy understood that the Bonds were subject to a decades-old preexisting dispute even before it acquired the Bonds. Gramercy's contention that its claims are not predicated on these significant pre-Treaty acts and facts "founder on the language of Article 10.1.3 and its manifest purpose," as Professor Reisman confirms.[58]

51. *First*, Gramercy argues that "[a]ll of [its] claims of breach arise out of Peru's measures, beginning in 2013 and later, to extinguish the value of the Land Bonds," and that Treaty jurisdiction "is not determined by the arising of a dispute but by claims submitted and measures challenged."[59] This ignores the express limitations of Article 10.1.3, and seeks to artificially detach certain later-in-time measures (on which Gramercy prefers to rely) from the pre-Treaty acts and facts on which those measures rest. As Professor Reisman concludes:

> The acts and facts of the Agrarian Reform Bonds and the ongoing conflict between the bondholders and the Peruvian Government took place before the entry into force of the TPA and certainly qualify as 'any act or fact.' . . . Nor can the language of Article 10.1.3 be circumvented by breaking an integrated dispute or situation into fragments, distributed along a time continuum, to create the impression that one of the later in the series is a 'new' dispute from which one restarts the clock.[60]

52. Tribunals have reinforced that they cannot exercise jurisdiction where later measures are so intertwined with pre-treaty acts and facts that they cannot be detached and adjudicated independently.[61] For example, in *Berkowitz v. Costa Rica* – which Gramercy badly and misleadingly mischaracterizes[62] – Costa Rica enacted a regulatory regime, prior to

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[57] Statement of Defense ¶¶ 179-181.

[58] Reisman II ¶ 43.

[59] Statement of Reply ¶¶ 201-202.

[60] Reisman II ¶ 44.

[61] *See, e.g., Berkowitz v. Costa Rica* (RA-150) ¶ 222 ("[I]t will be necessary to assess whether the claim that is alleged can be sufficiently detached from pre-entry into force acts and facts so as to be independently justiciable. . . . An alleged breach will not come within the jurisdiction of the Tribunal if the Tribunal's adjudication would necessarily and unavoidably require a finding going to the lawfulness of conduct judged against treaty commitments that were not in force at the time. . . . Such acts and facts cannot [] form the foundation of a finding of liability even in respect of a post-entry into force, or a post-critical limitation date, actionable breach. To be justiciable, a breach that is alleged to have taken place within the permissible period, from a limitation perspective, must, if it has deep roots in pre-entry into force or pre-critical limitation date conduct, be independently actionable."); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002 (RA-62) ¶ 70 ("The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.").

[62] Gramercy states that the *Berkowitz* tribunal "found that it lacked temporal jurisdiction because the post-entry into force actions were merely 'a compilation of acts and steps taken or to be taken by the Government,' and not 'orders or other regulatory measures imposing legal consequences on the Claimants.'" Statement of Reply ¶ 205 (quoting *Berkowitz* ¶ 240). As the referenced paragraph makes clear when read in full, and not quoted selectively, the tribunal

the treaty's entry into force, that expropriated the claimants' properties. The claimants presented a "seven-point matrix of alleged breaches" arising from the procedures and valuation methods later applied to the properties as part of the compensation regime under local law.[63] The tribunal ruled that those later measures could not be separated from the pre-treaty acts and facts that gave rise to them, and thus were not subject to its jurisdiction: "the [] allegations, in all of their various permutations . . . are all so deeply rooted in pre-entry into force conduct as not to be meaningfully separable from that conduct."[64]

53. Here, Gramercy's claims similarly purport to focus on compensation procedures and valuation methods that post-date the Treaty's entry into force – but, fundamentally, hinge on a dispute over the Bonds that arose many years before. That the claims are so deeply rooted in pre-Treaty acts and facts is underscored by Gramercy's own assessments before it acquired any Bonds. While it now alleges that Peru's measures starting in 2013 "extinguished" the Bonds' value, Gramercy understood at the time of its acquisitions that various measures and circumstances in the preceding years had already rendered the Bonds worthless on their face, as detailed above.[65] Indeed, Gramercy's entire investment was predicated on the idea that it could turn a longstanding dispute among Peruvians over "[redacted]" on worthless Bonds into a profit for Gramercy.[66]

54. As Gramercy's documents confirm, the measures impacting the legal status and valuation of the Bonds, and Gramercy's claim to payment on them, did not arise in 2013 – or any date close to it. In *Tecmed v. Mexico*, on which Gramercy relies, the tribunal considered it relevant to determine "if the conduct, acts or omissions prior to [entry into force] could not reasonably have been fully assessed by the Claimant in their significance and effects when they took place."[67] That is the opposite of what happened here. Gramercy *did* fully assess the framework governing the Bonds prior to the Treaty's entry into force, *did* understand the significance and effects – and, in fact, chose to acquire Bonds specifically on that basis. Without the preexisting dispute over "[redacted]" that arose before the Treaty entered into force, neither Gramercy's investment nor the alleged Treaty breaches would ever have taken place. Gramercy's claims are so deeply rooted in those pre-Treaty acts and facts that they cannot be adjudicated independent of them, as Article 10.1.3 requires.

55. *Second*, Gramercy suggests that, even if "when a dispute arose were remotely relevant, it could in any event only refer to the time when a qualifying dispute arose *between*

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was addressing the "Contraloría Report," an assessment by the Controller General of the expropriation procedures – and *not* any of the post-entry into force actions at issue. In fact, the tribunal expressly stated as a "preliminary observation" that the Report was "not [] a post-entry into force act or fact addressed to the Claimants on which they can rely to found a cause of action." *Berkowitz* ¶ 240.

[63] *See, e.g., Berkowitz v. Costa Rica* (RA-150) ¶¶ 228, 231-232.

[64] *Berkowitz v. Costa Rica* (RA-150) ¶ 269.

[65] *See supra* Section III.A.

[66] *See, e.g.*, Second Amended Koenigsberger (CWS-3) ¶ 21 (stating that "Peru had defaulted on the Bonds long before I learned about the Bonds," that the "face value of the Land Bonds as denominated in Soles de Oro was worthless even in 2005," and that he saw the Bonds as a "good opportunity"); [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY] (describing Gramercy's efforts to recover on "[redacted]" and "[redacted]"); Doc. CE-114 (noting that valuing the Bonds according to their "original nominal value and original currency[, they] are now worthless").

[67] *Tecmed v. Mexico* (CA-42) ¶ 68; *see also* Statement of Reply ¶ 204 (quoting and citing *Tecmed*).

these parties to the arbitration."[68] That contention, too, is fundamentally flawed. As Professor Reisman explains, "[t]hat the ownership of Bonds changed hands from the original bondholders to Gramercy does not cause the acts and facts of the previously existing and the continuing and recurring conflict with respect to the Bonds to vanish."[69] Were it otherwise, a party could circumvent the temporal limitations of Article 10.1.3 merely by acquiring, after the Treaty entered into force, an investment already burdened by pre-Treaty measures. That cannot be the case (and is what cases like *Phoenix Action* and *Philip Morris v. Australia* confirm) – though it is precisely what Gramercy has attempted here. In any event, Gramercy's efforts to place the timing of its dispute with Peru solely in 2013 (and later) measures ignore the fact that the Bonds were already subject to dispute at the time Gramercy acquired them. Gramercy knew this and essentially bought into the dispute with its 2006-2008 acquisitions; the dispute did not suddenly materialize in 2013, as it suggests.

b. Gramercy's Documents Confirm That The Claims Are Barred By The Treaty's Three-Year Prescription Period

56. Peru previously demonstrated that, even if the only relevant measures for prescription purposes are those starting in 2013, as Gramercy suggests, Gramercy also violated the limitations period under Article 10.18.1 because it submitted the claims to arbitration more than three years after the 16 July 2013 Constitutional Tribunal decision, which is the cornerstone of Gramercy's claims under its preferred timeline.[70] Following an established pattern, Gramercy *again* seeks to reformulate its claims by distancing itself from its own prior allegations and placing newfound emphasis on later measures, all in an unfounded attempt to circumvent the Treaty's "clear and rigid"[71] temporal requirement.

57. *First*, Gramercy repeatedly rests on the false premise that it submitted its claims by 2 June 2016 – and that, "even on Peru's case," the claims were submitted by 5 August 2016, so that the three-year prescription "window opened on August 5, 2013."[72] To the contrary, that has been *Gramercy's* case since it represented on 5 August 2016 that "Gramercy considers that, at the latest as of today's date, all conditions have been met for the formation of an arbitration agreement."[73] In the Statement of Defense, Peru expressly noted that Gramercy still had not yet shown that it met the waiver preconditions to the formation of an arbitration agreement.[74] Documents previously withheld by Gramercy now reveal that it could not have achieved an effective waiver, and thus submitted its claims to arbitration, any earlier than 10 August 2016, as detailed in the waiver section below.[75] This effectively

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[68] Statement of Reply ¶ 203 (emphasis in original).

[69] Reisman II ¶ 44; *see also, e.g., MCI v. Ecuador* (CA-133) ¶ 66 ("The Tribunal observes that a prior dispute may evolve into a new dispute, but the fact that this new dispute has arisen does not change the effects of the non-retroactivity of the BIT with respect to the dispute prior to its entry into force. Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.").

[70] Statement of Defense ¶¶ 182-188.

[71] *See* US Submission ¶ 6.

[72] Statement of Reply ¶ 194; *see also, e.g., id.* ¶¶ 148, 182.

[73] Gramercy Letter to Peru, 5 August 2016 (Doc. R-59).

[74] *See, e.g.*, Statement of Defense ¶¶ 182-183.

[75] *See infra* Section III.B.2.

removes from consideration any alleged Treaty breach prior to 10 August 2013. In any event, even Gramercy's proposed cut-off date of 5 August 2013 is fatal to its claims.

58. *Second*, Gramercy attempts to minimize its own prior reliance on the July 2013 decision as the foundation for its claims. As with waiver, Gramercy's position in this regard has changed over time.[76] Initially, Gramercy alleged that Peru "does not intend to honor its obligation to pay the updated value of the Land Bonds," and that these "intentions became apparent on July 16, 2013, the date the Constitutional Tribunal issued the 2013 CT Decision."[77] Communications with Peru prior to the arbitration reinforced that Gramercy viewed 16 July 2013 as the determinative date for prescription.[78] Later, Gramercy reiterated that it "first acquired constructive or actual knowledge of Peru's breaches on or after July 16, 2013, the date of the 2013 CT Order."[79] Gramercy now contends that, "[w]hile the word 'on' might have been an infelicitous choice of language in the circumstances, Gramercy should not be held hostage to it."[80] In fact, Gramercy's "infelicitous" statements are more credible than its later contorted formulations transparently aimed at avoiding the consequences of having failed to submit a claim to arbitration in accordance with Article 10.18.1.[81]

59. *Third*, Gramercy emphasizes that the "determinative factor" is when it knew or should have known of the Treaty breach alleged, and resulting alleged loss or damage.[82] A mere "suspicion that something bad may happen," Gramercy states, "does not suffice to trigger the three-year window."[83] Peru has not suggested otherwise. As Peru previously demonstrated, however, "the limitation clause *does not require full or precise knowledge* of the loss or damage," and instead "is triggered by the *first appreciation* that loss or damage will be (or has been) incurred" – this "starts the limitation clock ticking."[84] In *Rusoro v.*

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[76] *See* Statement of Defense ¶ 184.

[77] Gramercy's Notice of Intent to Commence Arbitration Under the United States-Peru Trade Promotion Agreement dated 1 February 2016 ¶¶ 24-25; *see also* Amended Notice of Intent to Commence Arbitration Under the United States-Peru Trade Promotion Agreement dated 15 April 2016 ¶¶ 24-25 (same).

[78] *See, e.g.*, Letter from Gramercy to Peru, 17 May 2016 (R-64) (stating that "time [was] running out" to file its claim, and in particular with respect to the fact that "Gramercy's claim includes allegations concerning the Constitutional Tribunal's July 2013 decision"); Letter from Gramercy to Peru, 1 June 2016 (R-56) (stating, the day before Gramercy filed the Notice of Arbitration, that "it appears that time has run out," and "Gramercy cannot wait any longer").

[79] Notice of Arbitration and Statement of Claim dated 2 June 2016 ¶ 233(c); *see also* Amended Notice of Arbitration and Statement of Claim dated 18 July 2016 ¶ 233(c) (same).

[80] Statement of Reply ¶ 183.

[81] *See, e.g.*, Second Amended Notice of Arbitration and Statement of Claim dated 5 August 2016 ¶ 233(c) ("[T]hough Gramercy acquired knowledge of the 2013 CT Order's existence on July 16, 2013, it did not acquire constructive or actual knowledge of Peru's breaches until after August 5, 2013"); *see also* Third Amended Notice of Arbitration and Statement of Claim dated 13 July 2018 ¶ 233(c) (same).

[82] Statement of Reply ¶ 176.

[83] Statement of Reply ¶ 178.

[84] *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 ¶ 213 (emphasis added); *see also id.* (confirming that its articulation of the prescription standard is in accord with "the approach adopted in *Mondev*, *Grand River*, *Clayton* and *Corona Materials*); *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (RA-144) ¶ 194 ("[I]n order for the limitation period to begin to run, it is not necessary that a claimant be in a position to fully particularize its legal claims (in that they can be subsequently elaborated with more specificity); nor must the amount of loss or damage suffered be precisely determined."); Statement of Defense ¶ 187.

Venezuela, for example, the tribunal held that it was enough to show "*simple knowledge that loss or damage has been caused*, even if the extent and quantification are still unclear," and found it satisfied where the claimant sent a letter in which it made a general reference to "harm" but made no attempt to articulate the extent of harm.[85] The United States agrees that "a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date."[86]

60. Gramercy's own witnesses and documents confirm that its "first appreciation" of alleged loss or damage from an alleged breach occurred on the same day that the Constitutional Tribunal issued its 16 July 2013 decision.

- *Gramercy closely monitored the case*. Gramercy "closely followed events in and affecting Peru."[87] It "followed the proceedings" before the Constitutional Tribunal, and was "confident that [the Court] would . . . order the Government to pay the Land Bonds using CPI."[88]

- *Gramercy analyzed the decision the same day*. Gramercy performed same-day assessments on 16 July 2013, including a series of emails that criticized the ruling as a "surprise," "nonsense," and "different from what we expected."[89]

- *Gramercy understood all key elements.* Per the decision's plain language, Gramercy understood, among other things, that the Bonds would be valued using dollarization (not CPI) since the date of the last clipped coupon, and paid through a process developed under the legal framework set forth in the order (including, among other things, priorities of payment for categories of bondholders).[90]

- *Gramercy appreciated its alleged loss or damage*. Gramercy "expect[ed] [the Court's decision] to represent a significant haircut,"[91] and told the press the next day that the decision "gave the government 'huge wiggle room' to make a

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[85] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 ¶¶ 216-217 (RA-147) (emphasis added).

[86] US Submission ¶ 8.

[87] Joannou ¶ 17.

[88] Second Amended Koenigsberger (CWS-3) ¶ 50.

[89] *See, e.g.*, Email from R. Koenigsberger to J. Cerritelli, 16 July 2013 (Doc. CE-544 ("Where did they come up with this nonsense? OU language in press over weekend seem to indicate that they fully appreciated the time value (need to index to cpi) issues . . . ."); Email from J. Cerritelli to R. Koenigsberger, 16 July 2013 (Doc. CE-544) ("The resolution is different from what we expected."); *see also* Reply Koenigsberger (CWS-4) ¶ 17 (confirming that "the 2013 CT Order was a big surprise").

[90] *See, e.g.*, Email from J. Cerritelli to R. Koenigsberger, 16 July 2013 (Doc. CE-544) ("The resolution is different from what we expected. It's not in soles indexed to the CPI, but it's converted into dollars at some parity exchange rate with interests."); *see also* Email from J. Cerritelli to R. Koenisberger, 17 July 2013 (Doc. CE-545) ("The resolution gives the government 6 months to formulate and unveil a program to settle the agrarian bonds. And sets a tenor of 8 years to pay the debt in full. The resolution provides some guidelines for the government to calculate the value of the bonds, when it unveils a settlement offer. Regarding to the original principal of the bonds the Tribunal directed the government to convert it into U.S. dollars at the exchange rate of the date when the bonds went into default, and to bring those dollars into today's dollars by accruing historical U.S. treasury interest rates.").

[91] Email from J. Cerritelli to R. Koenigsberger, 16 July 2013 (Doc. CE-544 ("It's not in soles indexed to the CPI, but it's converted into dollars at some parity exchange rate with interests. I would expect it to represent a significant haircut, but until we don't [sic] run the numbers I can't say for sure if it's a 50% haircut more or less.")

> smaller payment than [it] had expected."[92] That same day, an expert for a Gramercy-affiliated bondholder organization stated that "creditors might try to sue Peru in a foreign or international court."[93] Later, after a PwC audit inquiry, a Gramercy official elaborated that "wiggle room" meant "wiggle room for the government to try to impose a confiscatory settlement" – and further noted in the same email that the Treaty "protect[s] us from the possibility of indirect confiscation."[94]

61. Accordingly, the July 2013 Constitutional Tribunal decision did not simply trigger a vague and unsubstantiated "suspicion that something bad may happen," as Gramercy implies.[95] Rather, as Professor Reisman concludes:

> Gramercy's own contemporaneous internal correspondence and public statements confirm that Gramercy had assessed key elements of the July 16, 2013 Constitutional Tribunal decision on the same day that the decision was issued – and understood as early as that date that the decision set the parameters for the administrative bondholder process to follow, and would result in payment significantly lower than Gramercy had projected.[96]

62. Fundamentally, as Gramercy understood at the time, the July 2013 decision set key elements of the legal framework, and laid the foundation for other measures to follow, with respect to the valuation and payment of the Bonds. Gramercy also appreciated that, under the framework established by the decision and implementing measures, it would sustain loss or damage, insofar as payment would be a "significant" or even "confiscatory" departure from how Gramercy had valued the Bonds. Accordingly, Gramercy had acquired the requisite level of knowledge as of 16 July 2013 to "start[] the limitation clock ticking."[97]

63. *Fourth*, Gramercy argues that it could not have foreseen all implementing measures that followed the July 2013 decision – the "devil [would be] in the details"[98] – and attempts to parse various later measures in respect of individual claims, with emphasis on the 2014 Supreme Decrees.[99] In fact, however, in a letter to Peru in late 2013, before issuance of any of the Supreme Decrees, Gramercy advised that it had "analyzed our rights with respect to the Land Reform Bonds under Peruvian law, the [Treaty], and the applicable principles of international law, and we believe that we have a legal right to the payment of a cash amount equivalent to the total value of" more than US$ 1.1 billion.[100] Gramercy also expressly

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[92] Reuters, *Peru's land-reform debt payout could be minimal, bondholders say*, 17 July 2013 (R-398) ("Jose Cerritelli, an economist with Connecticut-based hedge fund Gramercy, which owns some of the bonds, said the court gave the government 'huge wiggle room' to make a smaller payment than he had expected.").

[93] Reuters, *Peru's land-reform debt payout could be minimal, bondholders say*, 17 July 2013 (R-398).

[94] Email from J. Cerritelli to R. Joannou, 9 October 2013 (Doc. CE-546).

[95] *See* Statement of Reply ¶ 178.

[96] Reisman II ¶ 46.

[97] *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (RA-150) ¶ 213.

[98] *See, e.g.*, Koenigsberger Reply ¶ 17 (quoting Doc. CE-545).

[99] *See, e.g.*, Statement of Reply ¶¶ 188-197.

[100] Gramercy Letter to President of the Council of Ministers, 31 December 2013 (Doc. CE-185) at 2.

"reserve[d] all our rights under the TPA [and] international law."[101] This contemporaneous 2013 representation belies Gramercy claim here that it could not have been aware of any Treaty breach or alleged damage until issuance of the Supreme Decrees in 2014.[102]

64. In any event, the foreseeability (or not) of subsequent measures that implemented the July 2013 decision is beside the point. As the United States confirms, "*subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period . . . . To allow otherwise would permit an investor to evade the limitations period* by basing its claim on the most recent transgression in that series, rendering the limitations provisions ineffective."[103] Gramercy itself argues that the alleged Treaty "breach arises from Peru's scheme *starting in 2013* and 2014 to extinguish the Land Bonds, without actually paying current value";[104] that "the other measures [are] premised on the 2013 CT Order";[105] that "the 2013 CT Order and the 2013 Resolutions are predicates to the 2014 Supreme Decrees";[106] and that Peru's "creation of the Bondholder Process can also be analyzed as a composite act."[107]

65. Thus, under Gramercy's own theory of the case, Peru's breach of multiple Treaty provisions arises from a continuing course of conduct – beginning with the July 2013 decision, the initial alleged breach on which all subsequent alleged breaches are founded. Gramercy cannot evade the Treaty's limitations period by separating out and selectively emphasizing only the later measures. Professor Reisman confirms:

> The July 16 Constitutional Tribunal decision thus laid the essential foundation for all subsequent measures alleged to constitute a Treaty breach; without that decision, no other measure would have followed. Gramercy's knowledge of that foundational alleged breach and alleged damages on July 16, 2013 is fatal to its claims *ratione temporis*, which I understand Gramercy contends were submitted to arbitration no later than August 5, 2016.[108]

66. Indeed, although no further examination is needed, Gramercy actually did not submit its claims to arbitration any earlier than 10 August 2016, as detailed below in connection with Gramercy's flawed waivers. As part of its efforts to downplay the July 2013 cut-off, Gramercy states that it was "confused by the 2013 CT Order," and that various

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[101] Gramercy Letter to President of the Council of Ministers, 31 December 2013 (Doc. CE-185) at 2 ("Naturally, you will understand that we must reserve all our rights under the TPA, international law and Peruvian legislation, and that we are presenting this letter without prejudice to any of those rights.").

[102] *See, e.g.*, Statement of Reply ¶ 189.

[103] US Submission ¶ 6 (emphasis added); *see also, e.g.*, *Berkowitz v. Costa Rica* (RA-150) ¶ 208 ("While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this *would effectively denude the limitation clause* of its essential purpose, namely, to draw a line under the prosecution of historic claims. Such an approach would also *encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period*.") (emphasis added).

[104] Statement of Reply ¶ 205 (emphasis added).

[105] Statement of Reply ¶ 197.

[106] Statement of Reply ¶ 187.

[107] Statement of Reply ¶ 195.

[108] Reisman II ¶ 46.

parties filed requests for clarification with the Constitutional Tribunal.[109] The Gramercy-affiliated organization ABDA was among the parties to file.[110] The Constitutional Tribunal then issued a Resolution on 8 August 2013 in which it reaffirmed the July decision, and also clarified that the Bondholder Procedure would be mandatory and exclusive to all other payment mechanisms.[111] Accordingly, by 8 August 2013, Gramercy knew with even greater certainty that the key elements of the July 2013 decision, with the corresponding alleged loss or damage, would stand – and that there were no other options. Because that, too, occurred more than three years before Gramercy submitted the claims to arbitration, it reinforces Gramercy's failure to establish jurisdiction under Article 10.18.1.

2. Gramercy's Own Evidence Confirms That It Did Not Timely Satisfy The Treaty's Waiver Requirement

67. Peru previously established that the Article 10.18.2 requirement to waive local proceedings is comprised of a formal component (submission of a written waiver) and a material component (abstaining from continuing or initiating proceedings), as confirmed by the Contracting Parties' agreement in *Renco v. Peru* and a consistent line of tribunal decisions applying similar waiver provisions.[112] The United States reaffirms that "[a]n effective waiver is [] a precondition to the Parties' consent to arbitrate claims, and accordingly a tribunal's jurisdiction"; that "[c]ompliance with Article 10.18.2(b) entails both formal and material requirements"; and that, "[i]f all formal and material requirements . . . are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration or the tribunal's jurisdiction."[113]

68. Gramercy contends that its faulty initial written waiver – which Gramercy itself unilaterally amended in view of its inadequacy – was not faulty. Gramercy also offers, for the first time, evidence of its alleged material waiver in the form of documents filed in local Peruvian proceedings. Gramercy fails to carry its burden of proving compliance with the waiver requirements, let alone in the manner and at the time Gramercy now claims.

a. Gramercy Cannot Salvage Its Invalid Formal Waiver

69. Peru demonstrated that Gramercy made the same fundamental mistake as the claimant in *Renco*: it first provided a qualified waiver that purported to reserve its rights as to claims in other fora if its Treaty claims were dismissed on jurisdictional or admissibility grounds.[114] The *Renco* case, the first and only other arbitration under the Treaty to date, was

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[109] *See, e.g.*, Koenigsberger Reply ¶ 19.

[110] *See, e.g.*, Koenigsberger Reply ¶ 19.

[111] Constitutional Tribunal Resolution, 8 August 2013 (RA-261).

[112] Statement of Defense ¶¶ 170-172.

[113] US Submission ¶¶ 10, 13, 17. Gramercy "agrees with Peru that tribunals have interpreted this and similar language to require both a formal written waiver and a material waiver," but briefly questions (in half a sentence) whether the material requirement has a basis in the Treaty. *See* Statement of Reply ¶ 150. Gramercy does not seriously contend that there is no material waiver requirement because that would be contrary to the considerable weight of authority, including the Contracting Parties' agreement.

[114] Statement of Defense ¶ 174.

dismissed on precisely that basis.[115] In its Submission, the United States reaffirms that the formal waiver "must be in writing and '*clear, explicit and categorical*,'" and "must relinquish *any* right to initiate or continue any action with respect to measures challenged in the arbitration," subject to an injunctive relief exception not applicable here.[116]

70. Gramercy cannot deny that Claimant GPH initially presented a qualified waiver with its 2 June 2016 Statement of Claim, followed later by unqualified waivers beginning with its 18 July 2016 Amended Statement of Claim (filed just three days after the *Renco* decision).[117] Instead, contrary to the well-reasoned *Renco* ruling and the Contracting Parties' agreement, Gramercy asks that the Tribunal "consider the issue anew" and permit Gramercy's initial faulty waiver to stand.[118] There is no basis to do so.

71. *First*, Gramercy contends that the waiver provision "should not be interpreted in an overly formalistic or technical manner."[119] In fact, like all Treaty provisions, Article 10.18.2 must be interpreted in accordance with the ordinary meaning of the terms in context, including the Contracting Parties' subsequent agreement.[120] The Treaty expressly requires a written waiver "of *any* right to initiate or continue . . . *any* [local] proceeding."[121] As the Contracting Parties and other authorities have consistently confirmed, the ordinary meaning of this plain language is "categorical" and not subject to any carve-out.[122] There is nothing "overly formalistic or technical" about this; it is a fundamental precondition to the existence of a valid arbitration agreement and Peru's consent to arbitrate.[123] Moreover, as

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[115] *See The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (RA-21) ¶ 193(a) ("Renco has failed to comply with the formal requirement of Article 10.18(2)(b) by including the reservation of rights in the waiver accompanying its Amended Notice of Arbitration because: (i) The reservation of rights is not permitted by the express terms of Article 10.18(2)(b); (ii) The reservation of rights undermines the object and purpose of Article 10.18(2)(b); (iii) The reservation of rights is incompatible with the 'no U-turn' structure of Article 10.18(2)(b); and (iv) The reservation of rights is not superfluous.").

[116] US Submission ¶ 12 (quoting *Renco v. Peru*, Partial Award (RA-21) ¶ 74) (emphasis added); *see also Renco* ¶ 95 ("[T]his language must be interpreted to require an investor definitively and irrevocably to waive all rights to pursue claims before a domestic court or tribunal.").

[117] *See also* Letter from Gramercy to Peru dated 5 August 2016 (Doc. R-59) ("We also have taken note that the tribunal in *Renco Group Inc. v. Republic of Peru* recently issued an award . . . addressing certain aspects of the Treaty's waiver requirement.").

[118] Statement of Reply ¶ 154.

[119] Statement of Reply ¶ 155.

[120] Vienna Convention, Arts. 31(1), 31(3).

[121] Treaty, Art. 10.18.2 (emphasis added).

[122] Statement of Defense ¶¶ 170-171; US Submission ¶ 12; *see also Renco v. Peru*, Partial Award (RA-21) ¶ 75 (observing that "tribunals . . . have repeatedly held that a waiver is invalid if an investor purports to carve out from its scope certain domestic court proceedings").

[123] The *Thunderbird* award, on which Gramercy relies, does not support a different interpretation. *See* Statement of Reply ¶ 155. It was squarely addressed, and correctly rejected, by the *Renco* tribunal in the same context. *Renco v. Peru*, Partial Award (RA-21) ¶ 143 ("A further comment may be appropriate here as to the concern expressed in *Thunderbird* that 'overly formalistic' or 'excessively technical' approaches should be avoided. This is obviously of no assistance here, given . . . the specific requirements of Article 10.18(2) of the Treaty. Further, the tribunal in *Thunderbird* cannot be taken to have laid down a general proposition that *formal* defects in a waiver can never invalidate a submission to arbitration, or can always be remedied at a later stage. The decision in that case seems to have turned upon the highly technical and insignificant nature of the defect that was in issue . . . .").

Gramercy is aware, the waiver is one of several requirements that determine when a claim is submitted to arbitration, with corresponding statute-of-limitations consequences.[124]

72. *Second*, Gramercy argues that its qualified waiver is consistent with the waiver provision's purpose of preventing parallel proceedings, and that requiring it to "irrevocably waive" the ability to bring claims elsewhere, even where the Tribunal denies jurisdiction, would be "highly prejudicial" to Gramercy.[125] This ignores the basic purpose and function of the waiver provision. The United States confirms that, as a "no U-turn waiver," Article 10.18.2 "permits claimants to elect to pursue any proceeding (including in domestic court) without relinquishing their right to assert a subsequent claim through arbitration under the [Treaty]" – *unless and until* a party elects to submit a Treaty claim, at which point it "must submit an effective waiver" of all other claims.[126] The *Renco* tribunal likewise held that Article 10.18.2 "is intended to provide flexibility, by allowing recourse to other fora up to a point, and certainty, by prohibiting any such recourse thereafter."[127]

73. Gramercy thus had unfettered freedom to pursue any claims in any fora of its choosing – until it chose to avail itself of the Treaty dispute mechanism and the mandatory preconditions associated with that choice. Gramercy's qualified waiver "purports to reserve [its] right to initiate subsequent proceedings in a domestic court and perform the very 'U-turn' which Article 10.18(2)(b) is designed to prohibit."[128] Upholding the ordinary meaning of the plainly worded waiver provision, as the Contracting Parties agree must be done, cannot constitute prejudice to Gramercy. On the other hand, allowing Gramercy to circumvent the requirements of Article 10.18.2 with a qualified waiver would be highly prejudicial to Peru.

74. *Finally*, Gramercy contends that, because GFM's waiver did not contain the same reservation of rights, "there is no dispute between the Parties with respect to GFM's June 2, 2016 waiver."[129] The fact that GFM submitted an unqualified waiver only reinforces that Gramercy understood what the Treaty requires. It is otherwise irrelevant. Even if GFM's written waiver were valid, it could not cure the defects in GPH's. And, as detailed below, GFM is even further removed from meeting the Treaty requirements for an "investor," such that the Tribunal could not exercise jurisdiction over its claims in any event.[130]

75. Accordingly, Gramercy's belated efforts to breathe new life into its faulty waiver of 2 June 2016 must be rejected.

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[124] *See, e.g.*, US Submission ¶ 11 ("The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Article 10.18.1, assuming all other relevant procedural requirements have been satisfied.").

[125] Statement of Reply ¶¶ 155, 157-158.

[126] US Submission ¶ 11.

[127] *Renco v. Peru*, Partial Award (RA-21) ¶ 96.

[128] *Renco v. Peru*, Partial Award (RA-21) ¶ 96.

[129] Statement of Reply ¶¶ 156-157; *see also id.* ¶ 166.

[130] *See infra* Section III.C.

b. Gramercy's Previously Withheld Documents Rebut Its Prior Representations As To A Material Waiver

76. Even assuming that Gramercy satisfied the formal requirement with the amended 18 July 2016 written waiver, Gramercy still did not meet the material waiver requirement until 10 August 2016 at the earliest. Gramercy's claims to have met the waiver requirement earlier are rebutted by the Peruvian court documents which it submitted for the first time with its Reply.

77. *First*, Gramercy states that "Peru misleadingly implies" that Gramercy may still be a participant in certain Peruvian proceedings.[131] In fact, on the basis of information available at the time, Peru did identify one case, as an example, in which courts records still identified Gramercy as a party.[132] Peru also demonstrated that Gramercy had given dramatically inconsistent explanations over time as to its participation in Peruvian proceedings, and failed to provide any concrete evidence of its withdrawal from any of them.[133] Gramercy, not Peru, has been misleading here. Gramercy responds that, "[a]lthough Peru seems to question whether GPH really did withdraw, it has no basis to doubt Mr. Koenigsberger's testimony to this effect."[134] This is the same witness who first testified that "Gramercy became a party to *hundreds* of legal proceedings in Peru,"[135] and then, in an amended statement weeks later, testified that Gramercy participated in "*seven* of those local proceedings."[136] Mr. Koenigsberger thus provided ample reason to question the accuracy of his statement. Gramercy acknowledges that this divergent testimony was "imprecise."[137]

78. *Second*, Gramercy blandly states that "[t]he withdrawal petitions are now in the record"[138] – which is to say that, for the first time, Gramercy produced with its Reply a few select documents filed three years ago in Peruvian courts. Indeed, Peru previously highlighted that Gramercy had compounded the uncertainty by withholding all documentary evidence of its involvement in, or alleged withdrawal from, Peruvian proceedings. Gramercy now suggests that newly-submitted withdrawal petitions from seven court proceedings show that it satisfied the material waiver requirement by 5 August 2016, when Gramercy had "tak[en] all steps within its power to discontinue the proceedings."[139] Gramercy's unilateral submission of petitions reflecting an intent to withdraw, however, is not enough.

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[131] Statement of Reply ¶ 172.

[132] Statement of Defense ¶ 176; *see also* Record No. 00258-1080-0-1706-JR-CI-01 in First Civil Court of Lambayeque, Resolution No. 92, 22 December 2017 (Doc. R-539).

[133] Statement of Defense ¶¶ 175-177.

[134] Statement of Reply ¶ 172.

[135] Witness Statement of Robert S. Koenigsberger dated 2 June 2016 ¶ 42 (emphasis added); *see also* Notice of Arbitration and Statement of Claim dated 2 June 2016 ¶ 136 ("Gramercy is a party to hundreds of legal proceedings in Peru."); Amended Notice of Arbitration and Statement of Claim dated 18 July 2016 ¶ 136 (same).

[136] Amended Witness Statement of Robert S. Koenigsberger dated 5 August 2016 ¶ 42 (emphasis added); *see also* Second Amended Notice of Notice of Arbitration and Statement of Claim dated 5 August 2016 ¶ 136 (stating that, "after investing, GPH became eligible to apply to become a party to" hundreds of proceedings, but instead only "initiated applications in seven of these Peruvian local proceedings").

[137] Statement of Reply ¶ 169.

[138] Statement of Reply ¶ 172.

[139] Statement of Reply ¶ 172; *see also* Doc. CE-600 through Doc. CE-606.

79. As the United States emphasizes, the Treaty requires an effective waiver of local proceedings, and not merely a show of intent to do so: "*such an abdication of rights ought to have been made effective as from the date of submission of the waiver*."[140] Likewise, "a waiver must be more than just words; *it must accomplish its intended effect*."[141] Gramercy's withdrawal could not take the intended legal effect, and thus satisfy the Treaty's waiver requirement, until the Peruvian courts entered orders to grant the petitions. While those petitions remained pending, Gramercy could still exercise all rights as a party – and could even revoke its withdrawal petitions and move forward with the cases.[142]

80. Accordingly, Gramercy's newly-submitted documents show that it could *not* have satisfied the material waiver requirement by 5 August 2016, as it claims. Of seven court orders submitted, two are dated 8 August 2016, two are dated 9 August 2016, and three are dated 10 August 2016.[143] Until the issuance of each such order giving legal effect to the withdrawal petition, Gramercy had not yet withdrawn as a matter of law. Thus, *even assuming, after multiple shifting accounts, that Gramercy's new exhibits reflect the full extent of its withdrawal from Peruvian proceedings*, Gramercy could not have concluded an effective Treaty waiver any earlier than the date of the last court order – *i.e.*, 10 August 2016.

81. *Third*, alternatively, Gramercy contends that the Peruvian proceedings are not actually subject to the Treaty's waiver requirement, and that its alleged withdrawal was merely "to avoid further distraction on this issue."[144] According to Gramercy, the proceedings are not "with respect to any measure alleged to constitute a [Treaty] breach," as Article 10.18.2 provides, because they predate the particular measures that Gramercy alleges give rise to its Treaty claim. Gramercy's claim to have renounced its rights in Peruvian proceedings simply to avoid a "distraction" is not credible on its face, and belies Gramercy's understanding that a failure to waive those local proceedings would be fatal to jurisdiction in this arbitration. In any event, Gramercy has again misread the Treaty.

82. In its Submission, the United States confirms that "[t]he phrase 'with respect to' *should be interpreted broadly*."[145] As it elaborates, "[t]his construction of the phrase is consistent with the purpose of this waiver provision: to avoid the need for a respondent State

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[140] US Submission ¶ 13 (quoting *Waste Management I* ¶ 24) (emphasis by the United States).

[141] US Submission ¶ 14 (quoting *Commerce Group* (RA-113) ¶ 80) (emphasis added).

[142] *See, e.g.*, Code of Civil Procedure, Art. 341 ("The *withdrawal is not presumed*. The document that contains it must specify its content and scope, legalizing its signature before the respective Secretary.") (emphasis added) (RA-343); Juan Monroy Galvez, Withdrawal Concept, 1988, at 85 (confirming that a request for withdrawal "is not sufficient" and that the "judicial declaration of withdrawal requires compliance with certain requirements") (RA-344); Marianella Ledesma Narvaez, Commons on the Code of Civil Procedure, 2008, at 342 ("Our Procedural Code maintains that since the withdrawal is a legal act that tends to extinguish rights, it operates as of approval by the judge.") (RA-345); Germán Aparicio y Gomez Sánchez, Code of Civil Procedures: Glosses and Background, Statement of Reasons, Jurisprudence, Second Edition, 1949, at 324, 327 ("The withdrawal of the trial is declared by the judge of the case. . . . *While the withdrawal is not declared, the party that formulated it may retract it, because it has no legal effect, even if a written document is signed as long as it is not judicially accepted*.") (emphasis added) (RA-346); Remigio Pino Carpio, Notions of Procedural Law and Comments on the Code of Civil Procedure, 1961, at 544 ("Can a withdrawal be withdrawn? . . . If the withdrawal has not yet been resolved, what is appropriate is to remove it. If it has already been, but the resolution has not been notified to the opposite party, the new withdrawal or withdrawal is appropriate.") (RA-347).

[143] *See* Doc. CE-741 through Doc. CE-747.

[144] Statement of Reply ¶¶ 170, 172.

[145] US Submission ¶ 15 (emphasis added).

to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of conflicting outcomes (and thus legal uncertainty)."[146] The United States also highlights the decision in *Commerce Group v. El Salvador*, where the tribunal held that the treaty waiver applied to parallel local proceedings that did not involve "separate and distinct claims," but rather raised matters which were "part and parcel" of the treaty claim and could not be "teased apart."[147]

83. Gramercy's claims in Peruvian courts concerned its "request for updating and payment of the Agrarian Land Reform Bonds," as its withdrawal petitions state.[148] In other words, Gramercy sought through the local proceedings to receive an updated valuation of, and payment on, Bonds. Fundamentally, Gramercy's claims in this Treaty proceeding arise from the same longstanding dispute over valuation and payment of the Bonds, concern many of the same measures, and seek the same relief.[149] Indeed, Gramercy could not have proceeded with its Bond valuation and payment claims in Peruvian courts without raising a legitimate risk of double recovery and conflicting outcomes in relation to its claims in this Treaty proceeding. Accordingly, waiver of the Peruvian proceedings was necessary – as, ultimately, Gramercy's own efforts to withdraw its local claims confirm.

84. Gramercy's contention that "each of GPH and GFM had submitted formally and materially valid waivers" on 2 June 2016, 18 July 2016, and in any event no later than 5 August 2016,[150] does not withstand scrutiny. Gramercy's efforts to rewrite the Treaty's waiver requirement are repudiated by the plain text and purpose of Article 10.18.2, the Contracting Parties' agreement on interpretation, and other prevailing authorities. In fact, on its own limited evidence, Gramercy could not meet both the formal and material requirements of the Treaty – at best, if at all – any earlier than 10 August 2016. That is the earliest possible date on which Gramercy's claims could be deemed submitted to arbitration, with attendant consequences under the Treaty's prescription period,[151] as addressed above.

C. Gramercy Fails To Prove That It Is An Investor Under The Treaty

85. Even if Gramercy's entire alleged investment did not constitute an abuse of the Treaty, and even if Gramercy had complied with the Treaty's mandatory preconditions to arbitration – neither is the case – the Tribunal *still* would not have jurisdiction because Gramercy is not an "investor" and did not make an "investment" under the Treaty.

86. Peru demonstrated that the Treaty ties the requirements of an investor to the existence of a covered investment: Article 10.28 defines an "investor" as "a national or an

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[146] US Submission ¶ 15 (quotation omitted).

[147] *Commerce Group v. El Salvador* (RA-113) ¶¶ 111-112; *see also* US Submission ¶ 15 (quoting same).

[148] *See, e.g.*, Doc. CE-600.

[149] *See, e.g.*, Third Amended Notice of Arbitration and Statement of Claim ¶ 262(b) (requesting order for Peru "to pay Gramercy the value of the Land Bonds that is the contemporary equivalent of the Bonds' value at the time they were issued").

[150] Statement of Reply ¶ 173.

[151] *See, e.g.*, US Submission ¶ 11 ("The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Article 18.18.1, assuming all other relevant procedural requirements have been satisfied."); *Renco v. Peru*, Partial Award (RA-21) (confirming that waiver requirement "is a precondition to the initial existence of a valid arbitration agreement, and as such leads to a clear timing issue").

enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party."[152] Thus, based on the fact alone that the Bonds are not an "investment," as reaffirmed below,[153] neither Claimant can be an "investor."

87. Peru also established that, even assuming that the Bonds were an "investment," Gramercy did not meet its burden of proof as to the "investor" requirement because it withheld significant evidence related to its alleged acquisitions.[154] Relying on conclusory allegations and the uncorroborated testimony of one witness, Gramercy failed to substantiate that it actually "made" an investment in Peru, as the Treaty requires. Gramercy's withheld evidence concerned, *inter alia*, the Bond purchase contracts; payment by Gramercy for Bonds in Peru; authentication of the Bonds; Gramercy's structures for acquiring, holding, and controlling the Bonds; and alleged third-party beneficial owners.[155] As Professor Reisman concluded in his First Opinion, "Gramercy has not provided relevant information and evidence that would be needed to substantiate its allegations as to the apparent acquisition of Bonds" – and, in fact, "Gramercy's own allegations raise a number of questions as to the precise nature of the transactions and parties involved."[156]

88. Gramercy's suggestion that it previously had "provided both testimonial and documentary evidence of its purchases, which Peru has not challenged,"[157] is baseless. Indeed, following Gramercy's superficial treatment of jurisdiction issues in its multiple amended Statements of Claim, along with its limited production and significant redaction of documents during document production, questions still remain as to the precise nature of its alleged Bond transactions. In the Reply, as throughout the proceeding, Gramercy insists that these are "matters that are [] irrelevant to the jurisdictional question," and that there is "nothing abusive or worrisome about the fact that sophisticated corporate investors, including Gramercy, structure their investments in a variety of ways."[158] To the contrary, even on the basis of the bare showing that Gramercy has made, it increasingly emerges that Peru's longstanding objections are well-founded; that they concern issues highly relevant to jurisdiction; and that Gramercy is not an investor that made an investment under the Treaty.

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[152] Statement of Defense ¶ 212; Reisman I ¶ 63; *see also* Reisman II ¶¶ 26, 40.

[153] *See infra* Section III.D.

[154] Statement of Defense ¶ 214; Reisman I ¶¶ 64-67 (addressing Gramercy's inadequate showing on the "investor" requirement and concluding that "Claimants still have to prove that they have made the alleged investment, i.e., acquired the Bonds complying with all of the formalities involved. This they have not done").

[155] *See, e.g.*, Statement of Defense ¶¶ 5, 214; Reisman I ¶ 66.

[156] Reisman I ¶ 67.

[157] Statement of Reply ¶ 25.

[158] Statement of Reply ¶ ¶15, 27; *see also, e.g.*, Procedural Order No. 6, Annex B, at 1 (Request 1) (Gramercy objecting to Peru's request for contracts and other closing documents on the basis that they "are neither relevant nor material"); *id.* at 6 (Request 2) (Gramercy objecting to Peru's request for documents demonstrating payment for Bonds on the basis that they "are neither relevant nor material"); *id.* at 22 (Request 7) (Gramercy objecting to Peru's request for documents regarding its alleged ownership and control of Bonds, including funds in which Bonds are held, on the basis that they "are neither relevant nor material").

1. Gramercy's Superficial Claims Based On Title And Inherited Control Do Not Satisfy Treaty Requirements

89. Gramercy claims that, for it to be a covered investor, it need only show that GPH "owns" the Bonds and that GFM "controls" them through its management of GPH.[159] This oversimplifies the Treaty's requirements – and, indeed, relies on the wrong Treaty provision for support. While the definition of *investment* under Article 10.28 refers to an "asset that an investor owns or controls, directly or indirectly," the definition of *investor* (which Gramercy mentions once in passing) requires that a party "attempts through concrete action to make, is making, or has made an investment." The specification of "concrete action," even with respect to an attempt, underscores that one must actively "make" an investment through tangible measures to qualify as a Treaty investor. As a point of comparison, the US Model BIT, on which Gramercy repeatedly relies,[160] does *not* require "concrete action" – reinforcing the importance that the Contracting Parties placed on the requirement to actively "make" an investment under this Treaty.[161]

90. Even setting aside the particular language of the Treaty, it is well-established as a matter of international law that a party's mere nominal ownership or control of an investment does not alone confer "investor" status. More is required. As tribunals repeatedly have ruled – including under treaties where the definition of "investor" requires only that a party possess the appropriate nationality – a claimant must make its own active contribution in order to qualify as a protected investor.

91. In *KT Asia Investment v. Kazakhstan*, for example, the tribunal ruled that a claimant holding undisputed title to shares "must itself have made a contribution," and cannot "benefit from a contribution made by someone else, here [the] ultimate beneficial owner."[162] In *Alapli v. Turkey*, where the claimant shareholder served as a "conduit" for capital contributions from third parties, dismissal of the claims turned, in part, on the conclusion that, "to be an investor a person must actually make an investment, in the sense of an *active contribution*."[163] In *Clorox v. Venezuela*, where the claimant became the sole controlling shareholder in a local company by virtue of a parent entity's contributions, the tribunal denied jurisdiction because the claimant had not made its own "action of investing."[164] Many other tribunals have affirmed that a claimant must actively make an investment on its own behalf, and cannot rely on an ownership or control interest acquired through the contributions of

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[159] *See, e.g.*, Statement of Reply ¶¶ 16, 19.

[160] *See, e.g.*, Statement of Reply ¶¶ 47, 52, 116.

[161] *See* 2012 U.S. Model BIT, Art. 1; 2004 U.S. Model BIT, Art. 1.

[162] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 ¶ 192 (RA-317); *see also id.* ¶ 206 (denying jurisdiction because the claimant "has made no contribution with respect to its alleged investment").

[163] *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012 ¶ 350 (emphasis added) (RA-318); *id.* ¶ 389 ("Neither the ECT nor the Netherlands-Turkey BIT contemplates jurisdiction over a claim brought by an entity which played no meaningful role contributing to the relevant host state project.").

[164] *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019 ¶¶ 816, 834-835; *see also id.* ¶ 834 (concluding that the claimant "has not proven that [it] has contributed or invested in said Clorox Venezuela assets beyond being its sole shareholder due to the effect of an operation that cannot be considered an investment") (unofficial translation by counsel) (RA-319).

others.[165] These holdings apply with even greater force here, given the particular language of the Treaty.

92. Gramercy claims to find support in *Mera v. Serbia* because the claimant in that case was an investment fund, and the tribunal noted that making an investment "comprises more than the funding and acquisition of investments, but as well, the holding and management of investments."[166] In *Mera*, however, it was undisputed that the claimant itself made substantial contributions to an investment vehicle's founding capital, and then actively administered that vehicle as it engaged in local investment projects.[167] Those facts are readily distinguishable from Gramercy's alleged "investment." Further, the issue actually in dispute in *Mera* was whether the claimant, which had changed domiciles, could be considered a national of a Contracting Party at the time it made the investment.[168] That issue has no bearing here whatsoever. Other cases on which Gramercy relies to argue that "legal or factual control suffices for jurisdictional purposes"[169] likewise are entirely irrelevant. Not one even considers, let alone holds, that control is sufficient to confer "investor" status.[170]

93. Accordingly, even assuming for the sake of argument that the Bonds were an "investment" under the Treaty, Gramercy still also must prove that it actively "made" that investment. Gramercy has not met that burden of proof – as to either Claimant – and, indeed, cannot, given the way in which it chose to acquire and hold its alleged Bonds.

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[165] *See, e.g.*, *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012 ¶¶ 221, 225 (noting that "'investment made by' investor" is "a formulation that would connote a more active relationship between investor and investment," and concluding that "the treaty protects investments 'made' by an investor in some active way rather than simple passive ownership") (RA-320); *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 ¶¶ 455-456 (ruling that "formal ownership and nominal control" was not enough, and that "the capital must still be linked to the person purporting to have made an investment") (RA-321); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ¶¶ 232-233 (holding that "mere ownership of a share is, in and of itself, insufficient," and declining jurisdiction in respect of a claimant where there was no evidence of an original or subsequent contribution) (RA-322).

[166] Statement of Reply ¶ 22 (quoting *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018 ¶ 107 (CA-140)).

[167] *See, e.g.*, *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018 ¶¶ 10-11 (CA-140).

[168] *See, e.g.*, *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018 ¶¶ 98-110 (CA-140).

[169] *See* Statement of Reply ¶ 21.

[170] *Thunderbird* concerned whether the claimant had sufficient control over local enterprises in order to bring claims on their behalf. *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (RA-77) ¶¶ 101-110. *Von Pezold* addressed whether the claimants could bring claims in relation to losses suffered by their local companies, or only losses they suffered directly; in any event, jurisdiction did not turn on control because the claimants "ha[d] made a clear contribution both financially and in terms of expertise and time invested in managing the assets." *Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (RA-197) ¶¶ 285, 324-326. *Perenco* concerned whether French individuals indirectly controlled the claimant at the relevant time for it to have standing under the France-Ecuador BIT. *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014 (CA-158) ¶¶ 490, 529-530.

2. Gramercy's Previously Withheld Documents Reveal That Gramercy Securitized Its Alleged Bonds To Sell Outside Of Peru, And Did Not Invest In Peru

94. According to Gramercy's superficial presentation of select facts, GPH purchased and holds title to the Bonds; GFM manages GPH and, by extension, controls the Bonds; Gramercy incurred damages based on its ownership and control of the Bonds; Peru should pay Gramercy nearly US$2 billion in damages; and no further inquiry is warranted. In fact, even the limited evidence available to date tells a far more complex story as to the Gramercy "investment," with significant jurisdictional consequences.

95. ***The whole purpose of Gramercy's "investment" was to repackage Bonds for sale to third parties outside Peru, not to invest in Peru.*** Gramercy's Chief Compliance Officer explains that, "[o]f course, Gramercy set up other entities above [Claimant] GPH in the corporate structure in order to sell investment products to our clients. This is a typical practice for any investment manager like Gramercy."[171]

96. ***Gramercy acquired its alleged Bonds at deep discounts from individual bondholders.*** Gramercy specifically targeted "small less expensive blocs" of Bonds from poorer bondholders.[172] Gramercy concedes for the first time in its Reply that it "purchase[d] the Land Bonds at substantial discounts,"[173] and that the total purchase price for all of its alleged Bonds was only US$33.2 million.[174]

97. ***Gramercy securitized its alleged Bond holdings, selling interests to third parties using "pass-through certificates" in other Gramercy entities.*** For example:

- An internal 2008 "Strategy Update" explains that "[t]he pass-through certificates allow investors to acquire exposure to these claims by purchasing dollar-denominated instruments tradeable on Euroclear."[175]
- Heavily-redacted 2007 and 2008 financial statements for Gramercy Emerging Markets Fund ("GEMF"), a Cayman entity that once [redacted]."[176]

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[171] Lanava ¶ 20.

[172] Gramercy Email 23 May 2008 (Doc. CE-731).

[173] Joannou ¶ 5.

[174] *See, e.g.*, Lanava ¶ 12.

[175] Gramercy Email 23 May 2008 at 4 (CE-731).

[176] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY]; *see also* [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY]. Based on Gramercy's representations, [redacted]. *See, e.g.*, Lanava ¶¶ 21-27; [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

- A 2012 Investment Management Agreement between [redacted] indicates the existence of a "Pass-Through Certificate Agreement" between [redacted]"[177]

98. ***Even before any alleged Bond purchases, Gramercy had transferred risk in the Bonds by selling ownership interests to third parties.*** Asset manager [redacted], for example, states that its funds " [redacted]" on 2 June 2006 – *i.e.*, two weeks before Gramercy's first alleged Bond acquisition on 16 June 2006.[178] According to Gramercy, [redacted] funds beneficially own [redacted]% of the Bonds.[179]

99. ***Gramercy made its alleged Bond purchases using funds from third-party investors.*** Gramercy's Chief Compliance Officer testifies that the money used for Bond purchases originated "[redacted]"[180] – *i.e.*, the same entity in which [redacted] funds (and presumably others) had invested before any Bond purchase ever took place. Gramercy has not produced any documents evidencing the origins of these funds. It stands to reason, on the basis of available evidence, that the funds from [redacted] that Gramercy used to buy the Bonds originated with these third-party investors in [redacted], and that Gramercy did not commit any capital of its own.

100. ***Third-party investors beneficially own over [redacted]% of Gramercy's alleged Bonds.*** Gramercy previously made various imprecise and unsupported statements regarding alleged beneficial owners of the Bonds.[181] For the first time in its Reply and accompanying documents, Gramercy has revealed that its "clients, who are the ultimate beneficiaries of Gramercy's Land Bonds,"[182] beneficially own more than [redacted]% of the Bonds – and, thus, that Gramercy itself holds almost no beneficial interest at all in the Bonds.[183]

101. ***Third-party beneficial owners include parties that are not U.S. nationals.*** Seeming to anticipate jurisdictional problems that it has skirted to date, Gramercy represents that the "vast majority of these beneficiaries are U.S. persons."[184] Even based on Gramercy's

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[177] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[178] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[179] *See, e.g.*, Lanava ¶ 35; [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[180] Lanava ¶ 11.

[181] *See, e.g.*, Letter from Gramercy to Ambassador of Peru, 29 January 2016 (Doc. R-336) ("Land Bonds that Gramercy manages and controls are beneficially owned by institutional investors including approximately 200 U.S. State, municipal and trade union pension funds located in at least 27 U.S. States."); Letter from Gramercy to Ambassador of Peru, 23 December 2015 (Doc. R-332) (Gramercy "manages of [sic] portfolio of Land Bonds on behalf of various institutional investors including numerous U.S. pension funds.").

[182] Lanava ¶ 33 [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[183] *See, e.g.*, [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY]. Based on Gramercy's representations, PARB holds the Bonds through its 100% ownership of Claimant GPH; PARB itself has [redacted] direct investors: [redacted]. Thus, third parties beneficially own [redacted]% of Gramercy's alleged Bonds.

[184] Lanava ¶ 34.

REDACTED CONTENT DESIGNATED AS CONFIDENTIAL BY GRAMERCY

representations, however, the UK entity [redacted] alone beneficially owns [redacted]% of the Bonds, and other unknown non-U.S. nationals beneficially own more through various commingled funds.[185] These are hardly insignificant holdings in view of Gramercy's claim that the Bonds are to be valued at nearly US$2 billion.

102. The picture revealed by Gramercy's previously withheld evidence thus confirms that neither Claimant meets the Treaty requirements for an "investor."

103. With reference to the characteristics of an investment set forth in Article 10.28 of the Treaty and the considerable body of international investment law,[186] Claimant GPH has not "made" any "investment" in Peru:

- *Contribution of Money or Assets*. GPH did not make any contribution of its own. In fact, bank statements show that [redacted], just days before its first alleged Bond purchase.[187] That is when [redacted], which had already secured third-party contributions by selling interests in the Bonds, began wiring money to GPH to fund the acquisitions.[188]

- *Duration*. Because GPH never made its own contribution, there is no duration of investment to measure. Further, GPH's alleged purchase of the Bonds was a mere vehicle for the sale of Bond interests to third parties, which had begun even before the first Bond purchase.

- *Risk*. Because GPH never made its own contribution, it did not incur any risk. Even setting aside the fact that the funds did not originate with GPH, Gramercy had transferred any alleged risk in the Bonds by selling ownership interests to third parties, beginning even before GPH made its first purchase.

- *Contribution to Peru's economic development*. GPH did not invest in Peru. Using funds from third parties, GPH made one-off payments to bondholders, with the speculative hope that Peru might later pay more. Meanwhile, Gramercy repackaged the Bonds, sold them to third parties outside of Peru, and engaged in measures to undermine the economy in an attempt to pressure Peru to settle.

104. Claimant GFM, which on Gramercy's own case had no involvement in the alleged Bond acquisitions, is even more removed from the "making" of any investment in Peru. As Peru has observed, to permit an entity not otherwise qualifying as an "investor" to benefit from Treaty protections simply by entering into a management contract, years after the alleged investment, with an entity alleged to have made the investment, has no basis in the Treaty and invites abuse.[189] Indeed, GFM made no investment and is not an investor:

- *Contribution of Money or Assets*. GFM never contributed any money or assets. It did not enter the Gramercy "investment" structure until December 2011, years

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[185] *See* [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[186] *See infra* Section III.D; *see also* Statement of Defense ¶ 205.

[187] *See, e.g.*, [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY] (showing an opening balance of ". ").

[188] *See* Lanava ¶ 11.

[189] Statement of Defense ¶ 215.

after all alleged Bond purchases were completed.[190] GFM did not even make a contribution to GPH, or otherwise, when it inherited management authority of GPH from a predecessor Gramercy entity.[191] Any management services contributed by GFM benefited only GPH and Gramercy, not Peru.

- *Duration*. Because GFM did not make a contribution, and never even indirectly owned the Bonds, there is no duration of investment to measure. Further, GFM's entry into the Gramercy structure postdated GPH's selling of ownership interests to third parties, which had begun even before the first Bond purchase.

- *Risk*. Because GFM did not make a contribution, and never even indirectly owned the Bonds, it did not incur any risk. Under the GPH Operating Agreement, moreover, GFM did not stand to gain or lose anything from GPH's alleged holding of the Bonds; all profits, losses, and distributions go to PARB as the sole owner of GPH.[192] The Agreement also expressly insulates GFM from liability in connection with its management of GPH.[193] GFM thus undertook no risk with regard to its management of GPH, let alone with respect to the Bonds.[194]

- *Contribution to Peru's economic development*. GFM did not invest in Peru. It merely assumed control of GPH, without making any contribution whatsoever, after GPH had made one-off payments to bondholders and sold interests in the Bonds to third parties outside of Peru, and while Gramercy engaged in measures to undermine the Peruvian economy in an attempt to pressure Peru to settle.

105. Gramercy maintains that "[n]othing in the Treaty excludes investment firms from the protection of Chapter 10," and that "the Treaty contemplates the opposite, by providing for example that investments may take the form of financial assets."[195] This is

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[190] *See, e.g.*, Amended Operating Agreement of GPH, 31 December 2011 (CE-165); *see also* Gramercy, "Peru Structure Charts," 17 May 2019 (CE-703) [DESIGNATED AS CONFIDENTIAL BY GRAMERCY] at 12 (showing 's entry into the structure).

[191] *See, e.g.*, Assignment and Assumption Agreement among GIA, GFM, and GPH, 31 December 2011 (CE-521) [DESIGNATED AS CONFIDENTIAL BY GRAMERCY]; Amended Operating Agreement of GPH, 31 December 2011 (CE-165).

[192] Amended Operating Agreement of GPH, 31 December 2011 (CE-165) Art. 2.2(b) ("The Company's profits and losses shall be allocated to the Member [PARB]."); *id.*, Art. VIII ("The Company may make distributions to the Member [PARB] from time to time in such manner as the Sole Manager [GFM] shall determine.").

[193] Amended Operating Agreement of GPH, 31 December 2011 (CE-165), Art. 3.3 (stating twice in the same paragraph, in nearly identical language, that "[t]o the fullest extent permitted by law, the Sole Manager or any agent of the Sole Manager shall not be liable to the Company or the Member for any mistake of fact or judgment or for the doing of any act or the failure to do any act in conducting the business, operations, and affairs of the Company that may cause or result in any loss or damage to the Company or the Member"); *id.* Art. 5 (indemnifying GFM "to the fullest extent permitted by law . . . in connection with any proceeding").

[194] Similar clauses are also included in its . *See, e.g.*, [ALL DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[195] Statement of Reply ¶ 27.

entirely beside the point. Further to its business model as a hedge fund focusing on distressed assets, Gramercy's "investment" structure with respect to the Agrarian Reform Bonds involved one-off payments to bondholders, using funds from third parties, with the speculative hope (supported by Gramercy's attack campaign) that Peru might later pay more on the Bonds, while at the same time repackaging Bond interests as securities which Gramercy sold to third parties outside of Peru. Whether or not the Treaty might extend protections to "investment firms" in certain circumstances, those circumstances are not present here. Neither Gramercy Claimant is an "investor" entitled to Treaty protections.

3. Gramercy Ignores That It Does Not Have Standing To Submit Claims As To Interests That Are Beneficially Owned By Third Parties

106. Even assuming that either Claimant could be considered an "investor," the Treaty expressly provides, consistent with well-established principles of international law, that Gramercy may only submit claims on its own behalf for alleged damages which Gramercy itself incurred. Gramercy does not have standing to pursue claims with respect to the vast majority of its alleged Bonds which, Gramercy only now reveals, are beneficially owned by third parties. Gramercy does not even attempt to address this fundamental problem in its jurisdictional case, and instead ignores the legal consequences of its new revelations.

a. The Treaty Does Not Permit Claims As To The Interests Of Third-Party Beneficial Owners

107. The Treaty expressly limits the scope of who may submit claims to arbitration to: (i) under Article 10.16.1(a), a claimant "on its own behalf" that "has incurred loss or damage by reason of, or arising out of" a breach; or (ii) under Article 10.16.1(b), a claimant "on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly" that "has incurred loss or damage by reason of, or arising out of" a breach.[196] Thus, the Treaty permits claims on behalf of third parties in only one specified scenario – not present here – and no other. Reinforcing the exceptional nature of claims brought "on behalf of an enterprise," moreover, damages awarded on such claims must be paid directly to the enterprise, and not to the claimant.[197] There is no dispute that Gramercy submitted claims only on its own behalf for damages it allegedly suffered.[198]

108. Jurisprudence and Contracting Party submissions on analogous provisions under the NAFTA confirm that the Treaty permits Gramercy to claim only for its own alleged losses, and not losses suffered by third parties. In *Pope & Talbot v. Canada*, for example, the tribunal noted that it "could scarcely be clearer" that under NAFTA Article 1116, governing claims on one's own behalf, a claimant is "claiming for loss or damage to *its interest*."[199] In

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[196] Treaty, Art. 10.16.1 (Doc. RA-1).

[197] Treaty, Art. 10.26.2 (Doc. RA-1) ("[W]here a claim is submitted to arbitration under Article 10.16.1(b): (a) an award of restitution of property shall provide that restitution be made to the enterprise; (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.").

[198] *See* Third Amended Notice of Arbitration and Statement of Claim ¶ 256.

[199] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in respect of Damages, 31 May 2002 ¶ 80 (RA-323) (emphasis added).

Clayton v. Canada, the tribunal cautioned that "to allow an investor to recover under Article 1116 [the entirety of] damages that belong to its investment could have an impact on other stakeholders."[200] In these and other cases, the United States has emphasized that, "[w]hen an investor files a claim . . . for direct losses suffered by it, only those losses that were sustained by that investor in its capacity as an investor are recoverable."[201]

109. Having brought claims "on its own behalf" under the Treaty, Gramercy may claim only for its own alleged losses, as these authorities under the analogous NAFTA regime reinforce. Accordingly, Gramercy has no standing to submit claims with respect to the interests and alleged losses of third-party beneficial owners.

b. International Law Does Not Permit Claims As To The Interests Of Third-Party Beneficial Owners

110. The express Treaty limitations on which parties may bring claims, and for which alleged loss or damage, are consistent with a well-established international law principle: namely, that a claimant does not have standing to bring claims with respect to the interests of third parties, including third-party beneficial owners of the investment at issue.

111. In *Occidental Petroleum v. Ecuador*, for example, the annulment committee considered whether the tribunal had wrongly assumed jurisdiction over the entirety of claims brought by a claimant that held full title to, but only a 60% beneficial interest in, the contested investment.[202] The Committee held:

> '[I]nternational law authorities have agreed that the real and equitable owner of an international claim is the proper party before an international adjudication, and not the nominal or record owner. . . . *The notion that the beneficial (and not the nominal) owner of property is the real party-in-interest before an international court may be justly considered a general principle of international law*.' . . . The position as regards beneficial ownership is a reflection of a more general principle of international investment law: claimants are only permitted to submit their own claims, held for

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[200] *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v.*, UNCITRAL, PCA Case No. 2009-04, Award of Damages, 10 January 2019, ¶ 388 (RA-324); *see also UPS v. Canada*, ICSID Case No.UNCT/02/1, Award on the Merits, 24 May 2007, ¶ 35 (Doc. RA-325) ("If there were multiple owners and divided ownership shares for UPS Canada, the question of how much of UPS Canada's losses flow through to USP . . . may have very different purchase.").

[201] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, United States Seventh Article 1128 Submission, 6 November 2001, ¶¶ 3-5 (RA-326) (emphasis omitted); *see also, e.g., S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Submission of the United States of America, 18 September 2001, ¶ 6 (RA-327) ("Articles 1116 and 1117 of the NAFTA serve distinct purposes. Article 1116 provides recourse for an investor to recover for loss or damage suffered *by it*.") (emphasis added); *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcoin of Delaware, Inc. v.*, UNCITRAL, PCA Case No. 2009-04, Submission of the United States of America, 29 December 2019, ¶ 4 (RA-328) ("Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury. Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 1116.").

[202] *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, ¶¶ 18, 144, 194, 202-205, 259-268 (RA-329).

> their own benefit, not those held . . . on behalf of third parties not protected by the relevant treaty.[203]

112. Noting that it agreed in this respect with the dissenting opinion of Professor Stern in the underlying arbitration, the annulment committee concluded that the tribunal had committed a manifest excess of powers by awarding claimants damages for the full value of the investment, and not the value of their more limited beneficial interest.[204]

113. Many other tribunals have affirmed that a claimant cannot pursue claims with respect to the interests of third parties, including beneficial owners. For example:

- In *Siag v. Egypt*, the claimants owned nearly all of the subject property, but held a beneficial interest in only 50% due to a contractual provision giving Egypt a 50% interest in the value of any sale. The tribunal held that "it would be surprising if the expropriation would result in payment to the Claimants of a sum representing the whole value of the Property," and thus that it could only award damages that reflected the claimants' 50% beneficial interest.[205]

- In *Blue Bank v. Venezuela*, the tribunal ruled that a trustee holding assets "for the ultimate benefit" of third parties "did not invest these assets for its own account and cannot, therefore, ground jurisdiction on any investment made by it."[206]

- In *Impregilo v. Pakistan*, the claimant asserted claims for the entirety of a joint venture's damages. The tribunal ruled it had "no jurisdiction in respect of claims on behalf of, or losses incurred by, either [the venture] itself or any of Impregilo's joint venture partners." Payment arrangements between the partners, moreover, were irrelevant: "the fact that Impregilo may be obliged to account to its partners in respect of any damages . . . is also an internal [venture] matter, which has no bearing on Pakistan's agreed exposure under the BIT."[207]

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[203] *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, ¶¶ 260-262 (RA-329) (quoting David J. Bederman, Beneficial Ownership of International Claims, 38 INT'L L. & COMPARATIVE L.Q. 935, October 1989, 936 (RA-330)) (emphasis added).

[204] *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, ¶¶ 265-271 (RA-329); *see also Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion of Prof. Stern, 20 September 2012, ¶¶ 148-149 (RA-331) ("As far as the position of international law towards beneficial owners, in cases where the legal title and the beneficial ownership are split, is concerned, it is quite uncontroversial, after a thorough review of the existing doctrine and case-law, that international law grants relief to the owner of the economic interest. The fact that international law favours the beneficial owner has been recognized by the doctrine; the case-law of the Iran-US Claims Tribunal which has always considered the beneficial owner of the legal interest rather than the legal owner when there was a split of title, as well as ICSID tribunals' decisions.") (internal citiations omitted).

[205] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶¶ 581-584 (RA-332).

[206] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017, ¶ 172 (RA-333).

[207] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 ¶¶ 151, 153 (RA-334).

- In *Saghi v. Iran*, the Iran-U.S. Claims Tribunal affirmed that "the Tribunal has favored beneficial over nominal ownership of property."[208]

114. Accordingly, as these authorities reflect, well-established principles of international law further confirm that the Treaty does not permit Gramercy to submit claims with respect to interests that are beneficially owned by third parties.

c. Gramercy's Previously Withheld Evidence Reveals That It Submitted Claims As To The Interests Of Third-Party Beneficial Owners

115. Questions as to the precise nature of third-party involvement in Gramercy's alleged "investment" remain unanswered. Gramercy has not disclosed, among other documents and details, the "pass-through certificates" by which it sold interests in the Bonds to third parties, the agreements between Gramercy and third parties governing those Bond interests, the purchase price and fee structure, and the representations which Gramercy made to third parties in connection with their sale.

116. Even the information which Gramercy has provided is, in many respects, unsubstantiated – including, for example, corporate structure summaries prepared by Gramercy for the purposes of this arbitration, without many of the underlying documents;[209] heavily redacted documents that significantly hinder review, let alone understanding;[210] and uncorroborated representations by interested third parties that have not been subject to document requests or the possibility of cross-examination.[211] Thus, rather than make its affirmative case on jurisdiction – for which Gramercy bears the burden of proof – Gramercy once again has left it for Peru to connect pieces and fill gaps, while once again reserving another sandbagging opportunity for Gramercy's final responsive submission.

117. Nonetheless, after years of making vague representations and withholding critical information, Gramercy itself has now represented that the vast majority of the Bonds on which Gramercy basis its claims are beneficially owned by third parties. Indeed, the placement of a dominant beneficial interest in the hands of third parties – over [redacted]% of the total alleged Bond holdings – was Gramercy's intended use for its purported "investment" all along, as detailed above, even as Gramercy alleges that it maintains nominal ownership. Gramercy's Chief Compliance Officer confirms that, "*[o]f course*, Gramercy set up other

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[208] *James M. Saghi, Michael R. Saghi, and Allan J. Saghi, Claimants, v. The Islamic Republic of Iran*, Iran-US Claims Tribunal, Case No. 298 ¶ 18 (RA-335); *see also* Richard B. Lillich & Daniel B. Magraw, The Iran-United States Claims Tribunal: Its contribution to the Law of State Responsibility, 1998, 105 (RA-336) ("The Tribunal's precedents have made clear that beneficial owners of property are to be preferred as legitimate claimants over nominal owners.").

[209] *See, e.g.*, [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[210] *See, e.g.*, [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY]; [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[211] *See, e.g.*, [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

REDACTED CONTENT DESIGNATED AS CONFIDENTIAL BY GRAMERCY

entities above GPH in the corporate structure in order to sell investment products to our clients. This is a *typical practice* for any investment manager like Gramercy."[212]

118. Thus, the holders of the real economic interest in Gramercy's alleged Bonds are not present in this proceeding. Indeed, they cannot be. These third-party investors in Gramercy cannot avail themselves of the Treaty because they purchased securitized instruments created and sold by Gramercy in the United States (and possibly other international markets); they did not make investments in Peru. Further, those third-party beneficial owners that are not U.S. nationals could not invoke Treaty protections even with respect to investments made in Peru. While all such third parties may have rights and claims under other instruments – including against Gramercy – they do not under the Treaty.

119. Further to the express Treaty requirements and international law principles detailed above, Gramercy may only bring claims on its own behalf with respect to loss or damage which Gramercy itself allegedly incurred. That simply is not the case with respect to more than [redacted]% of the Bonds at issue in this proceeding, which are beneficially owned by third parties. Gramercy does not have standing to submit claims with respect to those interests.

D. Gramercy Fails To Prove That Agrarian Reform Bonds Are An Investment Under The Treaty

120. Ultimately, even assuming that Gramercy did not abuse the Treaty, that Gramercy complied with mandatory preconditions to Treaty arbitration, and that the way in which Gramercy allegedly "made" its Bond acquisitions did not disqualify it from Treaty protections – none of which is the case – the fundamental fact remains that the Agrarian Reform Bonds do not constitute an "investment" under the Treaty.

121. It is undisputed that the Treaty must be interpreted in accordance with Vienna Convention Article 31, which requires that 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."[213] Peru established that a proper contextual reading of the Treaty, in light of its fundamental objective of promoting economic development, among others, confirms that the Bonds are not covered "investments."[214] The Bonds were issued in a unique domestic historical context in domestic currency, under domestic law, with recourse to domestic courts, as compensation for expropriated domestic lands – and *not* as vehicles for international investment, economic contribution, or development. As such, they do not have the characteristics of an investment, do not advance the Treaty's object and purpose, and are readily distinguishable from the types of debt contemplated by the Contracting Parties (and other investment treaty tribunals) as constituting "investments."

122. Gramercy's unfounded efforts to convert these domestic instruments into an international Treaty "investment" rely on a purely literal, out-of-context interpretation of the Treaty text, as well as a misplaced emphasis on alleged U.S. laws and negotiating policies. Thus, as Professor Reisman observes, "Gramercy and its experts do not adhere to the[]

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[212] Lanava ¶ 20 (emphasis added).

[213] Vienna Convention, Art. 31(1); *see also* Reisman II ¶¶ 6-10; Statement of Reply ¶ 35.

[214] Statement of Defense ¶¶ 201-204.

fundamental rules of treaty interpretation" – and, in fact, "both of Gramercy's experts expressly disclaim any interpretation of the Treaty as a matter of international law."[215] It is no surprise, then, that "Gramercy's erroneous application of relevant norms of international law results in an erroneous interpretation of the Treaty,"[216] as addressed below with respect to (1) an integrated reading of the Treaty text; (2) characteristics of an investment in light of the Treaty's object and purpose; (3) relevant investment jurisprudence on contemporary sovereign debt; and (4) circumstances of the Treaty's conclusion.

1. Gramercy's Superficial Reading Of The Treaty Text Violates Fundamental Rules Of Treaty Interpretation

123. Gramercy's reading of the Treaty text is flawed in several respects.

124. *First*, Gramercy's misinterpretation hinges on the fact that the Agrarian Reform Bonds are called "Bonds." According to Gramercy, "the Treaty's express reference to 'bonds,' 'debt instruments,' and 'public debt,' all . . . lead to the conclusion that the Land Bonds are covered investments."[217] To the contrary, the International Court of Justice and other tribunals have repeatedly ruled that a tribunal "cannot base itself on a purely grammatical interpretation"[218] or "simple dictionary reading of the terms."[219] Professor Reisman further explains that "[t]he circular definition, 'a bond is a bond' is not a substitute for a proper interpretation of the Treaty, including consideration of the characteristics of an investment and the Treaty's object and purpose."[220]

125. Even viewed in isolation, moreover, the ordinary meaning of these terms – as defined in Gramercy's own sources – do not support its case. Black's Law Dictionary, for example, defines "bond" as a "long-term, interest bearing debt instrument issued by a corporation or a governmental entity, *usually to provide a particular financial need*."[221] It also specifies, under the general definition for "debt," that "public debt" in particular is a "debt owed by a municipal, state, or national government."[222] The Dictionary of Finance and Investment Terms, in turn, defines "public debt" as "borrowings by governments *to finance expenditures not covered by current tax revenues*."[223]

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[215] Reisman II ¶ 6; *see also* Allgeier ¶ 11 ("I am not a lawyer and do not intend to address arguments of treaty interpretation as a matter of law . . . ."); Olivares-Caminal ¶ 16 ("I am not an expert in public international law and do not intend to address arguments of treaty interpretation as such . . . .").

[216] Reisman II ¶ 6.

[217] Statement of Reply ¶ 36.

[218] *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, International Court of Justice, Judgment, 22 July 1952, Preliminary Objection, ICJ Rep., at 104 (RA-337).

[219] *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent's Bifurcated Preliminary Objection dated 20 Apr. 2016, ¶ 137 (RA-338); *see also* Reisman II ¶ 6.

[220] Reisman II ¶ 20; *see also id.* ¶ 19 ("This is a syllogism that can only 'prove' the major premise, i.e., that the Treaty uses the word 'bond.' It does not get to the actual question, which is whether Peru's Agrarian Reform Bonds are an 'investment' under the Treaty. That question turns on interpretation by means of the methodology of VCLT Article 31.").

[221] Black's Law Dictionary (Doc. CE-718) (emphasis added).

[222] Black's Law Dictionary (Doc. CE-718).

[223] J. Downes, *Dictionary of Finance and Investment Terms* (Doc. CE-717) (emphasis added).

126. These sources reinforce Professor Reisman's prior conclusion that including Agrarian Reform Bonds in the Treaty definition of "investment" would "sit uncomfortably with the common understanding of 'public debt' in the investment context: loans incurred by the government to finance its activities when other sources of public income fail to meet the requirements."[224] Professor Guidotti likewise concludes that the Bonds "are not within the commonly understood definition of 'public debt,' as they were not issued in connection with government financing."[225] Indeed, the Agrarian Reform Bonds were issued to compensate landowners for expropriated lands in Peru, and *not* to finance Government activity or economic development.[226]

127. Not having a meaningful response to this fundamental distinction – one of several – setting the Bonds apart,[227] Gramercy contends that, "[m]ost significantly," the Treaty does not expressly state that public debt must be issued to operate or fund the Government.[228] The Treaty, however, need not do so: that is the ordinary meaning of "public debt," as Professor Guidotti and Gramercy's own authorities confirm.

128. Gramercy also ineffectually attacks certain authorities on which Professor Reisman previously relied.[229] As his Supplemental Opinion provides, however, there is no shortage of authorities, including from U.S. Government agencies and international institutions, confirming that "the idea of the Government *borrowing* funds in order to finance its operations and develop its economy underlies the usage of the term 'public debt.'"[230] Professor Guidotti also confirms that the U.S. Treasury Department has explained that its "primary goal in debt management is to *finance government borrowing needs* at the lowest cost over time."[231] The Agrarian Reform Bonds were never intended nor used for this purpose.[232]

129. *Second*, Gramercy argues that the Treaty was "negotiated pursuant to the U.S.'s 'negative list' framework," such that an asset is included within the scope of the Treaty unless it is explicitly excluded.[233] Thus, Gramercy suggests, the Treaty covers *every* type of bond or debt instrument except bilateral State-to-State loans because those are

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[224] Reisman I ¶ 29 (quotation and citation omitted).

[225] Guidotti II ¶ 22; *see also id.* ("[C]ontrary to what happens with all modern sovereign bonds that have been mentioned, the Agrarian Reform Bonds were never issued to fund Peru's borrowing needs. . . . In all modern government sovereign bonds discussed in this report, issued by Peru as well as other countries, the use of funds – i.e., to meet government borrowing needs – is always specified in the respective offering memorandums.").

[226] *See, e.g.*, Guidotti II ¶¶ 4, 22.

[227] *See, e.g.*, Guidotti II ¶¶ 4, 12.

[228] Statement of Reply ¶ 62.

[229] *See* Statement of Reply ¶¶ 56-64.

[230] Reisman II ¶ 36 (emphasis in original); *see also id.* ("Public debt compares the cumulative total of all government borrowings less repayments that are denominated in a country's home currency.") (quoting CIA World Factbook); Reisman II ¶ 37 ("History illustrates how governments have used sovereign debt to shape economic and political development. It shows how they have used it to help build lasting states, provide public goods and complete infrastructure projects.") (quoting 2019 International Monetary Fund Working Paper).

[231] Guidotti II ¶ 19 (quoting U.S. Treasury, Debt Management Overview and Quarterly Refunding Process, 8 September 2017.

[232] *See, e.g.*, Guidotti II ¶¶ 4, 22; Reisman II ¶ 38.

[233] Statement of Reply ¶ 47.

expressly excluded under footnote 13 to Article 10.28.[234] In this respect, too, Gramercy impermissibly seeks to circumvent the plain language of the Treaty and mandatory rules of Treaty interpretation, as Professor Reisman explains:

> The absence of an express exclusion for the Bonds, however, is not a substitute for a proper interpretation of the Treaty – let alone proof that the Bonds are covered investments. The fact that the Contracting Parties expressly excluded certain measures or assets from the application of the Treaty does not mean that anything not on the exclusion list is automatically included within the scope of the Treaty. That would deprive the definition of 'investment' under Article 10.28, and the examination of investment characteristics that it requires, of *effet utile*.[235]

130. Indeed, even the Treaty's express *inclusion* of "bonds" and "debt instruments" among the permissive forms an investment "*may* take" under Article 10.28 does not mean that all bonds or debt instruments necessarily are investments. The United States, which makes no mention of a "negative list" in its Submission, confirms the Contracting Parties' agreed interpretation in this regard:

> *The enumeration of a type of an asset in Article 10.28, however, is not dispositive* as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; *it must still always possess the characteristics of an investment*, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[236]

131. Professor Reisman observes that the United States "further underscores that not all listed items are *per se* qualified investments."[237] Accordingly, it certainly cannot be possible, as Gramercy suggests, that all items *not* listed on an exclusion list are *per se* qualified investments. A full assessment of the characteristics of an investment, together with the object and purpose of the Treaty, is still required.

132. The integrated assessment that the Treaty demands is further reflected in footnote 12 to Article 10.28. According to Gramercy, this footnote "explains *why* bonds constitute investments – rather than disqualifying them."[238] But Peru never suggested that footnote 12 "disqualifies" bonds. Rather, by providing that some forms of debt are "*more likely* to have the characteristics of an investment," and other forms are "*less likely* to have such characteristics," footnote 12 reinforces that no form of debt is automatically covered;

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[234] Statement of Reply ¶ 33.

[235] Reisman II ¶ 18 *see also id.* ¶ 16 (concluding that a "negative list" approach "ignores Article 10.28's additional and express requirement that a covered investment must 'ha[ve] the characteristics of an investment,' as well as the nuanced and flexible language of footnote 12 of Article 10.28, whose manifest premise is that some forms of debt in subsection (c) will require interpretation. . . . Together, these clauses perforce introduce the methodology of Article 31 of the VCLT in the light of the text, context, and object and purpose. Hence the need for the deductive and inductive interpretive exercise.").

[236] US Submission ¶ 18 (emphasis added).

[237] Reisman II ¶ 17.

[238] Statement of Reply ¶ 50.

interpretation is required. It necessarily follows that some "debt" and "bonds" may *not* constitute "investments." Professor Reisman reaffirms that this footnote "confirms that [the Article 31] judgment is required to determine whether a particular transaction qualifies as an 'investment' under the Treaty: it does not exclude 'bonds' from that necessary judgment."[239]

133. *Third*, Gramercy argues that Annex 10-F on public debt "necessarily assumes that public debt falls within the Treaty's definition of investment."[240] Here again, however, Gramercy resorts to circular reasoning – *i.e.*, the Treaty addresses public debt and therefore covers public debt. What this does *not* address is how Annex 10-F purportedly supports Gramercy's misreading of "investment." In fact, the United States confirms that it does not:

> Annex 10-F of the U.S.-Peru TPA addresses, *inter alia*, certain limitations on claims for breaches of obligations under Section A with respect to the default, non-payment or restructuring of a public debt. *This Annex does not limit or expand the definition of 'investment' under Article 10.28.*[241]

134. Gramercy's repeated efforts to impose a superficial reading of the Treaty – based on select words in Article 10.28 or Annex 10-F – contravene the ordinary meaning of those words interpreted in context, fundamental rules of Treaty interpretation, and the agreed interpretation of the Contracting Parties. Those efforts must be rejected.

2. Gramercy All But Ignores The Treaty's Object And Purpose

135. Gramercy fares no better even when it purports to assess the "characteristics of an investment," as Article 10.28 of the Treaty requires, including because Gramercy treats the Treaty's object and purpose as an afterthought. Indeed, Gramercy characterizes Peru's consideration of critical elements in the Preamble as an "argument of last resort," and places its discussion of object and purpose near the end of its argument – removed from analysis of the Treaty text, and after discussion of the negotiating history.[242] Gramercy has it backwards. Per the Vienna Convention, it is mandatory that the Treaty "*shall* be interpreted . . . in the light of its object and purpose";[243] by comparison, permissive recourse "*may* be had" to supplementary means, including the negotiating history, only to confirm the ordinary meaning or when the interpretation under Article 31 leads to an absurd or ambiguous result.[244]

136. Gramercy acknowledges, as it must, that Treaty objectives set forth in the Preamble include, *inter alia*, to:

- "Strengthen the special bonds of friendship and cooperation between [the Contracting Parties] and promote regional economic integration";

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[239] Reisman II ¶ 19; *see also id.* ¶ 16 (addressing the "nuanced and flexible language of footnote 12 of Article 10.28, whose manifest premise is that some forms of debt in subsection (c) will require interpretation"); Reisman I ¶ 28.

[240] Statement of Reply ¶ 41.

[241] US Submission ¶ 18 (emphasis added).

[242] Statement of Reply ¶¶ 119.

[243] VCLT, Art. 31(1) (emphasis added).

[244] VLCT, Art. 32 ("Recourse *may* be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.") (emphasis added).

- "Promote broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production";

- "Create new employment opportunities and improve labor conditions and living standards"; and

- "Agree that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law."

- "Recognize that Article 63 of Peru's Political Constitution provides that 'domestic and foreign investment are subject to the same conditions.'"[245]

137. Gramercy suggests, however, that these specified Treaty objectives are "very weak indicators of how to construe terms in the investment chapter," because the Treaty is a broader trade agreement containing twenty-two other chapters.[246] "The short response [to this]," Professor Reisman states, "is that the Contracting Parties (plural) put this language in the [Treaty] and that its generality enables the Tribunal seized of the case to address a broad range of provisions."[247] Indeed, it is well-established as a matter of international law that the Treaty's object and purpose is critical to a proper understanding of the text – and, further, that the Preamble is an appropriate place to find the object and purpose, even in broader trade agreements that cover matters in addition to investment protections.[248]

138. Gramercy's alleged investment in Agrarian Reform Bonds is not consistent with any of these stated Treaty objectives. Indeed, it is contrary to all of them.

- Gramercy did not strengthen cooperation or integration. It injected itself into a preexisting domestic dispute, sought to elevate it to an international Treaty dispute, and interfered with U.S.-Peru relations through ongoing aggravation.

- Gramercy did not promote broad-based economic development in Peru. It made one-off payments to individual bondholders, repackaged Bond interests to sell

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[245] Statement of Reply ¶ 123 (quoting Treaty Preamble). Gramercy suggests that the clause regarding parity between domestic and foreign investors applies only to investors in the United States. *Id.* ¶ 127. In fact, read together with the next clause, regarding Article 63 of Peru's Political Constitution, it plainly reinforces the Contracting Parties' shared objective that foreign investors not be accorded greater investment protections than domestic investors.

[246] Statement of Reply ¶ 124.

[247] Reisman II ¶ 24.

[248] *See, e.g.*, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 ¶¶ 272-273 (ruling that the "object and purpose of the BIT . . . is defined in its Preamble," including a clause on economic development confirming that "the object and purpose of the Treaty is not to protect foreign investments *per se*, but as an aid to the development of the domestic economy") (RA-339); *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009 ¶ 181 (holding that the claimant's proposed "literal application of the terms of the BIT effectively ignores the second sentence of Article 31(1) of the Vienna Convention, which requires the interpreter to take into account, together with the 'ordinary meaning' of the terms of the treaty, their context and the object and purpose of the treaty. The BIT's object and purpose is reflected in its preamble") (RA-340); *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ¶ 299 ("The 'object and purpose' of the Treaty may be discerned from its title and preamble.") (RA-341); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 ¶ 196 ("The NAFTA provides internal guidance for its interpretation in a number of provisions. In the context of a Chapter 11 dispute, it is appropriate to begin with the Preamble to the treaty.").

outside of Peru, and took measures to harm Peruvian sovereign finance and the economy in a campaign to pressure Peru into a settlement.

- Gramercy did not create new employment opportunities, or improved labor or living conditions, in Peru. It acquired distressed Bonds subject to a longstanding domestic dispute, with the speculative aim of enriching itself and its non-Peruvian investors.

- Gramercy did not respect parity between domestic and foreign investors. It has abused the Treaty in an effort to gain far more favorable treatment for itself than is available to Peruvian bondholders under governing Peruvian law.

139. Professor Reisman reaffirms that "the Treaty's object and purpose reflected in the Preamble – including, among others, to promote broad-based economic development, to create new employment opportunities, and to improve labor conditions and living standards – reinforces the conclusion that the Agrarian Reform Bonds do not qualify as an 'investment.'"[249] Indeed, viewing Gramercy's alleged Bond acquisitions in this proper light underscores that they cannot have the characteristics of a Treaty investment. Gramercy's efforts to downplay the importance of the Treaty's object and purpose are groundless.

3. Gramercy Makes Misleading Arguments On Investment Characteristics That Ignore Facts Revealed By Its Own Documents

140. While ignoring the Treaty's object and purpose, Gramercy contends that the Bonds do have the "characteristics of an investment" under Article 10.28, as well as the frequently-applied *Salini* criteria. As an initial matter, Gramercy disputes the relevance of *Salini* – and, in particular, the requirement of a contribution to the host State's economic development – because the case was decided under the ICSID Convention and has been "whittled down over time."[250] To the contrary, the "case law is progressively evolving towards a *greater* recognition of the *Salini* criteria," and tribunals interpreting a wide variety of investment treaties have regularly applied them.[251] In any event, Gramercy concedes that Article 10.28 "tracks closely" three of the four *Salini* criteria.[252] Further, Professor Reisman

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[249] Reisman II ¶ 21; *see also, e.g.*, Reisman I ¶ 41 ("The alleged purchase of the Agrarian Reform Bonds by Claimants with the hope of collecting larger payments than will be given to domestic holders of these bonds can hardly be said to contribute to the economic development of Peru, nor to parity between domestic and foreign investors. Indeed, the transaction that the Claimants present as an 'investment' in the Agrarian Reform Bonds is inconsistent with these objects and purposes of the Treaty. It is difficult to square a putative investor's speculation in this developing country's 'distressed property' with promoting broad-based economic development, reducing poverty, ensuring parity between domestic and foreign investors, or preserving the public welfare.").

[250] Statement of Reply ¶ 84.

[251] E. Gaillard and Y. Banifatemi, *The Long March towards a Jurisprudence Constante on the Notion of Investment*, in Building International Investment Law – The First 50 Years of ICSID (M. Kinnear et al. eds., 2015), at 124-125 (emphasis added) (RA-342); *see also, e.g.*, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012 ¶¶ 382-383 (applying *Salini* criteria as "[o]f particular relevance" in arbitration under the ECT and Netherlands-Turkey BIT) (RA-318).

[252] *See* Statement of Reply ¶ 79; *see also* Reisman I ¶¶ 45-49.

reaffirms the close alignment between the Treaty and *Salini*, including the requirement of a contribution to economic development, and that application of *Salini* is appropriate here.[253]

141. As detailed above, based on limited materials selectively disclosed by Gramercy, the available evidence indicates that Gramercy's alleged Bond "investment" does not meet any of the relevant criteria:

- *Contribution of money or assets*.[254] Gramercy made none. Bonds were purchased using funds from third-party investors that acquired beneficial ownership interests in the Bonds through payment to Gramercy.

- *Duration*.[255] There is none to measure. Gramercy did not make a contribution, and sold Bond interests to third parties even before it acquired any Bonds.

- *Risk*.[256] Gramercy incurred none. It never made its own contribution, and quickly transferred any alleged risk by selling Bond interests to third parties even before it acquired any Bonds.

- *Contribution to economic development*.[257] Gramercy made none. It made one-off payments to bondholders, repackaged the Bonds for sale outside of Peru, and actively sought to undermine Peru's economy in an attempt to compel settlement.

142. Gramercy makes no mention of these basic facts, which Peru pieced together from Gramercy's own documents. As such, Gramercy's entire application of the investment criteria is misleading – and wrong – and should be accorded no weight.

143. As part of that flawed analysis, Gramercy attempts at some length to substantiate some alleged contribution to Peru. None has any merit.

- *Land Reform Act of 1969*. Gramercy invokes this law, which states that the Agrarian Reform "will contribute to the Nation's social and economic development."[258] Under this view, any subsequent holder of a Bond would automatically fulfill the Treaty's developmental objective merely by acquiring

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[253] Reisman II ¶¶ 17, 39 ("[E]ven those three elements are not exclusive and do not, alone, suffice to establish that a transaction qualifies as an 'investment.' One also must still take into account the Treaty's object and purpose, including one of its paramount objects and purposes, i.e., the development of the host State. . . . [T]he Contracting Parties expressly incorporated most of the *Salini* investment characteristics in the Treaty's definition of 'investment,' and also affirmed the significance of a contribution to economic development in the Treaty's Preamble. Thus, while not all tribunals decide to apply the *Salini* investment criteria, I reaffirm that it is appropriate to do so here.").

[254] As previously established, the *Salini* criterion of contributing money or assets is reflected in the Treaty's requirement of a "commitment of capital or other resources." Statement of Defense ¶ 205; Reisman I ¶ 46.

[255] The *Salini* criterion of duration is reflected in the Treaty's footnote 12, which states that "[s]ome forms of debt" such as "long-term notes" are "more likely to have the characteristics of an investment," while other forms, "such as claims to payment that are immediately due" are "less likely to have such characteristics." Statement of Defense ¶ 205; Reisman I ¶ 47.

[256] The *Salini* criterion of risk is reflected in the Treaty's requirement of "assumption of risk." Statement of Defense ¶ 205; Reisman I ¶ 48.

[257] As addressed above, the *Salini* criterion of contribution to the host State's economic development is reflected in the Treaty's object and purpose, including to "[p]romote broad-based economic development." *See also* Statement of Defense ¶ 205; Reisman I ¶ 49.

[258] Statement of Reply ¶ 89 (quoting Decree Law No. 17716, Land Reform Act, 24 June 1969).

Bonds. As Professor Reisman concludes, this "frame of reference regarding decades-old domestic reforms could not satisfy the Treaty's object and purpose of *promoting* economic development through new cross-border investment."[259]

- *Purchase price*. After refusing for years to disclose the purchase price for its alleged Bonds, Gramercy now claims that it "injected tens of millions of dollars into the local economy, which had multiplier effects and created much-liquidity to stimulate further economic growth."[260] This, too, is insufficient, as Professor Reisman concludes: "that is the nature of every inward transaction. If that were the understanding of the term, it would mean that every transaction qualifies *ipso facto* as developmental and that the [Treaty's] object and purpose of being developmental would be deprived of *effet utile*."[261] Professor Guidotti likewise concludes that he has "seen no evidence that Gramercy itself actually contributed any money to Peru, as its payment for the bonds went right into the pockets of the bondholders."[262] Available evidence, moreover, suggests that the millions allegedly "injected" came from third parties, not Gramercy.

- *"Catalyst for a global solution*." Gramercy claims that it "contributed" an opportunity to resolve the Bond "impasse."[263] This is contradicted by its own documented strategy, from the outset, to politicize the dispute, manipulate Peruvian law, and pressure Peru to pay Gramercy more than it pays Peruvians.[264] Professor Reisman concludes that "Gramercy has not produced any 'solution' with respect to the Bonds, let alone one for all bondholders that purportedly contributed to the economic development of Peru. To the contrary, Gramercy has transformed a preexisting domestic dispute between Peruvian bondholders and the Government of Peru into an international arbitration that seeks to benefit Gramercy alone."[265] Professor Guidotti concludes that, "rather than contribute to Peru's economy, Gramercy has actively sought to damage it, including by seeking to impugn its reputation for fiscal responsibility and its relationship with the IMF and OECD, among others."[266]

144. Accordingly, as with the rest of its investment criteria analysis, Gramercy's claims to have made a contribution to the economic development of Peru are without merit.

145. As an additional consideration, Professor Reisman observes that the characteristics of an investment all "imply certain voluntary actions and decisions on the part of an 'investor.'"[267] In the case of the Bonds, however, the "landowners were obliged to comply with the land reform law; hence they had no choice."[268] Thus, the "landowners who

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[259] Reisman II ¶ 25 (emphasis in original).

[260] Statement of Reply ¶ 90.

[261] Reisman II ¶ 28; *see also id.* ¶ 29.

[262] Guidotti II ¶ 30.

[263] Statement of Reply ¶ 91.

[264] *See supra* Section III.A.

[265] Reisman II ¶ 31.

[266] Guidotti II ¶ 30.

[267] Reisman II ¶ 26.

[268] Reisman II ¶ 26.

were obliged to sell their lands under Peru's land reform law *were not investors*," and the Bonds "*were not issued by the Government as bonds for investment*."[269] Further, the "nature of those Bonds would not change by sale of those Bonds by the original bondholders to someone else. Nor would later Government permission enabling the original bondholders to transfer their Bonds to someone else, by this act alone, change the character of the Bonds."[270]

146. Accordingly, even as Gramercy tries to piggyback on the developmental objectives of the Agrarian Reform, it cannot, merely through the act of acquisition, transform the fundamental nature of the Bonds issued pursuant to that program into something that they are not – *i.e.*, Treaty investments. For that reason, and all other reasons articulated above, the Bonds do not meet the characteristics of an "investment" under the Treaty, when properly viewed in context and in light of the Treaty's object and purpose.

4. Gramercy Again Fails To Engage With Jurisprudence On Contemporary Sovereign Debt That Undermines Its Case

147. Peru previously established that international jurisprudence on contemporary sovereign debt further reinforces that the Agrarian Reform Bonds are not "investments" under the Treaty. Further to a detailed assessment of cases by Professor Reisman, Peru focused in its Statement of Defense on the decisions in *Abaclat v. Argentina* and *Poštová Banka v. Hellenic Republic*.[271] Peru also highlighted that Gramercy – which bears the burden of proof on this jurisdictional issue, and all others – had failed in its Statement of Claim to mention even a single case in support of its allegation that the Bonds are "investments."[272]

148. Ignoring its own failure to address any relevant authorities – and apparently overlooking the sections in Peru's Statement of Defense and Professor Reisman's First Opinion that did – Gramercy suggests that "Peru does not [] devote comparable attention" to *Abaclat* or two substantially similar cases also brought by Italian bondholders against Argentina.[273] Gramercy also argues that *Abaclat* is "materially indistinguishable" from its case, and repeatedly highlights that Professor Reisman served as an expert for the *Abaclat* claimants.[274] Rather than make speculative insinuations,[275] Gramercy might have considered why, after involvement in a leading treaty case on sovereign bonds, a renowned expert of international law would conclude that the Bonds in this case are not Treaty investments. Indeed, there is no mystery. As Professor Reisman explains: "I addressed *Abaclat* in the First Opinion because the form of investment at issue in that case was readily and conclusively distinguishable from Gramercy's acquisition of Agrarian Reform Bonds, and underscores that the Bonds are not 'bonds' or 'public debt' within the meaning of the Treaty."[276]

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[269] Reisman II ¶ 26 (emphasis added).

[270] Reisman II ¶ 26.

[271] Statement of Defense ¶¶ 207-211; Reisman I ¶¶ 50-62.

[272] Statement of Defense ¶ 207.

[273] Statement of Reply ¶ 130.

[274] Statement of Reply ¶¶ 82, 139.

[275] *See, e.g.*, Statement of Reply ¶ 139 ("Professor Reisman goes to some pains to distinguish *Abaclat*, presumably because of the positions he must have taken in that case in support of jurisdiction. Notably, neither he nor Peru's counsel disclosed a copy of his opinion or a transcript of his testimony from that case.").

[276] Reisman II ¶ 32.

149. Even in its Reply, Gramercy does not meaningfully engage with the key elements that distinguish *Abaclat* and contemporary sovereign bonds from Gramercy's case and the Agrarian Reform Bonds. They include the following, as summarized in Professor Reisman's Supplemental Opinion[277] and in the table below:

	Abaclat[278]	***Gramercy***
Treaty definition of "investment"	Broad: "extremely wide range of investments," with a "residual clause" for "any right of economic nature."	Narrower: requires an assessment of characteristics of an investment, with no residual clause.
Markets	Made for foreign investment; actively marketed to, and issued on, international markets.	Not made for foreign investment; not marketed to, or issued on, international markets.
Terms	Face value specified payment terms over a defined period.	Worthless face value and uncertainty of possible future payment.
Jurisdictions	Issued in foreign currencies, governed by foreign law, subject to foreign courts.	Issued in local currency, governed by local law, subject to local courts.
Contribution to development	"One of the pillars" of a growth plan; "no doubt" they "served to finance Argentina's economic development."	Compensation to landowners; not used to finance actions of the Government or development of the economy.
Claimants	All invested in the bonds before any dispute over payment arose. Individual pensioners (and others) acquired bond interests on the basis of favorable representations by Argentina.	Acquired Bonds decades after the dispute over payment arose. Alleged third-party pension funds (and others) purchased interests from Gramercy based on representations by Gramercy.

150. The tribunals in *Alemanni* and *Ambiente* addressed the same bonds and reached similar conclusions. As Professors Reisman and Guidotti both reaffirm, those contemporary sovereign bonds (which tribunals found to be entitled to treaty protections) are fundamentally distinguishable from the Agrarian Reform Bonds (which are not).[279]

151. Gramercy similarly purports to address *Poštová Banka v. Hellenic Republic*, in which the tribunal declined jurisdiction over interests in sovereign bonds, but does not actually respond to any of the key points that Peru raised. Gramercy contends that the case is "inapposite" because of the "materially different" language in the treaty at issue, which referred to debentures issued only by companies and not the State.[280] Gramercy makes no mention, however, of the tribunal analysis regarding the "special features and characteristics"

[277] Reisman II ¶¶ 32-35; *see also* Reisman I ¶¶ 55-56.

[278] *See, e.g.*, *Abaclat and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5, 4 August 2011 ¶¶ 43, 44, 47, 50, 51, 354, 366, 378.

[279] *See, e.g.*, Reisman II ¶¶ 32-35.

[280] Statement of Reply ¶ 144.

that set sovereign debt apart from corporate debt.[281] As Peru highlighted, and Gramercy ignores, the *Poštová Banka* tribunal specifically found, *inter alia*:

- "Sovereign debt, as indebtedness of a sovereign State, has special features and characteristics. First, it is clearly a *method of financing government operations*, from investments in infrastructure to ordinary government expenditures. Second, it is *a key instrument of monetary and economic policy*."[282]

- "An investment, in the economic sense, is linked with a process of *creation of value*, which distinguishes it clearly from . . . a subscription to sovereign bonds which is [] a process of *exchange of values i.e.* a process of providing money for a given amount of money in return."[283]

- "[T]he element of contribution to an economic venture and the existence of the specific operational risk that characterizes an investment under the objective approach are not present here."[284]

152. Thus, as Peru established, *Poštová Banka*'s analysis of contemporary sovereign debt underscores that the Agrarian Reform Bonds lack the necessary characteristics to constitute a Treaty "investment."[285] Gramercy offers no response. Indeed, much as Gramercy withheld *any* discussion of relevant jurisprudence from its Statement of Claim, it appears that Gramercy may once again be holding back so that it may further address these cases in its final jurisdictional submission, when Peru has no opportunity to respond in writing.

5. Gramercy's Misplaced Reliance On Circumstances Of The Treaty's Conclusion Cannot Salvage Its Flawed Treaty Interpretation

153. Gramercy emphasizes the circumstances of the Treaty's conclusion, including U.S. laws and policies that purportedly influenced the U.S. approach to negotiations of the Treaty.[286] Gramercy's reliance on events preceding the Treaty, and in particular the alleged perspective of only one Contracting Party, is fundamentally flawed. As Professor Reiman explains:

> The Vienna Convention's rule in Article 31 thus focuses, through several different lenses, *on the text of the instrument and events that follow rather than precede it, as the critical grist for the interpretive exercise*. . . . What is *not* included in this interpretive exercise is any instruments or communications *within* one Contracting Party with respect to the conclusion of the Treaty which were not accepted by

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[281] *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Final Award, 9 April 2015 (RA-179) ¶ 318.

[282] *Id.* ¶¶ 318-319 (emphasis added).

[283] *Id.* ¶ 361 (emphasis added).

[284] *Id.* ¶ 371.

[285] Statement of Defense ¶¶ 210-211.

[286] *See* Statement of Reply ¶¶ 97-118.

> the other Contracting Party as an instrument related to the Treaty. Nor, in accord with VCLT Article 32, may the interpreter have recourse to the *travaux préparatoires* or circumstances of a treaty's conclusion in order to counter the results of the application of Article 31.[287]

154. These are fundamental principles of Treaty interpretation under customary international law, as memorialized in the Vienna Convention. Nonetheless, Professor Reisman is compelled to raise them repeatedly[288] in response to the one-sided, U.S.-focused presentation by Gramercy and its expert, Ambassador Allgeier – who concedes, "I am not a lawyer and do not intend to address arguments of treaty interpretation as a matter of law."[289] Even the pre-Treaty circumstances on which Gramercy relies, moreover, lend no support to its claim that the Agrarian Reform Bonds are Treaty investments.

155. *First*, Gramercy argues that the Contracting Parties intended to include the Bonds under the Treaty because "Peru had to resolve ongoing disputes with U.S. nationals and companies affected by the Land Reform to even be eligible to negotiate," and the Contracting Parties therefore "had in mind" the Bonds during Treaty negotiations.[290] This argument is misleading and flawed in several respects:

- The purported "requirement" under U.S. law for resolution of disputes was part of the Andean Trade Promotion and Drug Eradication Act, a *unilateral* U.S. trade preference program that *predated* the Treaty. It was *not* a condition under U.S. law for the Treaty – a basic fact obscured by Gramercy's misleading quotation from various sources other than the ATPDEA itself.

- Appearing before the Peruvian Congress just weeks before negotiations began, the U.S. Ambassador to Peru expressly assured that "his government *does not condition* the signing of the Treaty on the solution of the pending litigation of the North American companies with the Peruvian State, as some have been holding in the press."[291]

- Carlos Herrera Perret, Peru's Head of the Negotiating Team for the Treaty's Investment Chapter, explains that Peru was under no obligation under Peruvian law to settle any preexisting disputes in order to negotiate – and that the United States proceeded with negotiations even while certain disputes were pending.[292]

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[287] Reisman II ¶¶ 8-9 (emphasis added) (quotation and citation omitted).

[288] *See, e.g.*, Reisman II ¶ 15 ("If the international legal interpretation of TPA Article 10.28 turned on the 2004 Model U.S. BIT, the U.S. Trade Act of 2002, U.S. administrative practices, or U.S. negotiating objectives, they would be relevant – but, of course, the task is the interpretation of *the Treaty* pursuant to applicable international norms."); *id.* ¶ 22 ("Contrary to the implication of Ambassador Allgeier's report, the Tribunal must rely on the Treaty's object and purpose – which is what *both* Contracting Parties negotiated and agreed – and not, as a general matter, on U.S. legislation's 'fundamental procedural and substantive standards.' The proper focus is on the instrument under interpretation, and not on whether it is consistent with and adopts the legislation or policy objectives of one of the Contracting Parties.").

[289] Allgeier ¶ 11.

[290] Statement of Reply ¶¶ 106-107.

[291] Record of Foreign Trade and Tourism Commission, Legislature 2003-2004 (per Peruvian Congress website), July 2004, at 16 (emphasis added)

[292] Herrera ¶ 14.

- Contemporaneous summaries indicate that the United States tried to raise certain disputes during Treaty negotiations, but Peru advised that they were being addressed in other fora and were not for discussion in relation to the Treaty.[293]

- The disputes identified by Gramercy concerned the underlying expropriation of property in Peru as part of the Agrarian Reform – *not* the Bonds. As Gramercy itself explains, the LeTourneau matter was resolved through a settlement payment.[294] The only other Agrarian Reform-related case identified by Gramercy involved a U.S. national who reported to the U.S. Embassy that he was contesting an expropriation, had made efforts to recovery property, "made no attempt to redeem the bonds," and stopped providing updates in 2001.[295]

156. As the fuller picture obscured by Gramercy reveals, the limited number of preexisting disputes with U.S. nationals concerning expropriations were not a precondition to Treaty negotiations, and in any event did not even concern the Bonds. Accordingly, they have no bearing at all on the substance of the Treaty negotiations, let alone whether the Bonds could be considered an "investment" under the Treaty.

157. *Second*, Gramercy suggests that it is relevant that the Contracting Parties expressly excluded public debt in other treaties prior to, or contemporaneous with, the Treaty.[296] In fact, that is wholly irrelevant. Under Vienna Convention Article 31(3), the Tribunal *shall* account for any *subsequent* practice or agreement of the Contracting Parties *together* regarding the interpretation of *this* Treaty; and, under Article 32, the Tribunal *may* account for the circumstances of conclusion of *this* Treaty. There is no basis, however, for the Tribunal to consider the *separate* prior or contemporaneous practice of each Contracting Party with respect to *other treaties* with *other* States.[297] In any event, the "public debt" which Peru excluded from the referenced treaties is entirely distinct from, and has no bearing on, the Agrarian Reform Bonds – as addressed above in view of the ordinary meaning of "public debt," and as also addressed below in view of Peru's experience negotiating the Treaty.

158. *Third*, Gramercy argues that contemporaneous Peruvian summaries of the Treaty negotiations indicate that the Contracting Parties intended to "cover[] all kinds of public debt with the sole exception of bilateral debt."[298] In fact, this is refuted by a proper reading of the Treaty text, which requires an assessment of the "characteristics of investment" in light of the Treaty's object and purpose – and thus does not extend protection to all non-bilateral State debt, as detailed above. In any event, the negotiations over "public debt" have

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[293] *See, e.g.*, Minutes of Treaty Negotiations Round No. 10, 10 June 2005, at 22-23 (stating that, "[d]uring the bilateral meeting, the United States reiterated the special concern that US investors have about the situation of litigation cases," and Peru replied that "litigations are following due process before a binding forum, by virtue of which they should not be a matter of discussion") (Doc. R-1041); *see also* Herrera ¶ 14.

[294] Statement of Reply ¶ 110.

[295] *See* Statement of Reply ¶ 33 (citing Docs. CE-456 at 9-10, CE-482 at 4, CE-492 at 3-4) (appearing to all concern the same individual bondholder). One other Agrarian Reform-related case reflected in one exhibit, but which Gramercy does not mention, similarly concerned a U.S. national who had contested the land expropriation, made no mention of Bonds, and "ha[d] not contacted the [U.S.] Embassy for assistance since 2002." Doc. CE-456 at 10-11.

[296] Statement of Reply ¶¶ 115-118.

[297] *See* Vienna Convention, Arts. 31-32.

[298] Statement of Reply ¶ 99.

no bearing whatsoever on the Bonds. As Mr. Herrera, Peru's Head of the Negotiating Team for the Treaty's Investment Chapter, explains:

- "Peru took the position of limiting public debt coverage under the Treaty because, in 2002, for the first time in 74 years, Peru had ventured into international capital markets with the Brady Bond Exchange for Global Bonds, Peru 2012. This transaction was followed by numerous Global Bond issues."[299]

- "These were sovereign bond issues in which Peru generally raised money from foreign companies to finance growth and development activities in the country."[300]

- "Throughout the negotiations, the understanding and focus of the concept of public debt (including bonds) as an 'investment' was always as an instrument aimed at obtaining financing in international markets."[301]

- "In contrast, the Agrarian Reform Bonds were a domestic instrument used as a form of payment, to landowners in Peru. The Agrarian Reform Bonds were configured internally, and not to obtain financing in international markets."[302]

- "Neither Peru nor the United States considered that the Agrarian Reform Bonds would be covered by the Treaty. Neither Contracting Party ever mentioned the Agrarian Reform Bonds during the negotiations. There is no reference to the issue in the minutes of the thirteen rounds of negotiations. The Agrarian Reform Bonds simply are not the type of instrument that the Contracting Parties had in mind when negotiating Treaty provisions regarding 'bonds,' 'debt,' and 'public debt.'"[303]

159. Accordingly, as the contemporaneous negotiating summaries and Mr. Herrera confirm, the Contracting Parties' exchanges on "public debt" were founded upon considerations regarding contemporary sovereign bonds issued outside of Peru to obtain financing on international markets, including U.S. markets. The Agrarian Reform Bonds were not discussed during Treaty negotiations, and indeed were never contemplated to fall within the scope of "public debt." Far from lending support to Gramercy's misinterpretation of the Treaty, the circumstances of the Treaty's conclusion therefore underscore that the Bonds are not, and were never considered to be, Treaty "investments."

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[299] Herrera ¶ 26.

[300] Herrera ¶ 26.

[301] Herrera ¶ 33.

[302] Herrera ¶ 33.

[303] Herrera ¶ 34.

IV. Merits

A. Gramercy Bears The Burden Of Proving All Elements Of Its Case

160. As detailed in Peru's Statement of Defense, international law and arbitral practice require that Gramercy prove all elements of its case.[304] This fundamental principle is beyond dispute, and is repeatedly confirmed by the United States in its Submission.[305]

161. Gramercy in its Statement of Reply does not explicitly address the legal standard, but nevertheless, Gramercy attempts to shift the burden of proof onto Peru.[306] This approach is consistent with Gramercy's longstanding pattern of withholding evidence and seeking to sandbag Peru, as addressed below.

162. Contrary to Gramercy's allegations, Gramercy bears the burden to prove all elements of its case – not just as to the jurisdictional requirements of the Treaty,[307] but also the substantive claims alleged under the Treaty,[308] as well as any alleged damages.[309]

163. Further to Procedural Order No. 1 and Peru's fundamental right to due process, this is the final written submission on the merits, and Gramercy is not entitled to present new arguments or produce new evidence. Gramercy has had every opportunity to prove its claims: it has failed.

164. As Peru previously detailed, Gramercy has withheld relevant and material evidence, notwithstanding repeated requests by Peru for transparency.[310]

165. In its Statement of Reply, Gramercy mischaracterizes Peru's statements as "revisionist accusations," and instead seeks to project its own failings onto Peru, by wrongly accusing Peru of withholding documents.[311] Both allegations are demonstrably incorrect. In

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[304] *See* Statement of Defense ¶¶ 160 *et seq.*

[305] US Submission ¶¶ 5, 34, 49, 55.

[306] *See, e.g.*, Statement of Reply ¶ 380; Bullard ¶ 18.1 (stating that "the Peruvian Government has not met its burden to prove" that the Supreme Decrees are not illegitimate).

[307] *See, e.g.*, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction dated 12 Feb. 2010 (RA-104) ¶ 57 ("[T]he claimant must *prove* the facts necessary for the establishment of jurisdiction.") (quotation omitted; emphasis in original); *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 Apr. 2009 (RA-100) ¶¶ 60- 61 (holding that a tribunal "cannot take all the facts alleged by the Claimant as granted facts," and that "if jurisdiction rests on the existence of certain facts, they have to be proven").

[308] *See, e.g.*, *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Award dated 26 July 2007 (RA-85) ¶ 121 ("The principle of *onus probandi actori incumbit* – that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals."); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 327 (1953) (RA-48) ("[T]here exists a general principle of law placing the burden of proof upon the claimant.").

[309] *See, e.g.*, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award dated 3 Mar. 2010 (RA-105) ¶ 453 ("[T]he Claimants hold the burden of proving their loss in accordance with international law principles of causation."); *Víctor Pey Casado and President Allende Foundation v. Republic of Chile [I]*, ICSID Case No. ARB/98/2, Award II dated 13 Sept. 2016 (RA-148) ¶ 205 ("It is a basic tenet of investment arbitration that a claimant must prove its pleaded loss . . . .").

[310] *See e.g.*, Statement of Defense ¶¶ 3, 62, 162, 165, 169, 176, 197.

[311] *See, e.g.* Statement of Reply ¶¶ 6, 607.

fact, Gramercy's non-transparent conduct has pervaded every phase of this proceeding, including, among others:

- Gramercy made anemic productions with each of the four notices of arbitration and statements of claim that it filed between 2016 and 2018, including by withholding Bond acquisition documents and documents showing its interest and holdings in the Bonds, among many others.[312]

- After many prior opportunities to do so, with its Reply Gramercy finally submitted into the record of this proceeding some of these relevant documents including over 21,000 pages of previously withheld bond purchase contracts.[313]

- During the document production phase, Gramercy agreed to produce only "certain" responsive documents and unilaterally cherry-picked which documents it produced.[314]

- Gramercy failed to produce any documents at all in response to various of Peru's document requests with respect to which Gramercy voluntarily undertook to produce and/or was ordered to produce by the Tribunal, including, for example, in connection with Gramercy's contemporaneous assessments of the Bonds;[315] Gramercy's compliance with applicable law;[316] and Gramercy's contemporaneous assessments of the Bondholder Process.[317]

- In addition, Gramercy continues to withhold relevant documents that are material to key issues, the existence of which is revealed by other documents or Gramercy itself. For example:

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[312] *See*, *e.g.*, Statement of Defense ¶ 5.

[313] *See*, *e.g.*, Letter from Peru to Tribunal 15 February 2019 (R-36).

[314] *See*, *e.g.*, Letter from Peru to Tribunal 15 February 2019 (R-36); Letter from Peru to Tribunal 28 March 2019 (R-41); Letter from Peru to Tribunal 11 June 2019 (R-56).

[315] During the document production phase, Peru requested documents between Gramercy and Exotix or other investment firms assessing Agrarian Reform Bonds as a potential or ongoing investment, including as to the legal framework governing the Bonds, the valuation of the Bonds, and the prospects for payment of the Bonds. See Procedural Order No. 6, Peru Document Request 18. In particular, Koenigsberger states that he "first became interested" in the Agrarian Reform Bonds when Exotix "brought them to my attention." Second Amended Witness Statement of Robert S. Koenigsberger ¶ 20. But, Gramercy did not just hear about the Bonds from Exotix; instead, Exotix representatives were on the ground with Gramercy part of its "due diligence." 2006 Memorandum (CE-114). Yet, Gramercy has not produced any documents.

[316] During the document production phase, the Tribunal ordered Gramercy to produce "Gramercy's memoranda regarding measures undertaken by Gramercy to comply with applicable law when it allegedly acquired Bonds, including actions to confirm authenticity of documents and title, issued from 2005 to 2008." Procedural Order No. 6, Peru Document Request 4. However, Gramercy produced no such documents, and includes no references to any responsive documents on its privilege log. *See* Letter from Gramercy to Peru, 22 March 2019 (Doc. R-1090).

[317] During the document production phase, Peru requested Gramercy produce documents regarding the Bondholder Process, including assessments of applicable Bond authentication procedures, payment procedures, and valuation formulas, and Gramercy's decision not to participate in the Bondholder Process. *See* Procedural Order No. 6, Peru Document Request 25. Gramercy represented that it would "produce certain non-privileged responsive documents assessing the applicable Bond authentication procedures, payment procedures, and valuation formulas in the Supreme Decrees in the period immediately following issuance of the Supreme Decrees." *See* Procedural Order No. 6, Peru Document Request 25. Gramercy has produced no such documents and only claims a single such document on its privilege log. *See* Letter from Gramercy to Peru, 22 March 2019 (Doc. R-1090).

- Documents that Gramercy has sought to keep confidential from the public show that there is basic information on the nature of its interest in the Agrarian Reform Bonds that Gramercy continues to withhold. For example, documents refer to a Pass-Through Certificate Agreement between Gramercy Funds Management and [redacted].,[318] which, according to another internal Gramercy document "allow investors to acquire exposure to [Gramercy's Agrarian Reform Bonds] by purchasing dollar-denominated instruments tradeable on Euroclear."[319] Gramercy has not submitted any pass-through certificates or related evidence.

- Financial statements show that Gramercy continues to withhold evidence that may be relevant to the valuations on the Bonds. For example, the 2010 financial statement of [redacted] relies on "an opinion of a nationally recognized independent valuation consulting firm."[320] Gramercy has not produced it.

- Gramercy's own witnesses in this proceeding refer to documents that might also be relevant to showing the extent and nature of Gramercy's speculation on the Bonds, as well as its actual valuation and holdings. For example, Gramercy executive Joannou refers to Gramercy having US$ 500 million "insurance" on the Bonds.[321] Gramercy has not produced any insurance agreement or other explanation of the terms or relevance of such insurance.

166. Peru notes that Procedural Order No. 3 provides that "[i]f a Party, without satisfactory explanation, and in contravention of the Tribunal's instructions, fails to produce a Document, the Tribunal may infer that such Document is adverse to the interest of that Party."[322]

167. This is not the first case in which a Gramercy entity has sought to withhold relevant evidence. In 2011, for example, Gramercy Advisors failed to produce documents to the United States, "rel[ying] on a vague need to protect 'investors,' while failing to establish a legitimate harm to these 'investors.'" A U.S. court rejected Gramercy Advisors' arguments.[323]

168. Peru, in contrast, has been nothing but transparent in this proceeding. In fact, Peru produced relevant and material documents in its possession and control as part of the more than 1,000 fact exhibits with over 33,000 pages of relevant documents Peru submitted with its briefing before the document production phase even began.

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[318] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[319] *See* Emails from J. Cerritelli, May 23, 2008 (Docs. CE-730 and CE-731).

[320] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[321] Witness Statement of Robert Joannou ¶ 8.

[322] Procedural Order No. 3 ¶ 48.

[323] *See* Ruling on the United States' Motion to Compel, *United States v. Gramercy Advisors*, 28 April 2011 (Doc. R-1094).

169. During the document production phase, notwithstanding and reserving its objections, Peru offered to produce relevant and material documents located in response to 17 of Gramercy's 21 Document Requests.[324] In addition to its extensive prior production of over with its briefing, Peru produced more than 3,800 pages. In addition, Peru expressly affirmed that "Peru has carried out a reasonable search," "[n]o document which Peru was ordered or voluntarily undertook to produce has been destroyed or concealed," and that "Peru has produced all Documents which it was ordered or voluntarily undertook to produce."[325] Indeed, Peru voluntarily produced pursuant to best efforts to locate responsive documents dating back several years (and, in some instances, a decade or more) from various branches of government and government agencies, notwithstanding the turnover in personnel and files that naturally occurs in the ordinary course. Peru will address Gramercy's specific and unfounded allegations regarding Peru's document production throughout the brief, as relevant.

170. In addition to the foregoing, Gramercy has inverted the proper order of the proceeding by forcing Peru to address issues first, effectively allowing itself to respond to the Respondent and adjust its arguments accordingly.

171. In its Statement of Reply, Gramercy demonstrated it had not "put all cards on the table" in its first written submission as was required,[326] and had instead kept its cards up its sleeve. Gramercy has subsequently denied sandbagging, and argued that its Statement of Reply was responsive. The Tribunal has given Gramercy significant leeway.

172. Gramercy's conduct is part of a pattern of sandbagging throughout this proceeding. Among other things, this includes the following examples:

- ***Images of Bonds***. Gramercy did not include any evidence of its holdings of Bonds with its first three notices of arbitration and statements of claim, other than a photograph of a single bond.[327] As Peru has explained, the actual bonds in this proceeding are relevant to key issues of jurisdiction, merits, and damages. In this context, Peru submitted two responses noting that Gramercy had failed to meet its burden by presenting only a "lone bond."[328] It was only subsequently on 14 April 2018, that Gramercy introduced images of additional Bonds into the proceeding.[329] Notably, Gramercy still has not produced a single original Bond in this proceeding, despite the requirement that these instruments by authenticated, as Gramercy itself acknowledges, as detailed herein.

- ***Bond Acquisition Documents***. For years Gramercy withheld documentation on its bond acquisitions. As Peru has explained, Gramercy's acquisition of the bonds is relevant to key issues of jurisdiction, merits, and damages. Yet, Gramercy did not attach any of this documentation to any of its four notices of

[324] Procedural Order No. 6; Letter from Peru to Tribunal, 15 February 2019 (R-36).

[325] Affidavit of President of the Special Commission that Represents the State in Investment Disputes, 22 March 2019.

[326] *See* Draft Procedural Order No. 1, 1 June 2018; Letter C-27 from Gramercy to the Tribunal, 27 June 2018 (no further objection).

[327] Response of Peru, 6 September 2016 ¶¶ 49-52.

[328] Response of Peru, 6 September 2016 ¶¶ 49-52; Response of Peru, 5 July 2016 ¶¶ 44-46.

[329] *See* Letter from Gramercy to Tribunal, 13 April 2018 (C-12).

arbitration and statements of claim. Accordingly, with its Statement of Defense, Peru was forced to address this issue and submit what it could discover of the relevant documentation.[330] It is only with its Reply that Gramercy submits this documentation,[331] together with the witness statement of Lanava. However, what Gramercy has finally submitted only raises more questions.

- ***Valuations of Bonds***. Gramercy also withheld for years evidence of valuation of the Bonds outside of this proceeding. As Peru has explained, valuations of the Bonds are relevant to key issues of jurisdiction, merits, and damages. Nonetheless, Gramercy did not attach any of this documentation to any of its four notices of arbitration and statements of claim. It is only with its Reply that Gramercy submits this documentation, together with the witness statement of Joannou. Yet, these documents are heavily redacted, obscuring any determination of potential relevance and reliability, and blocking any determination of context. The limited information Gramercy has submitted still has significant gaps, which only raises more questions.

- ***Beneficial Owners***. Gramercy has for years made vague assertions about the relevance of beneficial owners. As Peru has explained, the existence of beneficial owners may be relevant to key issues of jurisdiction, merits, and damages. Regardless, Gramercy did not attach any of this documentation to any of its four notices of arbitration and statements of claim. It is only with its Reply that Gramercy submits any documentation on beneficial owners, together with the witness statement of Lanava. However, what Gramercy has finally submitted again only raises more questions.

173. Again, with its Statement of Reply, Gramercy has withheld key information and documents with respect to key issues, including the original bonds, its acquisition of the bonds, the valuation of the bonds, and its beneficial owners. The record is now closed, however, and any further attempts by Gramercy to sandbag Peru will be a further assault on Respondent's fundamental due process rights in this proceeding.

B. Facts

174. Gramercy makes little or no effort to contest the facts demonstrated by Peru in the Statement of Defense. What facts it does address, Gramercy continues to mischaracterize.

1. The Agrarian Reform Bonds

a. The Unique History And Characteristics Of The Agrarian Reform Bonds Have Been Confirmed

175. Peru has demonstrated that the Agrarian Reform Bonds are the remnant of a historical period decades past. During Peru's Agrarian Reform, one of many throughout the

[330] Statement of Defense ¶¶ 69-72.

[331] Statement of Reply ¶ 18; Doc. CE-339.

world, Peru provided the Agrarian Reform Bonds as compensation for land in Peru. They were denominated in local currency, the *Sol de Oro*, and were subject to Peruvian law and jurisdiction. They were not offered publicly, listed on an exchange or issued into the U.S. market, and are not comparable to contemporary sovereign bonds.[332]

176. In its Statement of Reply, Gramercy seeks to conflate the Agrarian Reform Bonds with contemporary global bonds.[333] Contrary to Gramercy's allegations, the Agrarian Reform Bonds are distinct from modern sovereign bonds. Among other things, they were bearer instruments provided as compensation for land rather than to raise capital for the sovereign, they were not marketed or placed in an international exchange.

177. As to whether the Agrarian Reform Bonds are similar to contemporary sovereign bonds issued by Peru, Vice Minister Sotelo states:

> This is not correct. The Agrarian Reform Bonds were issued in a different context, serve different purposes and have different features. [….]
>
> As I mentioned in my previous statement, the Agrarian Reform Bonds were given to the prior landowners under the agrarian reform almost half a century ago, and since they were denominated in the local currency of that time, they were impacted by hyperinflation.[334]

178. The Vice Minister goes on to explain that "[i]n addition, the Agrarian Reform Bonds have features that are different from those of Peru's modern sovereign bonds," which include their objective,[335] registration,[336] format,[337] lack of investment bank involvement,[338] and the fact that they were not rated for investment.[339]

179. This is confirmed by Professor Guidotti, who concludes that "the Agrarian Reform Bonds are different from Peru's modern sovereign bonds, US Treasury bonds, and other modern sovereign bonds … for the following principal reasons, among others:

> The Agrarian Reform Bonds were issued as compensation for the expropriation of land, not for raising funds to invest in Peru.
>
> The Agrarian Reform Bonds were issued in nominal terms in a now-defunct currency and were subject to the risk of local inflation. They were not registered.

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[332] *See* Statement of Defense ¶¶ 20-31.

[333] Statement of Reply ¶ 75.

[334] Sotelo II ¶ 5.

[335] Sotelo II ¶ 9 ("The Agrarian Reform Bonds were given to the prior landowners under the agrarian reform, as compensation for the value of the expropriated lands.").

[336] Sotelo II ¶ 9 ("The Agrarian Reform Bonds were not registered with CAVALI ICLV S.A.").

[337] Sotelo II ¶ 9 ("The Agrarian Reform Bonds are physical instruments, and payments are related to the presentment of coupons.").

[338] Sotelo II ¶ 9 ("Investment banks were not involved in the distribution of the Agrarian Reform Bonds.").

[339] Sotelo II ¶ 9 ("The Agrarian Reform Bonds were not rated for their investment risk by the main rating agencies.").

> The Agrarian Reform Bonds were not designed to attract investors and were not marketed or pitched on road shows."[340]

b. The Uncertain Legal Status And Preexisting Dispute Related To The Bonds Have Been Confirmed

180. Peru has demonstrated that currency changes and hyperinflation resulted in uncertainty as to the value of the Agrarian Reform Bonds and procedure for recovery, which persisted at the time of Gramercy's alleged acquisitions,[341] thus disproving Gramercy's prior allegation that the "state of [Peruvian] law" was "abundantly clear" and that its contemporaneous research had revealed a "clear legal rule" in this regard.[342]

181. As Peru previously has detailed, the Constitutional Tribunal issued a partial but incomplete clarification of the status of the Agrarian Reform Bonds on 15 March 2001 ("March 2001 Sentence") which left open more questions than it answered.[343] Specifically, the March 2001 Sentence declared unconstitutional a 1996 law providing for the payment of the Bonds according to their nominal value plus interest. The March 2001 Sentence did not, however, establish a procedure for payment or a method for calculating the value of the Bonds.[344]

182. The Statement of Reply does not address the impact of the currency changes and hyperinflation on the Bonds or the legal framework prior to 2001, and it does not dispute that the Bonds were effectively worthless at this time. Gramercy continues to allege, however, that the state of the law was clear and denies there was uncertainty as to the value of the Bonds. Gramercy's assertions are not supported by the March 2001 Sentence and are contrary to the subsequent efforts to bring certainty to these issues.

183. ***Uncertainty in the March 2001 Sentence.*** Gramercy attempts to show that Peru's Constitutional Tribunal resolved the uncertainties as to the status of the Bonds in 2001, from which point the Bonds allegedly had "substantial value" according to Gramercy.[345] Gramercy's allegations are at odds with the March 2001 Sentence itself, as well as Peruvian law. Gramercy's interpretations of the Constitutional Tribunal's decision merely highlight the lack of clarity therein. For example:

- Gramercy incorrectly states that it is "indisputable" that the Constitutional Tribunal determined "that Peru has to pay the Land Bonds … at the current value of their principal, plus interest."[346] In fact, the March 2001 Sentence does not refer to the principal of the Bonds or interest, either in Section 1 of the Foundations, which Gramercy cites in support of its assertion, or elsewhere.[347]

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[340] Guidotti II ¶ 3.

[341] *See* Statement of Defense ¶¶ 32-51.

[342] Third Amended Notice ¶ 62 (citing Expert Report of Delia Revoredo Marsano De Mur ¶ 28); Amended Koenigsberger ¶ 33.

[343] *See* Statement of Defense ¶¶ 38 *et seq.*

[344] Constitutional Tribunal Sentence in Record No. 022-96-I/TC, 15 March 2001 (Doc. RA-211).

[345] *See. e.g.,* Statement of Reply ¶¶ 225 *et seq.*

[346] Statement of Reply ¶ 226.

[347] Constitutional Tribunal Sentence in Record No. 022-96-I/TC, 15 March 2001 (Doc. RA-211).

Far from being indisputable, nothing in the March 2001 Sentence suggests that Gramercy's interpretation is the only possible one.

- Gramercy incorrectly states that "when the Constitutional Tribunal declared that the Land Bonds had to be paid at current value, there could be no question what it meant."[348] In fact, the March 2001 makes only one mention of the current value principle, in Section 7 of the Foundations, which concludes that payment of nominal value of the Bonds pursuant to Law No. 26597 was inconsistent with the current value principle ["*principio valorista*"]. The Constitutional Tribunal did not elaborate on any alternatives that would be consistent with the principle, and nothing in the March 2001 Sentence suggests there was only one way this principle should be applied.[349] In fact, as addressed below, in the years following there was no consensus as to how the March 2001 Sentence should be interpreted and multiple efforts to clarify the legal framework failed.

- Gramercy incorrectly states that "CPI was implicitly required" by the March 2001 Sentence.[350] Gramercy relies on Castillo, who concludes that CPI is "the only adequate parameter to update the value of the debt represented in the Bonds."[351] Castillo admits both that the Constitutional Tribunal "did not explicitly reference CPI," and that "[i]t is clear that there are many reference indexes."[352] Likewise Gramercy's own Statement of Reply admits that CPI is "not universally" used as a method of determining current value.[353] Castillo nevertheless evaluates possible alternatives and concludes that CPI is "the only criterion that permits the appropriate updating of the value of the relevant obligation is CPI"[354] Notably Castillo, who is not an economist, is contradicted by Edwards, who states that a dollarization methodology "can result in a value that is relatively close to CPI updating."[355]

184. Contrary to Gramercy's allegations, the Constitutional Tribunal did not set a clear legal rule. Notably, and at odds with even its own allegations, Gramercy itself admits that "uncertainties remained" after the Constitutional Tribunal's March 2001 Sentence.[356] These uncertainties went to the heart of how the Current Value Principle should be applied:

- ***Uncertainty as to value to be updated***. There is no basis for Gramercy's incorrect attempt to equate the value of the Bonds with the value of the land taken during the Agrarian Reform. Nor is there any reason to assume that the value of the Bonds to be updated under the current value principle is necessarily their value at the time of issuance. As Dr. Hundskopf explains: "[t]he 2001

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[348] Statement of Reply ¶ 294.

[349] Constitutional Tribunal Sentence in Record No. 022-96-I/TC, 15 March 2001 (Doc. RA-211).

[350] Statement of Reply ¶ 294.

[351] Castillo ¶ 94.

[352] Castillo ¶¶ 21, 97.

[353] Statement of Reply ¶ 302.

[354] Castillo ¶ 21.

[355] Edwards I (Amended) ¶ 12.

[356] Statement of Reply ¶ 295.

judgment did not rule on what value should be updated. The value of the Agrarian Bonds is not tied to the value of the expropriated lands during the Agrarian Reform, which is legally irrelevant."[357]

- ***Uncertainty as to the method for updating.*** ***T***here is no basis for assuming that the Constitutional Tribunal implicitly meant that CPI was required for determining the current value of the Bonds.

  - The record before the Constitutional Tribunal at the time of the March 2001 Sentence included specific arguments by the petitioners regarding the method for determining the current value of the Bonds, including the application of CPI.[358] Despite this, the Constitutional Tribunal was silent on the method that should be used to calculate current value at that time.

  - Gramercy is unable to point to a single law or regulation mandating the use of CPI. On the contrary, the only alternative to a nominalist calculation of the value of the Bonds adopted by Peru at the time of the March 2001 Sentence was the dollarization method, which was included in Emergency Decree No. 088-2000 of the prior year, and which provided for the determination of the current value of the Bonds according to a dollarization method.[359]

  - Moreover, Gramercy's reliance on Castillo is misplaced. In a prior academic publication, Dr. Castillo himself recognizes that there are multiple "commonly used" updating methods,[360] and, in addition to CPI, refers to over a dozen types of index, "any of which," he states can be used to update values.[361] In practice, Castillo explains, current value is determined in accordance with the agreement of the parties or by a judge applying any of the methods set forth in Art. 1235 of the Civil Code (*i.e.*, by reference to

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[357] Hundskopf II ¶ 5; *see also id.* ¶¶ 20-44 (explaining the application of the current value principle in Peruvian law).

[358] Constitutional challenge of the College of Engineers of Peru, 16 December 1996, in Constitutional Tribunal Record No. 00022-1996-PI/TC at ¶ 1.39 (Doc. R-462) (arguing that the Bonds "must be subject to a necessary convertibility factor that will allow a reasonable economic translation in constant value of the present, plus interest, in accordance with the law."); Submission of 17 March 1997, in Constitutional Tribunal Record No. 00022-1996-PI/TC, at ¶ 6; CIP, 24 March 1997, in Constitutional Tribunal Record No. 00022-1996-PI/TC (Doc. R-462) (calculating the updated value of the bonds); Submission of, 25 April 1997, in Constitutional Tribunal Record No. 00022-1996-PI/TC, at ¶ 4 (Doc. R-462) (attaching an aide memoire with the application of a Consumer Price Index methodology and 5% annual interest); Submission of 15 January 2001, in Constitutional Tribunal Record No. 00022-1996-PI/TC (Doc. R-462) (referring to the application of CPI methodology).

[359] Emergency Decree No, 088-2000, 9 October 2000, Art.5 (Doc. RA-266).

[360] Felipe Osterling Parodi and Mario Castillo Freyre, El Nominalismo y el Valorismo en el Perú, Part 2, 2001, p.28 (RA-357) ("The standards commonly used by contractors, in order to keep the value of benefits stable, are the following: -Noble metals; - Merchandise; -Foreign Currency; -Adjustment Frequency; and mathematical formulas in efforts to correct the amounts owed.").

[361] Felipe Osterling Parodi and Mario Castillo Freyre, El Nominalismo y el Valorismo en el Perú, Part 2, 2001, p.37 (RA-357) ("[Any of the indices mentioned below can be used to update the value of benefits of giving money: these are, namely: -The Consumer Price Index; -The Wholesale Price Index; -Indices of Manufacturing, Mining, Agricultural Production, etc. ; -Employment Rates; - Variation Rates of the Net International Reserves of the Central Reserve Bank or Peru; - The Specialized Inflation Index; - The Public Rate Index; - The Gross Domestic Product Indices; -Tax, Commercial, Customs Indices, amongst others.").

indexes set by the Central Reserve Bank of Peru, other currencies, or goods) or any other adjustment index that preserves value.[362]

- As Dr. Hundskopf explains "[t]he 2001 judgment did not rule that a particular method should be applied and it is not correct that there is only one way of updating debts under the Civil Code. The Civil Code refers to different update methodologies, and it follows that the Peruvian legislator of the current Civil Code had no preference for a particular update method. Methodologies other than the CPI are also applied by courts and the government. In sum, it is not correct to equate the current value principle with a CPI principle."[363]

- Likewise, the Quantum experts explain, "current value" did not have any established economic or financial meaning: "The 2001 CT Decision created ambiguity because the "Current Value Principle" is not a universally recognized economic or financial concept, and it has no recognized methodology or calculation method, particularly with respect to the Unclipped Coupons. As such, the 2001 CT Decision left undefined the manner in which to calculate the value of the Coupons."[364]

- ***Uncertainty as to interest.*** As indicated above, there is no basis for assuming that the Constitutional Tribunal mandated a particular type of interest, if any, be paid to bondholders. Interest is not mentioned in the March 2001 Sentence. Nor do Gramercy's experts on Peruvian law address interest in their reports. As a general matter, Dr. Castillo addresses the relationship between interest and current value in a prior academic publication, which explains that the two concepts are different and notes that upon updating a debt "it is worth asking oneself whether the creditor might have the right to receive an additional amount by virtue of interests."[365] Gramercy's position that the rule as to interest was clear from the March 2001 Sentence is also contradicted by its own witness' testimony: Joannou states that Gramercy did not evaluate whether to "use compound rather than simple interest" until 2011 or 2012.[366] As Dr. Hundskopf explains "[i]t does not follow from the 2001 judgment that the creditor can demand a particular compensation in the form of interest for the monetary value of the Agrarian Bonds or that the loss of opportunity is a concept that corresponds to Agrarian Bonds. ."[367]

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[362] Felipe Osterling Parodi and Mario Castillo Freyre, El Nominalismo y el Valorismo en el Perú, Part 2, 2001, p.48 (RA-357) ("The judge, even during the proceedings, is authorized to update the monetary claim, applying the criteria referred to in Article 1235 or any other correction index that allows the amount of the obligation to be readjusted to constant value.").

[363] Hundskopf II ¶ 5; *see also id.* ¶¶ 45-62 (explaining that the current value principle is not the CPI principle).

[364] Quantum II ¶ 18.

[365] Felipe Osterling Parodi and Mario Castillo Freyre, El Nominalismo y el Valorismo en el Perú, Part 2, 2001, p. 46 (RA-357) ("it is worth asking whether the creditor would have a righto an additional sum for the concept of interests.").

[366] Joannou ¶ 21.

[367] Hundskopf II ¶ 5; *see also id.* ¶¶ 63-68 (explaining that the current value principle is not the CPI principle).

- ***Uncertainty as to payment method***. In striking down Law No. 26597 as unconstitutional, the Constitutional Tribunal did not mandate or put in place a framework for paying holders of the Agrarian Reform Bonds. As Peru has demonstrated, the Agrarian Development Bank, the entity previously in charge of paying the Bonds, was liquidated in 1992.[368] The March 2001 Sentence does not create a legal framework whereby any entity would take its place, or otherwise explain how the Bonds should be paid in practice.

185. Peru has also shown that the legal status of the Bonds remained uncertain following the March 2001 Sentence, which is borne out by the various efforts to attempts to clarify the legal framework for determining the value and paying the Agrarian Reform, all of which failed.[369]

186. In its Statement of Reply, Gramercy endeavors to demonstrate that there was consensus as to the legal status of the Bonds, and specifically that CPI should be used to calculate the current value of Agrarian Reform Bonds. Gramercy's allegations are not supported by the facts:

- ***Emergency Decree No. 088-2000.*** The only law to specify a methodology for calculating the current value of the Agrarian Reform Bonds prior to 2013 was Emergency Decree No. 088-2000, which provided for the application of a dollarization method, not CPI-updating favored by Gramercy.[370] Gramercy discounts the relevance of the Emergency Decree, by referring to the Agrarian Commission's report of February 2004,[371] which, as Peru explained in its Statement of Defense, concluded that the Emergency Decree contravened the March 2001 Sentence and recommended a methodology based on Adjusted CPI.[372] Gramercy's effort to ignore data points inconsistent with its own preferences is misguided, and mischaracterizes both the Agrarian Commission and the effects of its findings.

  - The Agrarian Commission was an *ad hoc* commission that included representatives of the government as well as a bondholder organization, and its recommendation did not have the force of law.

  - Contrary to Gramercy's assertion, the effect of the Agrarian Commission's report was not to "settle[] any uncertainty regarding the constitutionality of Emergency Decree 088-2000."[373] As Peru has demonstrated, a few months after the Agrarian Commission's report, on 2 August 2004, the Constitutional

[368] Decree Law N° 25478, 8 May 1992, Art 1 (Doc. RA-158).

[369] Statement of Defense ¶¶ 41-51.

[370] Emergency Decree No, 088-2000, 10 October 2000, Art.5 (Doc. RA-266).

[371] Statement of Reply ¶¶ 300, 318.

[372] *See* Statement of Defense ¶ 42; Letter of President of Commission created by Supreme Decree No. 148-2001-EF to MEF, 6 February 2004 (Doc. R-257).

[373] Statement of Reply ¶ 318.

Tribunal issued a new sentence upholding the constitutionality of Emergency Decree No. 088-2000.[374]

- Moreover, years later, draft Bill N° 456 / 2006 expressly provided for the repeal of Emergency Decree 088-2000, thus implicitly confirming that it remained in force.[375]

- ***Legislative Uncertainty prior to the Alleged Acquisition.*** Gramercy does not deny that there were multiple attempts to clarify the legal framework following the March 2001 Sentence. Gramercy argues, however, that the myriad judicial and legislative efforts to implement the Constitutional Tribunal's decision confirm that CPI-updating was the consistent rule in 2001.[376] Gramercy's argument is specious on its face: Not only did none of these bills become law, the very existence (and persistence) of attempts to establish a clear legal framework is evidence that no such framework existed. In addition:

  - Of three bills referring to valuation methodology introduced prior to the Gramercy beginning its alleged acquisitions, one would have provided for the application of a dollarization method (Bill N° 7440/2002-CR),[377] one for CPI plus interest calculated based on updated principal of debt (Bill N° 11459/2004-CR),[378] and one for an adjusted CPI calculation (Bill N° 11971/2004-CR).[379] Gramercy attempts to explain away the reference to dollarization in Bill N° 7440/2002-CR – the first draft legislation to address a valuation methodology following the March 2001 Sentence – by noting that the draft referred to the dollarization method in Emergency Decree 088-2000 being questioned.[380] What Gramercy fails to mention is that the draft referred to the dollarization methodology because Emergency Decree 088-2000 was good law, and the draft itself was expressly said to be consistent with the Constitutional Tribunal's decision.[381] Moreover, Gramercy's argument that the bill referring to dollarization is somehow less valid because it did not progress, is unsound as none of these drafts became law.[382]

  - Similarly, between 2006 and 2008, while Gramercy continued its alleged Bond acquisitions, there was no consensus as to the specific methodology for calculating current value: one bill would have provided for the application of an adjusted CPI method plus interest at rate on face of each Bond (Bill N° 456 / 2006),[383] one for CPI for Metropolitan Lima plus interest from the date

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[374] *See* Statement of Defense ¶ 43; Constitutional Tribunal Sentence in Record No. 0009-2004-AI/TC, 2 August 2004, ¶ 11 (Doc. RA-296).

[375] Bill No. 456 / 2006, 2 October 2006, Disposición Derogatoria. (Doc. R-499).

[376] Statement of Reply ¶¶ 309-332.

[377] Bill 7440 / 2002-CR, 27 June 2003 (Doc. R-414).

[378] Bill 11459 / 2004-CR, 24 August 2004 (Doc. R-418).

[379] Bill 11971 / 2004-CR, November 2004 (Doc. R-419).

[380] Statement of Reply ¶ 317.

[381] Bill 7440 / 2002-CR 27. June 2003, Effect of the Bill on the National Legislation (Doc. R-414).

[382] Statement of Reply ¶ 317.

[383] Bill No. 456 / 2006, 2 October 2006 (Doc. R-499).

when the State ceased payment (Bill N° 3272/2008-CR),[384] and one for CPI for Metropolitan Lima plus interest (Bill N° 3293/2008-CR).[385]

- Not only was Gramercy aware of the various legislative activity relating to the Agrarian Reform Bonds, by its own admission Gramercy's strategy was to shape the legislation to suit its own interests, as it had anticipated even before any alleged acquisitions.[386] In May 2008, internal Gramercy emails state: "[w]e have been in regular contact with the government of Peru since we started investing in these claims…. Our strategy calls for continuing to source in Peru to build a large enough position that the gov't can use as an anchor bloc to negotiate a restructuring solution."[387]

- ***Judicial Uncertainty.*** It is simply incorrect for Gramercy to suggest that Peruvian courts have always held current value should be determined according to a CPI approach.[388] As Peru has demonstrated, in 2004, the Constitutional Tribunal itself upheld the constitutionality of the dollarization method in in Emergency Decree No. 088-2000.[389] Gramercy's fails to distinguish the 2004 Sentence:

  - Gramercy is wrong to argue that the ruling is not relevant because the Emergency Decree predated the March 2001 Sentence: the Constitutional Tribunal expressly found that the dollarization method was consistent to the March 2001 Sentence.[390]

  - Gramercy is wrong to argue that the 2004 Sentence "turned" on the dollarization method being an option for bondholders. In fact, the Constitutional Tribunal gave two separate reasons for its holding, and specified that the "fundamental" point was that the Emergency Decree established an updating method.[391]

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[384] Bill No. 3272 / 2008, 2008 (Doc R-466).

[385] Bill No. 3293 / 2008-CR, 21 May 2009 (Doc R-502).

[386] *See, e.g.,* Memorandum from David Herzberg to Robert Koenigsberger, 24 January 2006, at 3 (Doc. CE-114) (anticipating "strategy would be to lobby a congress representative."); Email from Jose Cerritelli to David Herzberg, 24 January 2006 (Doc. CE-749) ("The draft legislation presently in congress could be improved further."); [redacted] (Doc. R-1095) ("[redacted].).

[387] Email from Jose Cerritelli to Scott Seaman, 23 May 2008 (Doc. CE-730); *see also,* [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY] [redacted].").

[388] Statement of Reply ¶ 322.

[389] *See* Statement of Defense ¶ 43; Constitutional Tribunal Sentence in Record No. 0009-2004-AI/TC, 2 August 2004, ¶ 11 (Doc. RA-296).

[390] *See* Constitutional Tribunal Sentence in Record No. 0009-2004-AI/TC, 2 August 2004, ¶ 10 (Doc. RA-296).

[391] *See* Constitutional Tribunal Sentence in Record No. 0009-2004-AI/TC, 2 August 2004, ¶ 10 (Doc. RA-296).

REDACTED CONTENT DESIGNATED AS CONFIDENTIAL BY GRAMERCY

- Gramercy is wrong to assert that "the Constitutional Tribunal gave no actual consideration to the question whether dollarization in general, or the Emergency Decree's specific approach to it, provided current value." In fact the Constitutional Tribunal explained that Emergency Decree No. 0088-2000 established an updating method [*mecanismo de actualización*], and was therefore different from the nominal payment "removed from the effects of time" [*ajeno a las circunstancias del tiempo*] which had been at issue in the prior case.[392]

- Moreover, to the extent it is relevant that the Constitutional Tribunal did not address whether dollarization did provide some specific current value, this suggests that the Constitutional Tribunal did not have a particular minimum benchmark value in mind that an updating method would be required to meet as a condition of its validity.

187. Peru notes that the existence of uncertainty does not render the current value principle "essentially meaningless," as Gramercy suggests when it seeks to put words in Peru's mouth.[393] As Peru has explained, the uncertainty as to how the current value of the Bonds should be calculated was a fact, and persisted until 2013. Subsequently, however, the Constitutional Tribunal has ruled on the methodology for calculating current value and Peru has been paying bondholders accordingly.

c. The Constitutional Tribunal's Resolution Has Been Confirmed

188. As Peru has demonstrated, in July 2013, the Constitutional Tribunal issued a Resolution resolving years of legal uncertainty by mandating an administrative process for bondholders and a method for determining the Bonds' current value (the "July 2013 Resolution").[394]

- The July 2013 Resolution mandated a process for paying bondholders, to be established by the Executive Branch by Supreme Decree. The Constitutional Court specifically provided that the process include procedures to verify the authenticity of the instruments and the identity of holders, calculate the current value of Bonds, and determine the form of payment, which potentially could be in cash, land, or bonds.[395]

- The July 2013 Resolution also considered various methods for determining the current value of the Bonds, and, after rejecting a methodology based on CPI, held that the "dollarization" method should be applied.[396] In so ruling, the Constitutional Tribunal considered the appropriateness of U.S. Dollar as safe-haven currency in times of hyperinflation,[397] and the legal precedent of Urgency

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[392] *See* Constitutional Tribunal Sentence in Record No. 0009-2004-AI/TC, 2 August 2004, ¶ 10 (Doc. RA-296).

[393] Statement of Reply ¶ 241.

[394] *See* Statement of Defense ¶¶ 87 *et seq*.

[395] July 2013 Resolution ¶¶ 27-29 (Doc. RA-213).

[396] July 2013 Resolution ¶¶ 21-25 (Doc. RA-213).

[397] July 2013 Resolution ¶ 22 (Doc. RA-213).

Decree No. 088-2000,[398] as well as the potential budgetary impact of other methods that might make payment impracticable.[399]

189. Gramercy agrees with Peru that the July 2013 Resolution was a turning point. According to Gramercy, Peru "completely reversed the legal framework," and that "this reversal began" with the July 2013 Resolution.[400] Gramercy's self-serving error is that it maintains that the legal status of the Bonds was clear following the 2001 March Sentence, which Peru repeatedly has shown was not the case.

190. Contrary to Gramercy's allegation, the Constitutional Tribunal did not "purport[] to calculate [current] value differently" in the July 2013 Resolution than it had in its prior rulings.[401] In fact, the Constitutional Tribunal *did not* purport to calculate current value in the March 2001 Sentence, and gave no guidance as to how this should be undertaken. In the 2004 Sentence, the Constitutional Tribunal did rule that the dollarization method established in Emergency Decree No. 0088 was a constitutional method for calculating current value, but did not say that it was not mandatory. The July 2013 Resolution was the first time the Constitutional Tribunal ruled on the appropriate methodology for calculating current value. As the Constitutional Tribunal stated, "this Tribunal determined that the Constitution required an 'updated valuation and payment' of the debt; but it did not specify the criteria for determining that valuation."[402]

191. In its Statement of Reply, Gramercy's assertions that the "genesis" of the July 2013 Resolution was "finding a way not to pay that value because it was so large."[403] Even aside from the fact that the current value of the Bonds was uncertain following the March 2001 Sentence, Gramercy's allegation does not conform with the facts.

192. Gramercy fails to acknowledge that the Constitutional Tribunal had various options available, including several that would not have resolved the legal status of the Agrarian Reform Bonds. For example:

- The Constitutional Tribunal could have refrained from issuing a ruling at all. As Gramercy recognizes, the Constitutional Tribunal had "deliberated for almost two years" and that there was "only a week before the scheduled replacement of five of the six sitting justices on July 17, 2013."[404] Moreover, both President Humala and the Congress stated publicly that it would be inappropriate for the Constitutional Tribunal to rule on the CIP's execution petition,[405] a fact that Gramercy has failed to address.

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[398] July 2013 Resolution ¶ 25 (Doc. RA-213).

[399] July 2013 Resolution ¶ 25 (Doc. RA-213).

[400] *See* Statement of Reply ¶¶ 327-28.

[401] *See* Statement of Reply ¶ 226.

[402] Constitutional Tribunal Resolution in Record No. 022-96-I/TC, 16 July 2013, ¶ 17 (Doc. RA-213). *See also, id.* Opinion of Magistrate Mesia Ramirez ¶ 16.

[403] *See* Statement of Reply ¶ 244.

[404] *See* Statement of Reply ¶¶ 404-5.

[405] *See* Statement of Defense ¶¶ 104-5.

- The Constitutional Tribunal could have refused to rule on the basis that the petition of the CIP was for an executory resolution, whereas bondholders should pursue their claims through ordinary court actions; this was the position of at least one Magistrate of the Constitutional Tribunal.[406]

- The Constitutional Tribunal could have dismissed the petition on the basis that it was time-barred as a matter of Peruvian statutes of limitations that had begun running as of the March 2001 Sentence; this was the position of at least one Magistrate.[407]

193. Nor does Gramercy account for the fact that the reaction to the July 2013 Resolution was largely negative, including, for example, because it was perceived as being too favorable to Gramercy.[408]

194. Despite the foregoing, Gramercy continues to allege incorrectly that the 2013 Resolution was "based on a false premise and tainted by violations of due process and procedure."[409] Gramercy mischaracterizes the facts and fails to rebut to Peru's evidence regarding the validity of the Constitutional Tribunal's decision.[410] For example, Gramercy continues to allege that "Minister Castilla spooked the justices" and that "multiple meetings took place between executive representatives and the Tribunal members," and dismisses the testimony of Ambassador Castilla in this proceeding.[411] As Ambassador Castilla explains:

> As I explained, I met with many people during my tenure as Minister, including the President of the Constitutional Tribunal, but I do not recall a particular meeting with him and the Prime Minister on July 10, 2013. Nor do I recall there being meetings with any of the members of the Constitutional Tribunal in the days before they issued their ruling. I have checked the Ministry's visitor logs for those days and do not see any record of them visiting the Ministry. I did not try to "spook" or "pressure" the Constitutional Tribunal. As I explained before, the MEF initially tried to have the ruling declared null and void.[412]

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[406] Constitutional Tribunal Resolution in Record No. 022-96-I/TC, 16 July 2013, Opinion of Magistrate Calle Hayen (Doc. RA-213).

[407] Constitutional Tribunal Resolution in Record No. 022-96-I/TC, 16 July 2013, Opinion of Magistrate Vergara Gotelli (Doc. RA-213).

[408] *See* Statement of Defense ¶¶ 104-5; *see also* The Tremendous Court and the Agrarian Reform Bonds, Carlos Monge - Los Andes, 19 July 2013 (Doc. R-560); The BCP assures that it only holds less than 0.6% of the agrarian bonds, Gestión, 30 July 2013 (Doc. R-561); CT orders the government to enforce judgment on payment of agrarian bonds, Peru 21, 16 July 2013 (Doc. R-562); Executive criticizes the Constitutional Tribunal for agrarian bonds judgement, Peru 21, 18 July 2013 (Doc. R-308); Manuel Pulgar-Vidal: Constitutional Tribunal confused its role with agrarian bonds judgement, Gestion, 17 July 2013 (Doc. R-307).

[409] *See* Statement of Reply ¶¶ 404-410.

[410] *See e.g.*, Statement of Defense ¶¶ 98-106.

[411] *See* Statement of Reply ¶¶ 6, 405, 410, 413.

[412] Castilla II ¶ 8.

195. Rather than proffer any witnesses, Gramercy relies on baseless inferences[413] and cherry-picked statements given by Magistrates Urviola and Eto Cruz in other contexts.[414]

- Gramercy omits to mention that Magistrate Eto denied any pressure from the Executive Branch. Magistrate Eto testified during a January 2019 hearing before the Peruvian Congress's Subcomission on Constitutional Accusations that "never in my life has the Executive established any type of pressure, we have never had it."[415]

- Gramercy omits to mention that both Magistrates denied receiving any document from the MEF. Magistrate Eto testified that "we have never had any type of document signaled by the Ministry of Economy and Finance, as we should know."[416] During the same hearing, Magistrate Urviola testified as follows: "I reject absolutely, that we had received from the Ministry of Economy and Finance a draft, this is absolutely false."[417]

- Gramercy omits to mention that both Urviola and Eto Cruz voted to confirm the July 2013 Resolution, as confirmed in the "acta" of the Constitutional Tribunal deliberations of the date of the Resolution.[418] As Magistrate Eto Cruz testified, "the resolution was always going to be the same" as it reflected the position of Magistrate Ramirez.[419]

196. Previously, Gramercy engaged in a futile effort to discredit the July 2013 Resolution by referring to the alleged "forgery" of one of the dissenting opinions (no less than 16 times in its Notice of Arbitration),[420] an allegation which Peru already has

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[413] *See, e.g.*, Statement of Reply ¶¶ 265, 413, 421. Gramercy seeks to draw conclusions from the document production in this arbitration, and alleges that Peru failed to produce documents shared with the Constitutional Tribunal relating to the budgetary impact of the Agrarian Reform Bonds. Peru confirmed during the document production that it had not identified any such documents responsive to Gramercy's request.

[414][414] *See. e.g.* Statement of Reply ¶¶ 405, 413.

[415] Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 37 (Doc. R-1100).

[416] Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 37 (Doc. R-1100).

[417] Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 14 (Doc. R-1100). Magistrate Alvarez's testimony during this proceeding confirmed "we would not have accepted a draft coming from an institution, normally this would have been a scandal." *See id.* at 24. Gramercy alleges that Peru failed to produce documents responsive to Gramercy Document Request No. 1 related to documents on the impact of the value of the Agrarian Reform Bonds provided by Peru to the Constitutional Tribunal before the July 2013 Resolution. *See* Statement of Reply ¶¶ 265, 413, 421. Procedural Order No. 6, Annex A, Request 1 (voluntarily undertaking that, "[n]otwithstanding and reserving its objections, Peru will produce relevant and material documents *located in response to this request, if any*") (emphasis added); *see also* Affidavit of President of the Special Commission that Represents the State in Investment Disputes, 22 March 2019 (declaring, *inter alia*, that "Peru has carried out a reasonable search," "[n]o document which Peru was ordered or voluntarily undertook to produce has been destroyed or concealed," and that "Peru has produced all Documents which it was ordered or voluntarily undertook to produce").

[418] Constitutional Tribunal, Record of Full Session of Tuesday 16 July 2013, 16 July 2013 (Doc. R-1101).

[419] Constitutional Tribunal, Record of Full Session of Tuesday 16 July 2013, 16 July 2013, at 33 (Doc. R-1101).

[420] *See* Third Amended Notice of Arbitration and Statement of Claim ¶¶ 12, 16, 17, 89, 92, 97, 99, 100, 205, 210, 233.

answered.[421] Notably, Gramercy's latest submission no longer refers to "forgery" at all, and Gramercy's passing reference to the "use of white out" omits to mention how this was explained in official investigations in Peru. For example, the clerk of the Constitutional Tribunal testified that the use of liquid paper was a "habitual practice" that pre-dated his time at the Court and that what was important was that it "never varied the decision" but instead was only used for "formal corrections."[422] Magistrate Urviola further stated, the application of "liquid paper was the practice that the Constitutional Tribunal had observed for a long time."[423] Magistrate Alvarez added that the use of liquid paper is "regular practice" and "not a strange thing"[424]

197. Gramercy falsely indicates that Peru does not deny or attempts to minimize criminal and congressional investigations into the issuance of the July 2013 Resolution. In fact, without taking any position on ongoing investigations, Peru has addressed the allegations. Gramercy also fails to acknowledge that the investigations do not call into question the validity of the July 2013 Resolution, as Peru has shown.[425] In fact, the investigation on which Gramercy relies ended with a dismissal of all accusations.[426]

198. As Peru has demonstrated, the July 2013 Resolution has been upheld repeatedly, and continues to be binding as a matter of Peruvian law.[427] The MEF as well as bondholder organizations ABDA and ADAEPRA presented challenges to the Constitutional Tribunal. The Constitutional Tribunal confirmed the July 2013 Resolution in August and November 2013.[428]

199. Contrary to Gramercy's suggestions,[429] the August and November rulings were not pivots by the Constitutional Tribunal. In both cases, the Constitutional Tribunal reaffirmed the methodology for determining current value of the Bonds and the mandate that Peru should establish a process for paying bondholders, as provided by the July 2013 Resolution.[430]

- ***August 2013 Resolution***. On 8 August 2013, the Constitutional Tribunal rejected requests for reversal of the July 2013 Resolution filed by MEF and the Congress,

[421] *See* Statement of Defense ¶¶ 100-102.

[422] Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 44, 51 (Doc. R-1100).

[423] Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 19 (Doc. R-1101).

[424] Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 25-26 (Doc. R-1101).

[425] *See* Statement of Defense ¶¶ 99-102; *see also*, Submission of Thirty-Sixth Criminal Provincial Prosecutor of Lima, Public Ministry, Record No. 436-2015, ¶ 12.5, 23 April 2018 (Doc. R-567).

[426] Congress dismisses accusation of fraud in case of agrarian bonds, El Comercio, 18 March 2019 (Doc. R-1102).

[427] *See* Statement of Defense ¶¶ 94-97.

[428] *See* Statement of Defense ¶¶ 107-109.

[429] *See, e.g.*, Statement of Reply ¶ 194.

[430] Constitutional Tribunal Resolution in Record No. 0002-1996-PI/TC, 8 August 2013, Resolution, ¶ 4 Doc. RA-229; Constitutional Tribunal Resolution in Record No. 0002-1996-PI/TC, 4 November 2013 (Doc. RA-230).

as well as requests for clarification filed by ADAEPRA and other bondholder organizations.[431] The Constitutional Tribunal clarified *ex officio*:

- That the methodology mandated in the July 2013 Resolution was generally applicable, including in ongoing judicial proceeding, except in those cases that there was already an explicit valuation with the status of *res judicata*.

- That the payment process mandated in the July 2013 Resolution was obligatory for bondholders seeking payment, without prejudice to access to the courts in case of arbitrariness by the Executive Branch in that proceeding.

- ***November 2013 Resolution***. On 4 November 2013, the Constitutional Tribunal accepted a request for clarification from the MEF as to the time limits for the payment process, and clarified *ex officio* that the payment prioritization addressed in the July 2013 Resolution only applied to cash payments.[432]

200. Accordingly, these subsequent resolutions confirmed the key components of the July 2013 Resolution, including the parameters of the payment procedure and the actualization methodology. The Constitutional Tribunal rejected challenges to those holdings and limited its holdings to the focused points detailed herein, none of which introduced new elements. For example, in explaining the application of the July 2013 Resolution to judicial proceedings, the Constitutional Tribunal stated that its ruling on the methodology "obviously" does not apply to cases where there is already a *res judicata* valuation.

d. The Development Of A Valid Bondholder Process Has Been Confirmed

201. The MEF has implemented the Constitutional Tribunal's mandate by developing and implementing the Bondholder Process, which determines the current value of Agrarian Reform Bonds and provides a procedure to pay bondholders in accordance with the July 2013 Resolution, as Peru has demonstrated.[433]

202. Gramercy now seeks to make the Bondholder Process the centerpiece of its claims against Peru. Yet Gramercy has put in no evidence that it ever considered the Bondholder Process other than in the context of its present claims, and Gramercy has failed to produce any documents with such an analysis despite being required to do so under Procedural Order No. 6. Moreover, Gramercy's privilege log lists only a lone entry responsive to Peru's document request.[434]

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[431] Constitutional Tribunal Resolution in Record No. 0002-1996-PI/TC, 8 August 2013, Doc. RA-229.

[432] Constitutional Tribunal Resolution in Record No. 0002-1996-PI/TC, 8 August 2013, Doc. RA-229.

[433] *See* Statement of Defense ¶¶ 110-127.

[434] Letter from Gramercy to Peru attaching privilege log, 22 March 2019 (Doc. R-1090); Procedural Order No. 6, Peru Request 25 (Gramercy states that it will "produce certain non-privileged responsive documents assessing the applicable Bond authentication procedures, payment procedures, and valuation formulas in the Supreme Decrees in the period immediately following issuance of the Supreme Decrees, namely, January 18, 2014 – February 28, 2014" in response to Peru's request for "[i]nternal Gramercy documents regarding the Bondholder Process, including assessments of applicable Bond authentication procedures, payment procedures, and valuation formulas, and Gramercy's decision not to participate in the Bondholder Process.")

203. In its Reply, Gramercy relies on rhetoric and conspiratorial accusations of a "cover-up," without engaging with the testimony of Peru's witnesses. Gramercy simply states, incorrectly, that Peru has not produced any documents demonstrating the reasoning behind the Bondholder Process.[435] Contrary to Gramercy's assertions, Peru complied with the Constitutional Tribunal's mandate and established the Bondholder Process in good faith. As Ambassador Castilla explains:

> the MEF acted in good faith, and the Decree was backed by legal and technical supporting documents from the corresponding areas at the Ministry. I was unaware of any issue related to the formula when the Decree was adopted.[436]

204. As Vice Minister Sotelo explains:

> Last year I already explained and provided extensive documentation regarding these issues…. As I explained and demonstrated last year, the MEF acted in good faith to implement the procedure for bondholders to collect, in accordance with the Constitutional Tribunal's decision. The purpose of this process was to comply with the Constitutional Tribunal's decision and pay the current value to the holders of authentic Agrarian Reform Bonds, not to "extinguish" the debt in an illegitimate or illegal manner. The previously attached documents are consistent with the type of documents that are prepared in practice when decrees of such nature are developed. The documents show that the MEF met its obligations and implemented the procedures through a deliberative process and in accordance with the applicable law, as explained in detail below.[437]

205. Notwithstanding the inappropriateness of Gramercy's efforts to shift the burden of proof, Peru notes that it already has explained the development of the Bondholder Process in detail, and, whereas Gramercy has withheld documents, Peru put in copious records in the first instance. For the avoidance of doubt, Peru highlights the following:

- ***Applicable Law.*** The Bondholder Process was established by Supreme Decrees, in accordance with the mandate of the Constitutional Tribunal.[438] There have been four Supreme Decrees, each issued in accordance with Peruvian law.[439] For each Supreme Decree, DGETP prepared a technical report and the MEF's Office of Legal Advisors prepared a legal report. In addition, the objectives of each decree were set forth in an explanatory statement (*exposición de motivos*) and corresponding aide memoire.[440] Contrary to Gramercy's assertion, there is no

[435] *See* Statement of Reply ¶ 340.

[436] Castilla II ¶ 11.

[437] Sotelo II ¶ 11.

[438] July 2013 Resolution ¶¶ 27-29 (Doc. RA-213).

[439] *See, e.g.*, Statement of Defense, ¶¶ 110-119.

[440] Supreme Decree No. 017-2014-EF, 17 January 2014 Record (Doc. R-317); Supreme Decree No. 019-2014-EF, 21 January 2014 Record (Doc. R-318); Supreme Decree No. 034-2017-EF Record, 28 February 2017 (Doc. R-357); Supreme Decree No. 242-2017-EF, 18 August 2017 Record (Doc. R-359).

evidence that "the MEF intended to single Gramercy out."[441] Gramercy is not mentioned in any of the reports, and Gramercy has failed to provide any evidence that it was considered at all.

- ***Establishment of the Bondholder Process.*** As Peru has explained, the Constitutional Tribunal mandated that the Bondholder Process be established within six months of the July 2013 Resolution.[442] Within this timeframe, the MEF's challenge to the Constitutional Tribunal's decision was not resolved until August and its request for clarification on the deadlines was not resolved until November.

  - Contrary to Gramercy's assertions,[443] Peru has put in multiple documents relating to the issuance of the first Supreme Decree, which show it was not arbitrary. Among other things, General Directorate of Indebtedness and the Treasury ("DGETP") prepared two technical reports, in which it addressed the Constitutional Tribunal's mandate that the MEF in six months create a payment process, as well as the specific criteria for the valuation and payment of the Agrarian Reform Bonds.[444] The MEF's Office of the General Counsel likewise provided its legal opinion,[445] which, among other things, highlighted the "*carácter mandatorio*" of the July 2013 Resolution.[446] The aide memoire and corresponding explanatory statement specified that the purpose of the draft supreme decree was to comply with the July 2013 Resolution.[447]

  - The Constitutional Tribunal mandated a dollarization methodology be used for determining the current value of the Agrarian Reform Bonds.[448] The MEF had a report addressing how to implement the dollarization methodology that had been prepared by Dr. Bruno Seminario in 2011, following then-Minister Benavides' decision to send a new draft law to Congress.[449] Gramercy tries to argue that the reliance on the Seminario report demonstrates the MEF was not complying with the July 2013 Resolution,[450] but it has failed to identify any aspect of Dr. Seminario's analysis that was inconsistent with the Constitutional Tribunal's methodology. On the contrary, both the Seminario report and the

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[441] Statement of Reply ¶ 274.

[442] July 2013 Resolution ¶¶ 26-29 (Doc. RA-213).

[443] *See, e.g.,* Statement of Reply ¶¶ 341 *et seq*.

[444] Report No.011-2014-EF/52/04, Office of Public Debt of the Ministry of Economy and Finance, 14 January 2014 (Doc. R-983); Report No. 014-2014-EF/52.04, Office of Public Debt of the Ministry of Economy and Finance,17 January 2014 (Doc. R-15).

[445] Report No. 055-2014-EF/42.01, Office of the General Counsel of the Ministry of Economy and Finance, 17 January 2014 (Doc. R-16).

[446] Report No. 055-2014-EF/42.01, Office of the General Counsel of the Ministry of Economy and Finance, 17 January 2014, ¶¶ 3.3, 3.8 (Doc. R-16).

[447] Aide Memoire (Doc. R-988); Explanatory Statement (Doc. R-989).

[448] July 2013 Resolution ¶¶ 21-25 (Doc. RA-213).

[449] *See* Statement of Defense, ¶ 82.

[450] *See* Statement of Reply ¶ 342.

Constitutional Tribunal agree that the proper method for updating the Bonds was through dollarization.

- On 17 January 2014, Supreme Decree 017-2014-EF approving the administrative regulations for the Bondholder Process, was signed.[451] Supreme Decree 017-2014-EF was published in the Official Gazzette of Peru on 18 January 2014.[452]

- Shortly thereafter, the DGETP prepared another technical report, in which it reviewed the relevant background. In particular, the DGETP noted how the actualization methodology provided in Annex 1 of Supreme Decree No. 017-2014-EF covered the situation where a bondholder had not clipped any of the coupons on an Agrarian Reform Bond, but not the situation where one of more of those coupons had been clipped.[453] The report attached a draft supreme decree and was sent to the MEF's Office of the General Counsel for its legal opinion. The aide memoire and corresponding explanatory statement specified that the purpose of the draft supreme decree was to comply with the July 2013 Resolution.[454]

- The MEF's Office of the General Counsel reviewed the DGETP report and issued its own report.[455] This report addressed the relevant background and legal basis of the draft supreme decree. It also provided a legal analysis of the draft supreme decree. Based on its analysis, the MEF's Office of the General Counsel concluded that the draft was viable from the legal perspective.

- On 21 January 2014, Supreme Decree 019-2014-EF broadening the scope of Annex 1 of Supreme Decree No. 017-2014-EF was published.[456] Supreme Decree 019-2014-EF was published in the Official Gazette of Peru on 22 January 2014.[457]

- ***Further Development of the Bondholder Process.*** Following the issuance of Supreme Decrees 017 and 019-2014-EF, the MEF worked with the National Bank of Peru and the Ministry of the Interior to put in place the mechanisms required by the Bondholder Process, including the critical first step of authenticating Bonds submitted for payment.[458] As participating bondholders

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[451] Supreme Decree No. 017-2014-EF, 17 January 2014 (Doc. R-987).

[452] Supreme Decree No. 017-2014-EF, 18 January 2014 (Doc. RA-16).

[453] Report No.016-2014-EF/52/04, Office of Public Debt of the Ministry of Economy and Finance, 20 January 2014 (Doc. R-676).

[454] Aide Memoire; Explanatory Statement (Doc. R-678).

[455] Report No. 066-2014-EF/42.01, Office of the General Counsel of the Ministry of Economy and Finance, 17 January 2014 (Doc. R-16).

[456] Supreme Decree No. 019-2014-EF, 21 January 2014 (Doc. R-680).

[457] Supreme Decree No. 017-2014-EF, 18 January 2014 (Doc. RA-16).

[458] Interinstitutional Collaboration Agreement between the MEF and the National Bank in the Framework of Supreme Decree No. 017-2014-EF, 29 January 2014 (Doc. R-321); Interinstitutional Collaboration Agreement between the MEF and the Ministry of the Interior with intervention of the National Police of Peru Record 03 December 2014 (Doc. R-330).

advanced to the valuation stage of the Bondholder Process, DGETP also began preparing another supreme decree with supplemental provisions anticipated by Supreme Decree No. 017-2014-EF, and reconfirmed the actualization formulas, which at that point had not been applied to any participating bondholders.[459]

- Gramercy makes a series of incorrect and self-contradictory allegations about the MEF's actions. For example, Gramercy alleges that "Peru does not appear to have consulted Dr. Seminario himself before actually implementing the formula,"[460] and that Peru performed "no analysis whatsoever" for the "substantial revision" of the formula,[461] while also stating that Dr. Seminario "revised" the methodology,[462] and criticizing Dr. Lapuerta for being too "charitable."[463] Putting aside Gramercy's mischaracterizations, the evidence shows that the MEF consulted with both Dr Seminario and Dr. Lapuerta in confirming the valuation methodology.[464]

- Both Dr. Seminario and Dr. Lapuerta confirmed the continued validity of the concepts and guidelines in Dr. Seminario's 2011 report.[465] In addition, Dr. Seminario noted two "*precisiones*" to the formulas set forth in his prior conclusions.[466] Dr. Lapuerta likewise also noted that there was an "error tipográfico" in Supreme Decree No. 019-2014-EF caused by a missing asterisk in the annex to Dr. Seminario's original report.[467] Contrary to Gramercy's mischaracterization,[468] however, Dr. Lapuerta did not criticize the formula; his report confirmed that while there could be other, more complex, methodologies, "the method proposed by Professor Seminario was reasonable and showed an undeniable simplicity."[469]

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[459] *See, e.g.*, Report No. 069-2014-EF/52/04, Office of Public Debt of the Ministry of Economy and Finance, 15 April 2016, ¶ 21 (Doc. R-341); Report No. 115-2016-EF, 27 May 2016 (Doc. R-352). Gramercy incorrectly alleges that Peru failed to produce documents responsive to its request for documents applying the actualization methodology contained in Annex 1 of Supreme Decrees No. 017-2014-EF or 019-2014-EF to any specific bonds, including Gramercy's. *See* Statement of Reply ¶¶ 258, 340, 343. In fact, Peru produced ROP033755, which Gramercy itself submits as Exhibit CE-589.

[460] Statement of Reply ¶ 343; *compare Id.* ¶ 346 .

[461] Statement of Reply ¶ 358.

[462] Statement of Reply ¶ 247.

[463] Statement of Reply ¶ 348.

[464] *See, e.g.*, Report No. 115-2016-EF, 27 May 2016, ¶ 9 (Doc. R-352); Letter from the DGETP to Bruno Seminario, 13 May 2015 (Doc. R-1104); *see also* Statement of Defense ¶¶ 113-115.

[465] Letter from Bruno Seminario to DGETP, 2 June 2016 (Doc. R-354); The Actualized Value of the Agrarian Reform Bonds, Carlos Lapuerta, 21 August 2016 (Doc. R-355).

[466] Letter from Bruno Seminario to DGETP, 2 June 2016 (Doc. R-354).

[467] Gramercy incorrectly alleges that Peru failed to produce documents responsive to Gramercy Document Request 13 related to reports, draft reports and communication with the independent consultants Bruno Seminario and Carlos Lapuerta. *See* Statement of Reply ¶ 355. Gramercy is incorrect. In fact, Peru produced such documents with its Statement of Defense, including a letter from Bruno Seminario to the MEF and the report produced by Mr. Lapuerta. *See* Docs. R-354, 355. In addition, at Gramercy's request, Peru produced further a further 123 pages of responsive documents with its document production. *See* Document Production of Peru.

[468] Statement of Reply ¶ 247.

[469] The Updated Value of the Agrarian Reform Bonds, 21 August 2016 (Doc. R-569).

- Following these consultations, DGETP prepared two additional technical reports, in which it reviewed the conclusions of the independent experts and recommended certain precisions to the Annex containing the methodology for determining the current value of the Bonds, among other things, and drafted a decree.[470] The MEF's Office of the General Counsel issued its own report concluding that the proposed draft supreme decree was viable.[471]

- On 26 February 2017, Supreme Decree No. 034-2017-EF approving the administrative regulations for the Bondholder Process, was signed.[472] Supreme No. Decree 034-2017-EF was published in the Official Gazette of Peru on 28 February 2017.[473]

- Following the issuance of Supreme Decree No. 034-2017-EF, the DGETP prepared a technical report, in which it reviewed the relevant background and determined that it would be convenient to consolidate the various existing norms into a single Unique Actualized Text ("TUA").[474] In addition, the DGETP recommended providing additional detail regarding the valuation methodology.[475] The aide memoire and corresponding explanatory statement reflected these objectives.[476]

- The MEF's Office of the General Counsel reviewed the DGETP report and issued its own report.[477] This report addressed the relevant background and legal basis of the draft supreme decree. It also provided a legal analysis of the draft supreme decree. Based on its analysis, the MEF's Office of the General Counsel concluded that the draft was viable from the legal perspective.

- On 18 August 2017, Supreme Decree No. 242-2017-EF approving the TUA for the Bondholder Process, was signed.[478] Supreme No. Decree 242-2017-EF was published in the Official Gazette of Peru on 19 August 2017.[479]

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[470] Report No.247-2016-EF/52/04, Office of Public Debt of the Ministry of Economy and Finance, 20 October 2016, (Doc. R-687); Report No.004-2017-EF/52/04, Office of Public Debt of the Ministry of Economy and Finance, 4 January 2017, (Doc. R-693); *see also,* Aide Memoire (Doc. R-697); Explanatory Statement (Doc. R-698).

[471] Report No. 1471-2016-EF/42.01, Office of the General Counsel of the Ministry of Economy and Finance, 27 October 2016 (Doc. R-688); Memorandum No. 006-2017-EF/42.01, 4 January 2017 (Doc. R-694).

[472] Supreme Decree No. 034-2017-EF, 26 February 2017 (Doc. R-699).

[473] Supreme Decree No. 034-2017-EF, 18 January 2014 (Doc. RA-22).

[474] Report No.124-2017-EF/52/04, Office of Public Debt of the Ministry of Economy and Finance, 7 June 2017, (Doc. R-681)

[475] Report No.124-2017-EF/52/04, Office of Public Debt of the Ministry of Economy and Finance, 7 June 2017, Section II, ¶ 1 (Doc. R-681).

[476] Aide Memoire (Doc. R-685); Explanatory Statement (Doc. R-684).

[477] Report No. 731-2017-EF/42.01, Office of the General Counsel of the Ministry of Economy and Finance, 9 June 2017 (Doc. R-682).

[478] Supreme Decree No. 242-2017-EF, 18 August 2017 (Doc. R-683).

[479] Supreme Decree No. 242-2017-EF, 19 August 2017 (Doc. RA-23). Gramercy incorrectly alleges that Peru failed to produce any documents responsive to Gramercy Document Request 11 related to reports or other materials concerning Supreme Decrees No. 034-2017-EF and 242-2017-EF. *See* Statement of Reply ¶ 355. Gramercy is

206. Gramercy seeks to portray the development of the TUA as "surreptitious," and implies that Peru had some obligation to involve Gramercy in the development of the Bondholder Process' regulations.[480] Not only does no such obligation exists, it should be noted that Gramercy had already filed several notices and amended notices in this arbitration by this time and that Peruvian representatives did in fact consult with Gramercy.[481] As Peru has indicated, Peru and Gramercy entered into a Consultation Protocol dated 11 November 2016, which established a Consultation Period that lasted until 28 February 2017 and provided for confidentiality; Peru continues to refrain from further statements in light of the Consultation Protocol and reserves all rights.[482] Moreover, Gramercy now omits to mention that Peru's representatives met with Gramercy in September 2017 to address the opportunity for Gramercy to participate in the Bondholder Process.[483]

207. Gramercy also has sought to introduce a new legal opinion by Dr. Alfredo Bullard and make the novel argument that the Bondholder Process is illegitimate as a matter of Peruvian Law. Like the rest of Gramercy's claims, such arguments have no legal basis. As Dr. Garcia explains, the concept of legitimacy put forward by Dr. Bullard does not exist in Peruvian law.

> Conceptually, according to Peruvian law, supreme decrees are the most characteristic expression of the regulatory power of the Executive Branch. Under Peruvian law, there is no qualification of "legitimacy," as an explicit attribute of a norm, as Dr. Bullard refers to. Strictly speaking, whether a supreme decree is in accordance with the law or the legality is verified by considering whether the norms is constitutional, legal, in force, or valid in accordance with the requirements applicable under our legal system.[484]

208. Moreover, as Dr. Garcia explains, Dr. Bullard is trying to apply guidelines and regulations to the Bondholder Process that are inapplicable. For example:

> In relation with the regulatory quality analysis, I consider that, contrary to what Dr. Bullard suggests, the Supreme Decrees are not within the applicable scope of Legislative Decree 1310 that requires [the referenced] analysis given that they do not create administrative procedures of general reach, but instead special; thus, its effects

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incorrect. In fact, Peru produced 25 such documents with its Statement of Defense, including the full documentary records leading to the issuance of each supreme decree. *See* Docs. R-341, 352, 354, 355, 357, 359, 681-699. In addition, at Gramercy's request, Peru produced further a further 77 pages of responsive documents with its document production. *See* Document Production of Peru.

[480] Statement of Reply ¶¶ 257, 301.

[481] Garcia ¶¶ 46-71.

[482] Consultation Protocol signed 11 November 2016 (Doc. R-153); Amendment, 23 January 2017 (Doc. R-156); Second Amendment, 22 February 2017 (Doc. R-157).

[483] *See, e.g.*, Peru Observations of Peru, 21 September 2017 (Doc. R-610).

[484] García ¶ 16.

> produce a coming together of people based on subjective conditions: the legitimate holders of the bonds.[485]

209. As another example, Dr. García refutes Dr. Bullard's claim that a different set of formal requirements apply under a different instrument. Specifically, Dr. García explains:

> It is clear that, for the purposes of the Peruvian internal system, which governs the aspects of public debt in Peru, the rules related to the National Public Debt System they would reach the Supreme Decrees, which are outside the scope of the [relevant instrument].[486]

210. Whatever Gramercy may think of the Bondholder Process, Dr. García explains that its development complied with the requirements of Peruvian law: "the supreme decrees are valid and in force and meet the requirements essentials of legality and reasonableness."[487]

211. Gramercy has failed to present any evidence that Peru's implementation of the Bondholder Process is connected to the instant arbitration. Gramercy repeatedly refers to the Directoral Resolution No. 023-2019-EF/52.01, suggesting there was something nefarious in its issuance "just three days" before the original deadline for Gramercy's Reply.[488] In fact, the Resolution was signed on 8 May 2019,[489] and was published in the Official Gazette of Peru on 11 May 2019;[490] the original deadline for Gramercy's Statement of Reply was 14 May 2019 and Gramercy requested an extension on 10 May 2019, which was granted without Peru having been given a reasonable opportunity to respond. Gramercy fails to mention, that DGETP has issued various Directoral Resolutions relating to the various phases of the Bondholder Process. Directoral Resolution No. 023-2019-EF/52.01 was required to make payments in sovereign bonds as provided by Supreme Decree No. 242-2017-EF.[491] Neither it nor the technical report prepared by DGETP refers to Gramercy or this arbitration.[492] Indeed, it has no bearing whatsoever on Gramercy, which elected years ago to boycott the Bondholder Process.

212. Finally, Gramercy seeks to discredit the Bondholder Process by alleging that it deprives bondholders of access to courts. According to Gramercy, the Constitutional Tribunal's Resolution of 8 August 2013 "deprived Gramercy of … continued normal access

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[485] García ¶ 16.

[486] García ¶ 58. As Dr. García clarifies, this issue relates to public debt within Peru's legal framework. *See id.*

[487] García ¶ 118.

[488] Statement of Reply ¶ 607.

[489] Directoral Resolution No. 023-2019-EF/52.01, 8 May 2019 (Doc. R-1105).

[490] Directoral Resolution No. 023-2019-EF/52.01, 11 May 2019 (RA-358).

[491] July 2013 Resolution ¶ 29 (Doc. RA-288); Report No.124-2019-EF/52/04, Office of Public Debt of the Ministry of Economy and Finance, 7 May 2019 (Doc. R-1106); Supreme Decree No. 242-2017-EF, 18 August 2017, Art. 16 (Doc. R-683).

[492] Report No.124-2019-EF/52/04, Office of Public Debt of the Ministry of Economy and Finance, 7 May 2019 (Doc. R-1106).

to the country's civil court system."[493] This is incorrect, as Peru has previously demonstrated.[494]

213. Participation in the Bondholder Process requires that a bondholder with claims pending in court, with no decision yet rendered, withdraw those claims in order to be paid through the Process. The 8 August 2013 Constitutional Tribunal Resolution itself confirms that this "does not prevent creditors of the debt from returning to a judicial process in case of an arbitrariness during the course" of the Bondholder Procedure.[495] Moreover, in judicial proceedings where a court has rendered a decision but not yet set a valuation, the bondholder obtains payment through that judicial process, subject to the Bondholder Process valuation methodology.[496] In addition, the Bondholder Process preserves the due process rights of participating bondholders to seek recourse through, at various stages, litigation and administrative appeal, including the following:

- ***Authentication***. In the event that a bond not be authenticated, Supreme Decree No. 242-2017-EF specifically provides that the bonds be returned to the participating bondholder without prejudice to its rights to pursue legal action.[497]

- ***Registration***. In the event of a dispute regarding the title of Bonds, Supreme Decree No. 242-2017-EF specifically provides that the bondholder should seek recourse before the judicial branch.[498] In addition, a participating bondholder can pursue administrative recourses of reconsideration and appeal to challenge the directoral resolution terminating the registration phase.[499]

- ***Actualization***. A participating bondholder can pursue administrative recourses of reconsideration and appeal to challenge the directoral resolution terminating the actualization phase.[500]

- ***Payment***. A participating bondholder can pursue administrative recourses of reconsideration and appeal to challenge the directoral resolution terminating the payment phase.[501]

214. Dr. García explains:

> The [participant in the Bondholder Process] may file the resources for Reconsideration and Appeal under Articles 208 and 209 of the General Administrative Procedure Law [1] (LPAG) during the registration, actualization and payment phases contemplated in

[493] Statement of Reply ¶ 485.

[494] *See*, *e.g.*, Statement of Defense ¶ 278.

[495] Resolution, Constitutional Tribunal, 8 August 2013, ¶ 16 (Doc. RA-229).

[496] Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Final Complementary Provisions First and Second.

[497] Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Art. 7.4.

[498] Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Art. 2.

[499] Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Art. 9.2.

[500] Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Art. 14.2.

[501] Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Art. 14.2.

> Articles 9.2, 14.2 and 17.7 respectively of the TUA. This right is based on Articles 216° and 217° of the Single Ordered Text of Law No. 27444, LPAG, which establishes that when confronted with an administrative act that supposes that it violates, affects, ignores or injures a right or a legitimate interest, its contradiction proceeds in the administrative way in the manner foreseen in said Law.[502]

215. In addition to the forgoing, Dr. García explains other administrative and judicial avenues potentially available to challenge:

- **Contentious-Administrative Action**. "Article 148 of the Political Constitution of Peru establishes the right of the administrators to challenge through contentious-administrative action. The contentious-administrative action is a process in which the actions taken by the administration at the administrative headquarters are reviewed. In such processes, the non-application of a rule that infringes the legal system can be discussed. When the controversy is of law and if there is a conflict between legal norms with the Constitution, the judge is empowered to prefer the constitutional norm and disengage the legal norm, in the exercise of diffuse control of the Constitution. In these cases, what the judge resolves is applicable only to the specific case, and does not extend to other processes."[503]

- **Popular Action**. "Article 200 of the Political Constitution of Peru recognizes as a constitutional guarantee to popular action, "that it proceeds, for violation of the Constitution and the law, against regulations, administrative norms and resolutions and decrees of a general nature, whatever the authority from which they emanate. Articles 84°, 85° and 8° of Law No. 28237, Constitutional Procedural Code, recognizes that the claim for Popular Action directed against a supreme decree can be filed by any person before the corresponding Chamber of the Superior Court of Justice of Lima in a term that prescribes to the five years counted from the day following publication of the norm."[504]

- **Amparo**. "The Amparo Action route, which contemplates our Political Constitution, would also be available, in the event that the alleged victims consider that a constitutional right has been violated. This process is intended to provide urgent protection of fundamental rights - other than individual freedom - against an obvious and arbitrary violation or threat of violation of constitutional rights. The scope of this route reaches the actions or omissions of the administrative authorities, so that the affected party can achieve ineffectiveness of any legal act that is contrary to the rights that the Political Constitution protects."[505]

[502] García ¶ 106.

[503] García ¶ 107.

[504] García ¶ 108.

[505] García ¶ 109.

216. In this context, Dr. Wühler concludes: "The fact that a bondholder has access to administrative recourse and may seek reconsideration of decisions at various stages of the process provides an important element of due process."[506]

e. The Implementation And Advances Of The Bondholder Process Have Been Confirmed

217. Gramercy cannot dispute the fact that Bonds are being updated and bondholders are being paid. Thus, Gramercy turns to rhetoric, characterizing the results as "unjust" and "deplorable,"[507] on the basis that updating methodology in the Bondholder Process results in valuations that are only a small percentage of those under Gramercy's methodology. This critique is conceptually flawed in that it assumes that Gramercy's valuation is the only valid one, so that any lower value is necessarily a "unilateral haircut."[508] There is no basis for Gramercy's circular argument.

218. Gramercy's attempts to impugn the implementation of the Bondholder Process also fail. In fact, despite Gramercy's concerted efforts to suppress participation in the Bondholder Process, bondholders have continued to participate and are being paid in accordance with Peruvian law. As Vice Minister Sotelo summarizes:

- **Authentication**: the Ministry has received 443 cases for a total of 12,902 bonds. Of these, it has reviewed 401 cases and authenticated a total of 377 cases involving 11,395 bonds.
- **Registration**: of the total of authenticated cases, the Ministry has received 254 cases seeking to be registered and has reviewed 236 cases, with 193 of those being registered, 5 being rejected, 18 being in process and 37 are awaiting more information.
- **Actualization**: of the total of registered cases, the Ministry has received 146 cases, with 76 actualized cases, 66 in process of actualization and 4 are awaiting more information.
- **Payment**: of the total of actualized cases, the Ministry has received 29 cases and completed resolutions for 16 cases, 13 of which have been paid and 13 cases are still pending at this stage. The payment amount depends on the characteristics of the Agrarian Reform Bonds that were submitted, including their total amount, term and collected coupons. The average amount paid to this date is approximately 116,000 Soles.[509]

219. Peru's payment of the Bonds through the Bondholder Process is not comparable to a sovereign debt restructuring, as Gramercy alleges.[510] As Professor Guidotti

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[506] Wühler II ¶ 11; *see also* Wühler II ¶ 22 (The Bondholder Process "includes necessary due process elements through the provision of administrative recourse possibilities as well as external control mechanisms.")

[507] Statement of Reply ¶¶ 389, 401.

[508] Statement of Reply ¶ 369 (*citing* Olivares-Caminal ¶ 129).

[509] Sotelo II ¶ 24.

[510] Statement of Reply ¶¶ 367-371.

explains "[b]ecause Peru has not defaulted on the Agrarian Reform Bonds, there can be no debt restructuring."[511] Moreover, Professor Guidotti notes:

> "[t]he Bondholder Process by which Peru is paying bondholders lacks other common characteristics of a debt restructuring. For example, rather than decrease the value of the bonds (as is typical in a restructuring), Peru's bondholder process actually significantly increases the amount to be paid to bondholders relative to the contractual terms of the instrument.
>
> The Bondholder Process includes other steps not typically found in a restructuring, such as the authentication of the instruments and the creation of a registry of legitimate holders, and adjudication of disputes regarding the bonds in local courts. [512]

220. On the contrary, the Bondholder Process functions as a claims process designed to provide compensation for a select group of potential participants, and shares many common characteristics with other claims processes. As Dr. Wühler explains "the Bondholder Process is a compensation procedure" because it "has a number of characteristics in common with other compensation procedures that are not found in debt restructurings."[513]

221. As Professor Wühler explains, "the bondholder process is a viable mechanism" for the following reasons:

> The regulatory framework for the Bondholder Process corresponds to the established practice in other compensation processes because it derives from a ruling of a domestic court and subsequent regulatory steps developed to establish a legal framework for the procedure.
>
> The structure of the Bondholder Process is logical, understandable and in keeping with accepted international processes for compensation procedures.
>
> The Process is transparent, with publicly available laws and regulations and available formats for bondholder submissions and information sufficient to make informed choices about participation.
>
> Bondholders have chosen to participate and are advancing through the different stages of the Process at a reasonable pace.[514]

222. Gramercy has presented two witnesses who participated in the Bondholder Procedure, both of whom filed appeals with respect to the actualization phase.[515] As part of their appeals, both had the opportunity to have counsel and file written arguments, of which

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[511] Guidotti II ¶ 3.

[512] Guidotti II ¶ 3.

[513] Wühler II ¶ 6.

[514] Wühler II ¶ 6.

[515] [redacted].

they both availed themselves.[516] In addition, both had the opportunity to present a written report by an economic expert on the value of their bonds, of which they both availed themselves.[517] Moreover, each was granted an in-person opportunity for their expert to present its conclusions before DGETP representatives, of which both availed themselves – one bondholder also brought her attorney.[518] Both also received prompt decisions on their appeals.[519]

223. Notably, both were aided in their appeals by individuals affiliated with Gramercy and its allies. Specifically, [redacted] was represented by Gramercy attorneys Mario Seoane and Isaac Huamanlazo and proffered ABDA President Ramon Remolina as her expert in valuation.[520] [redacted] also proffered ABDA President Ramon Remolina his expert in valuation.[521]

224. As Vice Minister Sotelo explains, "[t]he DGETP reviewed the submitted expert reports and declared that the appeals lacked sufficient grounds."[522]

225. Moreover, both of Gramercy's witnesses have pursued further recourse in Peruvian courts, bringing amparo actions to challenge the constitutionality of the Bondholder Process.[523] Again, both of these actions are signed by Gramercy attorneys Mario Seoane and Isaac Huamanlazo.

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[516] [redacted]

[517] [redacted]

[518] [redacted]

[519] [redacted]

[520] [redacted] Ramon Remolina and Mario Seoane are also listed as "victims" in a petition filed by petitioner ABDA before the Interamerican Commission on Human Rights against Peru. *See* Record of Inter-American Commission of Human Rights Case P-128-14 (Doc. R-1147).

[521] [redacted]

[522] Sotelo II ¶ 28.

[523] [redacted]

2. Gramercy And The Agrarian Reform Bonds

a. Acquisition Of The Bonds

i. Gramercy's Documents Demonstrate That It Knew the Agrarian Reform Bonds Were Speculative, Uncertain and Subject To An Existing Dispute

226. As Peru explained in the Statement of Defense, Gramercy was the lone fund that chose to acquire Agrarian Reform Bonds.[524] The only contemporaneous evidence of any due diligence behind its decision to speculate on these instruments presented by Gramercy was a plain-looking memorandum dated 24 January 2006 (the "2006 Memorandum") authored by David Herzberg, which included only a cursory assessment of the legal framework, and failed to mention the dollarization method in Emergency Decree No. 088-2000, the August 2004 Sentence which upheld it, and nowhere stated that the law was clear.[525]

227. In its Statement of Reply, Gramercy asserts that the 2006 Memorandum was "summarizing the results of Gramercy's due diligence and some of the objective evidence on which it relied in making its investment decision."[526]

228. Gramercy has not produced witness declarations from either Herzberg or Cerritelli nor has it specified other evidence on which it relied. This is all the more significant given the testimony of Gramercy's executive: Lanava states that David Herzberg and Jose Cerritelli "led [Gramercy's] efforts on the ground in Peru."[527] In fact, the record shows that the evidence on which Gramercy may have relied was minimal, not objective, and the result of Gramercy outsourcing its due diligence to self-interested third parties.

229. In 2006, Cerritelli was the Director of Research at ICAP/Exotix in New York,[528] the firm that allegedly brought the Agrarian Reform Bonds to Gramercy's attention.[529] Cerritelli reportedly was also a holder of Agrarian Reform Bonds.[530] He subsequently joined Gramercy in November 2007, and Gramercy told its investors that he had "direct and sole responsibility for the restructuring of $3 billion of defaulted sovereign debt in the Republic of Peru."[531]

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[524] Statement of Defense ¶¶ 7, 59.

[525] Statement of Defense ¶¶ 59-60.

[526] Statement of Reply ¶ 290.

[527] *See* Lanava ¶ 10.

[528] See Investment Presentation to San Bernardino County Employees' Retirement Association – Gramercy Distressed Opportunity Fund, Gramercy, 10 July 2012, at 1,7-8 (Doc. R-71)

[529] Koenigsberger ¶ 20.

[530] Government of Peru upset with court decision ordering payment of old bonds, Reuters, 17 July 2013 (Doc. R-563).

[531] See Investment Presentation to San Bernardino County Employees' Retirement Association – Gramercy Distressed Opportunity Fund, Gramercy, 10 July 2012, 1 (Doc. R-71).

230. Similarly, previously withheld documents that Gramercy sought to keep confidential show that Cerritelli himself relied on biased sources. Two emails from Cerritelli to Herzberg dated January 24, 2006 convey the deficient information as to the legal status of the Agrarian Reform Bonds that was included in the 2006 Memorandum.[532] These emails are titled "Adaepra notes," indicate that Cerritelli was receiving information from ADAEPRA.[533] Rather than an objective analysis, they contain unsourced characterizations and ADAEPRA puffery (*e.g.*, "Adaepra has been successful on both its strategies;" "[b]ased on the above achievements by Adaepra the road for a settlement with the government is wide open.").[534]

231. Other evidence that Gramercy has sought to keep confidential shows that neither source was objective or disinterested. On the contrary, a partial list of Gramercy's early efforts to acquire Bonds show that both ADAEPRA and Cerritelli had self-interested reasons for inducing Gramercy to purchase Bonds: Gramercy paid ADAEPRA and Cerritelli a percentage for Bonds they sourced.[535]

232. Gramercy does not mention that one of its legal experts introduced in the Statement of Reply previously has addressed the obligation to conduct proper due diligence and the consequences of not doing so:

> An investor is responsible for knowing the applicable laws. Not knowing them is not an excuse for not keeping them. That duty of diligence prevents it from forgoing requesting and reviewing detailed reports prepared by local counsel that permit it to evaluate the legal framework in which the investment will occur.
>
> In the contractual framework, the Peruvian Civil Code establishes, as a basic rule, that parties must act with diligence. The foreign investor that does not act with such diligence is responsible for the damages that result from its conduct, and it cannot claim the damages it suffers as a result of its lack of diligence.[536]

233. Notably, even Gramercy's limited due diligence reveals that Gramercy was aware of the uncertainty as to the Agrarian Reform Bonds. As Peru explained in its Statement of Defense, Gramercy's assessment of the risks of acquiring the Agrarian Reform

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[532] *See* Email from J. Cerritelli to D. Herzberg, January 24, 2006 (Doc. CE-729); Email from J. Cerritelli to D. Herzberg, January 24, 2006 (Doc. CE-749). The emails refers to "[t]he constitutional tribunal of March 15, 2005" which may be basis for the similar language in the 2006 Memorandum. In addition, certain portions of the 2006 Memorandum appear to have been copied verbatim from the email (*e.g.*, "ADAEPRA has proposed using the consumer price index…").

[533] 2006 Memorandum, at 6 (Doc. CE-114).("ADAEPRA indicated it would be happy to assist us in any capacity to buy bonds from its holders. The president specifically told us he would furnish us with a list of the 20 largest bondholders.").

[534] *See* Email from J. Cerritelli to D. Herzberg, January 24, 2006 (Doc. CE-729); Email from J. Cerritelli to D. Herzberg, January 24, 2006 (Doc. CE-749).

[535] *See* [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY] (listing ADAEPRA fees totaling US$ [redacted], and Cerritelli fees totaling US$ [redacted]).

[536] *See* Legal Report of Alfredo Bullard, *Convial Callao S.A. y CCI – Compañía de Concesiones de Infraestructura S.A. v. The Republic of Peru* (ICSID Case No. ARB/10/2), 22 July 2011, ¶ 9 (RA-355) [CONFIDENTIAL]; Second Legal Report of Alfredo Bullard, *Convial Callao S.A. y CCI – Compañía de Concesiones de Infraestructura S.A. v. The Republic of Peru* (ICSID Case No. ARB/10/2), 22 February 2012, ¶¶ 55, 64, 68, 69 (RA-356) [CONFIDENTIAL].

Bonds, and that the contemporaneous evidence of any due diligence by Gramercy confirms that Gramercy recognized the uncertainty as to their legal status at that time.[537]

234. In its Statement of Reply, Gramercy alleges that Peru has not engaged with or discredited the supposed evidence of Gramercy's expectations and that the content of the 2006 Memorandum is undisputed.[538] In fact, the 2006 Memorandum is replete with errors. For example, in addition to typos, the paragraph addressing the Constitutional Tribunal's rulings is unclear and has factually inaccurate statements, including, for example, several references to a "March 15, 2005, constitutional court [*sic*] decision" even though the Constitutional Tribunal did not rule on the Agrarian Reform Bonds on March 15, 2005.[539]

235. Notwithstanding such errors, even Gramercy's paltry 2006 Memorandum belies Gramercy's current allegation that there was no clear legal rule that the Bonds will be updated through the CPI method. On the contrary it underscores the uncertainty that existed at the time as to the legal status of the Agrarian Reform Bonds. For example, the 2006 Memorandum refers to "the complexity surrounding the investment opportunity," the existence of "draft legislation" and that the issue of the updating the debt to current value is "further complicating matters," and the government's use of an "alternative inflation index" rather than CPI.[540] Gramercy planned to lobby Peru to effect a change in the legal framework at least since the time of the 2006 Memorandum.[541]

236. The 2006 Memorandum likewise reveals that Gramercy was knew the Agrarian Bonds were the subject of a pre-existing dispute,[542] recognizing that decades had passed since the issuance of the Agrarian Reform Bonds and 14 years had passed since the closure of the Agrarian Bank,[543] and that five years had passed since the Constitutional Tribunal's 2001 Sentence. In fact, Gramercy's Due Diligence memo refers to "a period of 18 years" of alleged "default."[544] Moreover, it refers to ongoing litigation involving the valuation of the Bonds.[545] Internal Gramercy emails reveal that before Gramercy acquired any bonds, it was aware that its collaborator, ADAEPRA, was pursuing "a judicial strategy demanding payment of the agrarian debt."[546] Moreover, it was also aware of the failure of recent legislative efforts to increase certainty regarding the status of the Agrarian Reform Bonds.[547]

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[537] *See* Statement of Defense ¶¶ 55-60.

[538] *See* Statement of Reply ¶¶ 290-297.

[539] 2006 Memorandum, at 1 (Doc. CE-114).

[540] *See* Statement of Defense ¶¶ 59-60 (*citing* 2006 Memorandum, at 1 (Doc. CE-114)).

[541] 2006 Memorandum, at 1 (Doc. CE-114) ("One potential strategy would be to lobby a congress representative to call for a vote between the elections in April and the inauguration at end of July. During this lame duck period, a congress representative may be willing to call for a vote knowing that he/she will be leaving congress within weeks and has little to lose.").

[542] 2006 Memorandum (CE-114).

[543] Decree Law No. 25478, 8 May 1992 (RA-158).

[544] 2006 Memorandum (CE-114).

[545] 2006 Memorandum (CE-114).

[546] Email from Jose Cerritelli to David Herzberg, 24 January 2006 (Doc. CE-729).

[547] 2006 Memorandum (CE-114) (referring to "draft legislation, currently in congress, negotiated with all political parties, which was drafted by the comision agrarian" and the possibility of pursuing a "strategy … to lobby a

237. Likewise, the documents on which the 2006 Memorandum was based, which Gramercy withheld and continues to designate as confidential, show that there was no clear legal rule that the Bonds will be updated through the CPI method. Specifically, the emails from Cerritelli to Herzberg dated 24 January 2006 state that "draft legislation is moving forward and still could be improved and negotiated further;" that "Adaepra has proposed using the consumer price index;" and that there is an "alternative inflation index."[548] In addition, they contain comments highlighting the uncertainty that were not included in the 2006 Memorandum, including, for example, that "[w]e are in new territory now and we are building a new case history of the valuation of these debts in the courts."[549]

238. Similarly, there is no evidence from the time of Gramercy's alleged acquisitions that Gramercy considered that the March 2001 Sentence required Peru to pay "the current value of their principal, plus interest" or that "CPI was implicitly required." Other documents previously withheld by Gramercy also show how Gramercy's current allegations differ from its contemporaneous assessment of the uncertainty and the need to resolve the legal uncertainty. For example, an undated document titled "[redacted]" states that "[redacted]."[550] Likewise, a report by Cerritelli dated 23 May 2008 (the "2008 Report") refers to a "constitutional court ruling in 2000 [*sic*]" that "established that the government is obligated to pay these claims at their inflation adjusted value, not at the inflation eroded face value of the bonds." The 2008 Report acknowledges the "failed" legislation relating to the Bonds, and mentions a "new inflation index [] to smooth over the 1980s' inflation peaks" as well as CPI.[551] In addition, it refers to a "restructuring strategy" to "approach the gov't [*sic*] of Peru … and propose to them a restructuring under the same terms as those in the law passed by congress in 2006, which expired when outgoing president Toledo left office without signing it."[552]

239. In its Statement of Reply, Gramercy alleges its expectations as to the legal status of the Agrarian Reform Bonds were based on "established jurisprudence," and its witness suggests (but does not state) that Gramercy was aware of "the widespread use of CPI in Peru."[553] Gramercy has not submitted any additional contemporaneous analysis of the legal framework at all. Earlier in this proceeding, Gramercy refused to produce Gramercy documents assessing the Bonds as a potential investment, including as to the governing legal framework, from time of its alleged acquisition, which, according to Gramercy, would be privileged.[554] Gramercy's privilege log, however, does not refer to any such documents. While the log does refers to fourteen (14) legal memoranda dated between 2006 and 2008,

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congress representative to call for a vote between the elections in April and the inauguration at end of July."); Email from Jose Cerritelli to David Herzberg, 24 January 2006 (Doc. CE-729) (referring to "draft legislation").

[548] *See* Email from J. Cerritelli to D. Herzberg, January 24, 2006 (Doc. CE-729); Email from J. Cerritelli to D. Herzberg, January 24, 2006 (Doc. CE-749).

[549] Email from J. Cerritelli to D. Herzberg, January 24, 2006 (Doc. CE-749).

[550] [redacted], undated, (Doc. R-1095) [DESIGNATED AS CONFIDENTIAL BY GRAMERCY]

[551] *See* Emails from J. Cerritelli, May 23, 2008 (Docs. CE-730 and CE-731).

[552] *See* Emails from J. Cerritelli, May 23, 2008 (Docs. CE-730 and CE-731).

[553] *See* Statement of Reply ¶ 306 (*citing* Koenigsberger ¶ 12).

[554] *See, e.g.* Gramercy Response to Peru's Document Request No. 19.

REDACTED CONTENT DESIGNATED AS CONFIDENTIAL BY GRAMERCY

Gramercy describes these as responsive to other requests and as addressing "legal requirements for the acquisition of bonds from individual bondholders." Separately, the log indicates the existence of email chains relating to valuation methods from 2013.[555] If there were any assessments of the legal framework prior to 2013, it is not reflected in the privilege log and is not otherwise apparent in this proceeding.

240. For the avoidance of doubt, even if Gramercy had produced a contemporaneous opinion erroneously concluding that there was certainty as to the value of the Bonds and the procedure of payment, this would not change the fact that Peruvian law was uncertain, as detailed above. But Gramercy's failure to produce any such evidence is telling: either Gramercy is hiding contemporaneous evidence that it finds inconvenient, or Gramercy did not conduct a thorough due diligence. Either way, there is no basis for Gramercy's alleged expectations. Gramercy attempts to flip the burden of proof, arguing that "Peru has not put forward any evidence" in connection with Gramercy's supposed expectations,[556] particularly since Gramercy has admitted that it bears the burden of proof.[557]

ii. Gramercy's Withheld Bond Contracts Demonstrate That It Paid US$ 33M

241. In its Statement of Defense, Peru noted that Gramercy so far had failed to provide even basic substantiation for its allegations that it purchased Agrarian Reform Bonds, much less its manner of doing so. Given Gramercy's unwillingness to even try to meet its burden of proof, Peru introduced public deeds it had discovered with the purchase price agreed by Gramercy for its inventory of Agrarian Reform Bonds.[558]

242. In response to the evidence produced by Peru, Gramercy has now produced documentation of its alleged acquisitions and admits that the purchase price for its inventory of Agrarian Reform Bonds was US$ 33.2 million,[559] *i.e.* a far cry from the US$ 1.8 billion it claims it is due. It should be recalled that Gramercy sought to hide the purchase price for a long time. According to *The Economist*, Gramercy "refuse[d] to disclose how much it paid for the bonds."[560]

243. Gramercy's newly submitted contracts also reveal that Bonds often were assigned a purported value applying an updating methodology by ADAEPRA, a Peruvian bondholder organization. The ADAEPRA methodology differs from the one Gramercy uses in this case, including, among other things, because it uses simple interest.[561] As the Quantum experts explain:

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[555] Letter from Gramercy to Peru attaching privilege log, 22 March 2019 (Doc. R-1090).

[556] *See* Statement of Reply ¶ 309.

[557] *See, e.g.* Gramercy Response to Peru's Document Request No. 19 ("Peru justifies this request as supporting its attempt to disprove Claimants' claims that they had legitimate expectations when investing in the land bonds and that their compensation claims are valid rather than to prove Peru's own claims, and Peru does not bear the burden of proof for these claims.").

[558] Quantum I, Appendix 6 - Gramercy Acquisition Table.

[559] *See* Doc. CE-339; Lanava ¶ 12.

[560] *See Let's sue the conquistadors*, The Economist, 16 July 2016 (R-61).

[561] See Edwards II ¶ 67.

> With respect to the calculation performed by ADAEPRA, we would note that it is obviously a calculation performed by a group with an interest in the outcome of the compensation determination. This calculation would not be regarded as independent in our view. Nevertheless, this approach apparently applied interest at the rate stated in the Agrarian Bonds on a simple rather than compound basis, but also inflation adjusted the principal portion of Unclipped Coupons from the bond issuance date.[562] For all the reasons already explained earlier in this report, there is no logical economic basis to use the bond issuance date to apply inflation.[563]

244. Gramercy required that the sellers include provisions in the contracts in which the sellers expressly "recognize, declare, and guarantee" that as of the date of execution they had not been able to collect payment on the Bonds,[564] that Gramercy was taking on the "risk" of "possible effective compensation,"[565] and that the contract price was "adequate."[566]

245. The newly revealed contracts also reveal exactly how much Gramercy paid and the exact nature of what Gramercy they paid for. Specifically, the contracts provide that the possibility of effective compensation derived from the assets constitutes a contingent right [*derecho expectaticio*], the "materialization" of which ran at the risk of Gramercy.[567]

246. Under Peruvian law, a contingent right [*derecho expectaticio*] is a legal interest in which the right holder does "not currently have a certain active subjective legal situation (for example, a subjective right), but has the prospect of acquiring it, provided that a certain event is verified."[568] For example, in a situation where one party has signed a contract to acquire land subject to the granting of a municipal operating license; until that license is

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[562] Reply Expert Report of Sebastian Edwards, 21 May 2019, ¶ 67, **(CER-6)**

[563] Quantum II ¶ 226.

[564] *See*, *e.g.*, Contract for the Assignment of Rights, Doc. CE-339.001, 20 October 2006, Art. 3.2(i).

[565] *See*, *e.g.*, Contract for the Assignment of Rights, Doc. CE-339.001, 20 October 2006, Art. 3.2(vi).

[566] *See*, *e.g.*, Contract for the Assignment of Rights, Doc. CE-339.001, 20 October 2006, Art. 3.2(vi).

[567] *See*, *e.g.*, Contract for the Assignment of Rights, Doc. CE-339.001, 20 October 2006, Art. 3.2(vi) ("the possibility of effective compensation derived from the Assets constitutes an expectative right the materialization of which is the account and risk of the [seller].")

[568] Romulo Morales Hervias, Subjective legal situations, 352 (RA-352); *see also* Juan Espinoza Espinoza, Business Legal Acts: Doctrinal, Legislative, and Jurisprudential Analysis, 274-275 (RA-353) "In general … the acquirer of a right subject to a suspensive condition and who alienated it under a decision condition does not hold the respective rights before the condition occurs, but they can become the right holder (such situations of advantage and inactive, as is known, they are given the technical name of expectations [...]). It has been seen in particular that the holders of the "expectations" have two fundamental interests: the one refers to the asset that is the object of the right that they expect to acquire (it is the interest of the holder of the expectation that the asset is not lost or destroyed , as well as maintaining the qualities, utility and value that it originally had); the other refers to the event contemplated as a condition (it is the interest of the holder of the expectation to conjure any attempt by the counterpart to prevent the event from taking place) The difference of the expectation with the legitimate interest (defined by the same doctrine that I have been following as a legal situation of inactive advantage) is given in that the first "is the position of those who do not have the right; but maybe he will have it with the production of the condition."); Fernando Vidal Ramirez, The Legal Act, Seventh Edition, 376-377 (RA-354) (It is convenient, in the first place, to determine the original rights by the legal act before the condition is fulfilled, The doctrine makes reference, in such circumstances, to contingent, eventual, or expectative rights. . .. Considering that a definitive right has not been acquired until the condition precedent has been fulfilled ….").

granted, the party acquiring the land has a "derecho expectaticio" in the land based on its expectation that it will acquire the land.[569] In other words, the right Gramercy was acquiring was an expectation contingent on the fulfillment of a future condition.

iii. Gramercy's Scanned Copies Of The Bonds Have Not Been Authenticated

247. As detailed in Peru's Response, Gramercy initially submitted only a copy of a lone Bond and an unsubstantiated inventory.[570] As detailed in Peru's Statement of Defense, Gramercy extemporaneously submitted into the record photographs of 9,655 Bonds together with a new inventory and a report prepared by Deloitte & Touche LLP (which apparently refers to different photographic files), but failed to submit its Bonds for authentication or provide any evidence of other steps to authenticate its alleged Bonds.[571] As Peru demonstrated, photographs are insufficient to establish authenticity of the alleged Bonds, which was underscored by Gramercy's own 2006 Memorandum, which noted the importance of "first review[ing] the physical bonds."[572] Moreover, as the Quantum experts explained in their first report, Gramercy's own photographs had discrepancies that raise authenticity issues, including, "instances where the Coupons were damaged or ripped, the bond title was missing, some of the Coupons used in Professor Edwards' calculations were missing, and some or all the Coupons were detached from the bond title."[573]

248. In its Statement of Reply, Gramercy fails to address the authenticity of the Agrarian Reform Bonds, and does not attempt to address any of these "discrepancies" identified by Peru.

249. Gramercy's refusal to address discrepancies is notable, given that it also refused to produce documents requested by Peru relating to its own previous findings of discrepancies with regards to at least other 115 Bonds that were removed from Gramercy's inventory.[574] The Tribunal held that Gramercy had the burden of proof with respect to this issue, and that "failure to discharge such burden will by itself lead to dismissal."[575] Gramercy has not produced any evidence with which to discharge this burden.

250. In fact, evidence produced with Gramercy's Statement of Reply suggests that Gramercy itself has ever confirmed the authenticity of the alleged Bonds. Despite having recognized the importance of a physical review,[576] previously withheld documents relating to Gramercy's alleged acquisition show that the authentication work ostensibly performed by Gramercy was merely a review of title:

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[569] Romulo Morales Hervias, Subjective legal situations, 352 (RA-352).

[570] *See, e.g.,* Response of Peru, 5 July 2016 ¶ 43.

[571] *See* Statement of Defense ¶¶ 63-68.

[572] *See* Statement of Defense ¶ 67; 2006 Memorandum, at 2 (Doc. CE-114).

[573] Quantum (RER-5), ¶ 15.

[574] *See* Letter C-12 from Gramercy to the Tribunal, dated 13 Apr. 2018.

[575] *See* Procedural Order No. 6, Annex B, Doc. Request No. 9.

[576] *See, e.g.,* 2006 Memorandum, at 2 (Doc. CE-114); [redacted], undated, (Doc. R-1095) [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

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> This legal work involves gathering all original documents that evidence the validity of the bonds -- title to each expropriated property, government documents issued at the time each particular expropriation was made, documenting unbroken ownership chains when the bonds were transferred through inheritance or by their transfer of an original holding company to their original shareholders or their heirs.[577]

251. While a legal review of title is undoubtedly important (for example, the second step in the Bondholder Process is Registration, which also looks at supporting documentation accrediting the bondholder's identity and acquisition of the Agrarian Reform Bonds), it is not by itself sufficient to demonstrate authenticity. As Peru has underscored, the Agrarian Reform Bonds "are literally physical paper documents," and a chain of custody is insufficient to authenticate and not a basis for demanding payment.[578]

252. Peru previously indicated that Gramercy could submit Bonds for authentication in the established Bondholder Procedure, and noted that the deadline for doing so was 19 January 2019.[579] Gramercy has chosen not to do so, and instead is asking the Tribunal to rule on liability as to unauthenticated instruments.

253. Whether or not Gramercy has authentic Agrarian Reform Bonds is critical to its claims. Now that all of Gramercy's merits submissions having concluded, it is apparent that Gramercy has failed to produce material evidence necessary to discharge its burden. On this basis alone, its claims must be dismissed.

254. Gramercy's approach is in stark contrast to claimants in other investor-State cases, including in *Abaclat v. Argentina*, which Gramercy cites favorably in its Reply.[580] Notably, in *Abaclat*, the bonds at issue were not old physical bonds, and authenticity was not an issue. Even so, claimants created and maintained an electronic database with documentation from tens of thousands of individual claimants,[581] and allowed for forensic and expert verification of said documentation, to which respondent was then able to respond.[582] The tribunal noted that the information in the database "is presented in a way sufficiently manageable for the examination of Claimant specific information."[583]

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[577] *See* Emails from J. Cerritelli, May 23, 2008 (Docs. R CE-730 and CE-731); *see also* Lanava ¶ 10 (stating that a local law firm assisted Gramercy in "validating the Land Bonds" and compiling "diligence checklist[s]," none of which is attached as an annex to the witness statement.).

[578] *See e.g.,* Statement of Defense ¶ 27. *See also,* Lanava ¶ 14 ("These Land Bonds are essentially bearer instruments. If they were to be lost, stolen, or destroyed in a fire or flood, Gramercy could have faced a significant loss.").

[579] *See* Statement of Defense ¶ 68

[580] *See, e.g.*, Statement of Reply, ¶ 75.

[581] *Abaclat and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5, 4 August 2011 (RA-171) ¶ 501; *Abaclat and others v. Argentine Republic*, Procedural Order No. 15, ICSID Case No. ARB/07/5, 20 November 2012 (RA-351) ¶ 19.

[582] *Abaclat and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5, 4 August 2011 (RA-171) ¶¶ 164, 679.

[583] *Abaclat and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5, 4 August 2011 (RA-171) ¶ 679.

b. Gramercy's Efforts To Establish Certainty

i. Gramercy's Documents Demonstrate That It Repeatedly Sought to Change Peruvian Law to Establish Certainty

255. As Peru has shown, Gramercy continued its efforts to change the legal framework with respect to the Agrarian Reform Bonds,[584] and made various ineffectual attempts to demand payment while the legal framework continued to be uncertain.[585] In its Statement of Reply, Gramercy admits that "uncertainties remained" but seeks to downplay them, alleging that "the basic elements were well established, namely CPI plus interest."[586] Gramercy's contemporaneous conduct belies its current allegations.

256. Documents previously withheld by Gramercy demonstrate that Gramercy's lobbying strategy to change the legal framework following its alleged acquisition of Bonds. For example, in September 2008, Gramercy stated:

[redacted].[587]

257. Gramercy does not deny that Gramercy Advisors wrote the President of Peru in May 2009 to propose restructuring whereby Peru would swap Gramercy's Bonds with new sovereign bonds.[588] The letter from Gramercy Advisors, signed by Cerritelli in his capacity as Managing Director, acknowledges that there was not yet a "definitive solution" and acknowledged the "complexity of the issue." In its proposal, Gramercy chose to specify that the current value of the Bonds would be based on (i) a CPI index prepared by Peru's National Institute of Statistics, (ii) calculated as of the date of issuance for each Bond, and (iii) applying interest at the rate for each series of Bonds as of the date of the last paid coupon. Nowhere does the proposal state that this particular methodology was required by the Constitutional Tribunal. In any case, the MEF considered Gramercy's restructuring proposal and found that "under the current legal framework, it is only possible to update the value of the Agrarian Debt Bonds, in the judicial instance."[589]

258. In June 2009, Gramercy Advisors also wrote to the Agrarian Commission of Congress dated that was included in a report of the Agrarian Commission of Congress and

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[584] Statement of Defense ¶¶ 49-50.

[585] *See* Statement of Defense ¶¶ 73-86.

[586] Statement of Reply ¶ 295.

[587] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[588] Gramercy Letter to President of Peru, 7 May 2009 (Doc. R-261).

[589] Report No. 073-2009-EF/75.20, 30 June 2009 (Doc. R-262) (translation by counsel).

REDACTED CONTENT DESIGNATED AS CONFIDENTIAL BY GRAMERCY

likewise highlighted the importance of a new bond issuance.[590] Gramercy [redacted] in a statement to its investors in December 2009, [redacted]

[redacted].[591]

259. Shortly thereafter, in January 2010, Gramercy stated, "[redacted]."[592] "From 2009 through 2011," one of Gramercy's witnesses states, Gramercy saw the "Peruvian Congress's debate and drafting of a bill" which had been "heavily negotiated" as a sign of "progress that led us to increase our internal fair market values [of the Bonds]."[593]

260. With its lobbying efforts having failed, Gramercy Peru Holdings began 28 extrajudicial conciliation proceedings against the MEF in 2010 seeking payment for the Bonds.[594] As the MEF explained, Gramercy's demand for payment was not viable, because "there is no legal framework … nor any norm that establishes a procedure for the Public Administration to update these debts expressed in Soles Oro."[595] Gramercy subsequently began local proceedings in courts across Peru.[596] Gramercy now seeks to use a 2014 report prepared in connection with 44 Bonds in one of these proceedings as evidence confirming the legitimacy of its expectations.[597] Gramercy neglects to mention that the report's authors were

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[590] Agrarian Commission Report, 31 May 2011 (Doc. R-397).

[591] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[592] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[593] Joannou ¶ 17.

[594] Conciliation Proceeding Records (Doc. R-266-270, 272-290, 292-295).

[595] Report No. 092-2010-EF/75.20, 15 October 2010 (Doc. R-504) (translation by counsel).

[596] *See* Statement of Defense ¶ 86.

[597] Statement of Reply ¶¶ 242, 325.

designated at the request of Estudio Seoane Abogados.[598] Estudio Seoane Abogados was Gramercy's counsel in Peru,[599] and also provided the documentation and information for the report.[600] Nor does Gramercy mention that the report used a different methodology to calculate the current value of the Bonds than the method Gramercy has proposed for this arbitration, including for example with respect to the calculation of interest, which accounts for approximately 93% of the total valuation in the local proceeding. Gramercy fails to address why, if there was certainty, there are not similar reports with respect to all of its Bonds. In fact, Gramercy chose not to seek payment of all the Agrarian Reform Bonds in the courts, gambling instead on the possibility that it would be able to effect a change in the law.

ii. Gramercy's Documents Reveal It Did Not Disclose Material Information To Investors About The Agrarian Reform Bonds While Also Indicating That They Might Suffer A Total Loss

261. As Peru has demonstrated, in soliciting commitments, Gramercy disclaims responsibility.[601] For example, Gramercy advised a U.S. pension fund that investors must be "willing to assume the risks involved with such an investment" and may "lose all or a substantial portion of their investment."[602] As Gramercy confirms in a 2018 brochure:

> There can be no assurance that the objectives associated with any of Gramercy's investment strategies will be met or that the Firm will achieve profitable results. Investments involve risk of loss, and clients **must be prepared to bear the loss of their entire investment**.[603]

262. Moreover, documents provided by Gramercy to investors reveal that Gramercy did not advise them of the particular risks relevant to the Agrarian Reform Bonds, including their uncertain history or the amount of return that micht be available under the Bondholder Process. For example, Gramercy's presentations to potential investors are silent on details about the Agrarian Reform Bonds, merely stating misleadingly that Cerritelli had "direct and sole responsibility for the restructuring of $3 billion of defaulted sovereign debt in the Republic of Peru," despite the fact that the Agrarian Reform Bond are not defaulted debt

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[598] Report, 26 August 2014, p. 3 (Doc. CE-342).

[599] *Siege of Bonds*, Caretas, 25 October 2012 (Doc. R-72).

[600] Report, 26 August 2014 p. 12 (Doc. CE-342).

[601] *See, e.g.,* Statement of Defense ¶ 58.

[602] *See Investment Presentation to San Bernardino County Employees' Retirement Association – Gramercy Distressed Opportunity Fund,* Gramercy, 10 July 2012, 1 (Doc. R-71) ("The purchase of investments is suitable only for sophisticated investors for whom such an investment does not constitute a complete investment program and who fully understand and are willing to assume the risks involved with such an investment … The investments' performance may be volatile and investors may lose all or a substantial portion of their investment.")

[602] Peru's First Submission, ¶¶ 13-31 (R-20).

[603] Gramercy Funds Management LLC, Brochure, March 29, 2018, pg. 9 (emphasis added) (Doc. R-540).

and that Gramercy does not have US$ 3 Billion worth of Bonds, even under the most exorbitant of its valuations.[604]

263. Likewise, in its Monthly Overviews, Gramercy reported on its [redacted].[605]

264. Gramercy has been found to have withheld information from its investors before: in an investigation into the New Mexico Educational Retirement Board's investment in reliance on Gramercy's "incomplete, if not outright dodgy" representations, the National Legal and Policy Center concluded that Gramercy had failed to disclose regulatory actions to which it had been subject.[606]

iii. Gramercy's Financial Statements Reveal That Gramercy Never Valued The Bonds Anywhere Close To US$ 1.8 billion.

265. Gramercy itself has valued the Bonds differently over the years, applying different methodologies depending on its particular needs in a given situation. Gramercy's own financial statements provided in this proceeding show Gramercy has used various bases of valuation and reported multiple valuations over time, all significantly higher than what it paid and all significantly lower than what it is claiming.[607] None of these valuations is remotely similar to the US$ 1.8 Billion Gramercy claims in this proceeding.

266. The Financial Statements are not consistent with an expectation by Gramercy that the CPI method would be used to determine the current value of the Bonds at the time of its alleged acquisition. During the years following its acquisition, Gramercy valued the Bonds at close to their acquisition price, [redacted]

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[604] *See, e.g.,* Investment Presentation to San Bernardino County Employees' Retirement Association – Gramercy Distressed Opportunity Fund, Gramercy, 10 July 2012, 1 (Doc. R-71).

[605] *See, e.g.,* [redacted]DESIGNATED AS CONFIDENTIAL BY GRAMERCY]; [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[606] *See* National Legal and Policy Center, State Pension Funds and Big Investment Firms: What Could Possibly Go Wrong? 20 September 2013 (Doc. R-1124).

[607] [redacted] [ALL DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

REDACTED CONTENT DESIGNATED AS CONFIDENTIAL BY GRAMERCY

[redacted]:

> "[redacted]."[608]

267. Addressing the valuations during the years of Gramercy's alleged acquisitions, Gramercy's witness states that Gramercy "[redacted]."[609] that "[redacted]."[610] In fact, the evidence shows that Gramercy's valuations were significantly higher than the amount Gramercy may have paid.

268. Subsequently, according to Jounnou, the valuations were based on a financial model that Gramercy built in 2009,[611] a model he admits does not match the one prepared by Edwards for this arbitration.[612]

269. By Joannou's own account, the valuations were driven by factors extrinsic to the Bonds, including, for example, the global economic crisis and what Gramercy's auditors would accept,[613] and Gramercy adjusted this model over time, for example to use compound interest instead of simple interest.[614]

270. Joannou's conclusion that "these values … were not just abstractions" because they were "used in the conduct of [Gramercy's] business," is not credible.[615] Each of the transactions to which he refers is an internal transaction where the prices were set by Gramercy itself. Gramercy may not even have maintained enough insurance on the Bonds to cover the value it reported over several years.[616]

271. Notably, the financial statements reveal Gramercy's reliance on "[redacted]."[617] as well as sources that have not been disclosed or put before this Tribunal, including valuations by "[redacted]."[618] "[redacted]

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[608] [redacted] (Doc. CE-548) [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[609] Joannou ¶ 11.

[610] Joannou ¶ 27.

[611] Joannou ¶ 14.

[612] Joannou ¶ 16.

[613] Joannou ¶ 27.

[614] Joannou ¶ 21.

[615] Joannou ¶ 29.

[616] Joannou ¶ 8 (alleging that Gramercy maintained "over US$500 million of insurance." He does not cite any support for this allegation).

[617] *See, e.g.,* [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[618] *See, e.g.,* [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[redacted]."[619] The Statements further acknowledge that [redacted]"[620] As the Quantum expert explains, the financial statements actually confirm [redacted]:

> [N]o reliance can be placed on the values in Claimants' audited financial statements as an accurate measure of FMV because [redacted].[621]

272. Gramercy has not been able to identify a single financial statement or other document, internal or otherwise, where its valuation of the Bonds is comparable to what it is claiming in this proceeding.[622] If Gramercy had legitimately believed that its alleged Bonds were worth what it is claiming in this proceeding, the malleability of its valuations over time highlights a pattern of misrepresentation to its investors.

273. Gramercy has been implicated in improperly assigning values to assets before: the Internal Revenue Service of the United States, for example, has found that Gramercy manipulated bond valuations and used sham transactions as part of a tax shelter scheme that was found to be prohibited under U.S. law.[623]

c. Gramercy and the Resolution

i. Gramercy's Documents Show That It Attempted to Influence the Constitutional Tribunal

274. In Peru's Statement of Defense, Peru pointed noted that Gramercy lawyers Mario Seoane and Isaac Huamanlazo visited the Constitutional Tribunal and met with the

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[619] *See, e.g.,* [redacted]; [redacted] (Doc. CE-504) [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[620] *See, e.g.,* [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[621] Quantum II ¶ 236

[622] In mid 2012, Gramercy represented to the San Bernardino County Employees' Retirement Association that Cerritelli "direct and sole responsibility for the restructuring of $3 billion of defaulted sovereign debt in the Republic of Peru." If this refers to Gramercy's alleged Bonds at issue in this proceeding (i.e., the Bonds for which Cerritelli was responsible), the valuation for 2012 is nearly twice what Gramercy claims at present. *See* Investment Presentation to San Bernardino County Employees' Retirement Association – Gramercy Distressed Opportunity Fund, Gramercy, 10 July 2012, 1 (Doc. R-71).

[623] See relevant U.S. Case law (Doc. R-1146).

magistrates at least five times in the first half of 2013, including visits in March, April, and June.[624]

275. Gramercy has no response to this in its Statement of Reply.

276. In fact, Gramercy has since produced internal communications from 2013 that demonstrate that Gramercy continued to meet with members of the Constitutional Tribunal. For example, a communication from Cerritelli regarding the July 2013 Resolution states that "we are discussing the above issues with the president of the tribunal, Oscar Urviola."[625]

ii. Gramercy's Documents Show That It Promptly Took Issue With The Constitutional Tribunal's Resolution

277. As Peru has shown, the July 2013 Resolution provoked immediate criticism from both the public and private sectors,[626] and that Gramercy and other bondholders understood its effects on their desired payout. For example, bondholder Ismael Benavides (a former Minister of Economy who was later retained by ABDA, a bondholder organization in Peru linked to Gramercy,[627] stated: "[t]his reduces the payment to the smallest amount possible."[628] Similarly, bondholder Alfonso Chunga (a representative of ADAEPRA whose complaint against Magistrate Urviola before Peru's Congressional Subcommission on Constitutional Complaints was subsequently dismissed)[629] told the press that the government would end up paying 10 percent of what he thought was owed.[630]

278. Gramercy's own documents reveal Gramercy also understood the July 2013 Resolution to be a turning point, just not one that comported with its preferences.

279. Gramercy executive Jose Cerritelli told Reuters that "the court gave the government 'huge wiggle room' to make a smaller payment than he had expected."[631] Gramercy's current efforts to portray Cerritelli's reaction as one of uncertainty are belied by Gramercy's internal communications assessing the July 2013 Resolution in the hours and days after it was issued. These communications reveal that Gramercy understood that the

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[624] Statement of Defense ¶ 106; Constitutional Tribunal, Visitor Registry, 2013, at the following dates 16 January 2013, 22 March 2013, 15 November 2013, 3 October 2013, 18 September 2013, 26 June 2013, 29 April 2013, 16 August 2013, 24 June 2013, 14 August 2013 (Doc. R-467).

[625] Email from Jose Cerritelli to Robert Koenigsberger, 9 October 2013 (Doc. CE-737).

[626] *See* Statement of Defense ¶¶ 94-97.

[627] ABDA Petition in Record No. 0022-1996-PI/TC, 16 March 2015, at 6 (Doc. CE-199); Ismael Benavides Ferreryor, Cesar Peñaranda Castaneda and Carlos Adrianzen Cabrera, Expert Report, "On the Costs and Benefits of Restructuring the Selective Default of the Peruvian Land Debt, 17 February 2015, at 3 (Doc. CE-199A).

[628] Peru's land-reform debt payout could be minimal, bondholders say, Reuters, 17 July 2013 (Doc. R-398).

[629] Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019 (Doc. R-1100); Congress dismisses accusation of fraud in case of agrarian bonds, El Comercio, 18 March 2019 (Doc. R-1102).

[630] Peru's land-reform debt payout could be minimal, bondholders say, Reuters, 17 July 2013 (Doc. R-398).

[631] Peru's land-reform debt payout could be minimal, bondholders say, Reuters, 17 July 2013 (Doc. R-398).

Constitutional Tribunal's decision rendered Gramercy's preferred valuation of the Bonds untenable:[632]

- According to Cerritelli, "[t]he resolution is different from what we expected. It's not in soles indexed to CPI, but it's converted into dollars at some parity exchange rate with interests. I would expect it to represent a significant haircut, but until we don't run the numbers I can't say for sure if it's a 50% haircut more or less."

- Koenigsberger's response was more emphatic: "Where did they come up with this nonsense? OU language in press over weekend seem to indicate that they fully appreciated the time value (need to index to cpi) issues… [*sic*]"

280. Later, explaining his reaction to the July 2013 Resolution, Cerritelli explained that his reference to "wiggle room" meant that the July 2013 Resolution allowed Peru to impose a confiscatory settlement:

> This is what I meant by there being wiggle room for the government to try to impose a confiscatory settlement -- if the bondholders don't push back and accept any offer proposed by the government somehow based on an aggressive interpretation of the July 16 Constitutional Tribunal resolution.[633]

281. As to how a "confiscatory valuation formula" might still be avoided, Cerritelli stated that "we are discussing the above issues with the president of the tribunal, Oscar Urviola," and that "the investment protection rights under the free trade agreement between the U.S. and Peru protect us from the possibility of indirect confiscation of the NPV of our investment in Peruvian government debt without fair and proper compensation."[634]

d. The Bondholder Process

i. Gramercy's Documents Reveal That It Sought to Undermine the Bondholder Process

282. In Peru's Statement of Defense, Peru established the efficacy and efficiency of the Bondholder Process, including how individual participants are advancing through its various steps and receiving payment.[635] In its Statement of Reply, Gramercy seeks to attack the Bondholder Process by claiming it has an "abysmal" participation rate, which it seeks to use to bolster its case against Peru.[636] However, as Dr. Wuhler confirms, "[r]ates of

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[632] *See* Emails between J. Cerritelli and R. Koenigsberger, 16-17 July 2013 (Doc. CE-544).

[633] Emails between R Joannou and J Cerritelli, October 2013 (Doc. CE-546).

[634] Emails between R Joannou and J Cerritelli, October 2013 (Doc. CE-546).

[635] Statement of Defense ¶¶ 124-126.

[636] Olivares-Caminal § III.G.

participation in the Bondholder Process are reasonable, given the historic circumstances and the complexity of the process."[637]

283. Moreover, Gramercy does not mention its own role in suppressing participation in the Bondholder Process. Gramercy, in fact, continues to publically disseminate misinformation about Peru and the Bonds, and refuses to correct or withdraw previous misinformation. The dissemination of negative information could impact participation in the Bondholder Process, as Dr. Wühler confirms: "public criticism of the procedure" "may have impacted participation."[638]

284. For example, the Gramercy-created organization Peruvian-American Bondholders for Justice ("PABJ"), created the website protectourpensionsnow.org, which has been mentioned in both American and Peruvian press in 2019. The website publishes misinformation, including by alleging that "[t]he Peruvian government defaulted on billions of dollars' worth of sovereign land bonds and now refuses to repay the Americans who are owed" and "the pension funds of hardworking Americans … invested in good faith in these bonds. And now they could lose millions in retirement savings."[639] The website directs visitors to "learn more" by visiting the PABJ website. It also provides links to articles attacking Peru's relationship with the OECD, among other articles linked to Gramercy's campaign that Peru has previously detailed, and quotes the letter sent by Teamsters President James Hoffa to the Embassy of Peru, which Peru has addressed previously.[640] In addition, PABJ continues to publish similar longstanding misinformation on its own website, including that Peru "refuses to repay" and is "choosing to continue defaulting."

285. Gramercy has not denied any of the foregoing.

ii. Gramercy Admits That The Bondholder Process Valuation of its Bonds is US$ 34M, More Than It Paid for the Bonds

286. Gramercy rejects that the Bondholder Process as it now stands is relevant because, "having commenced the arbitration, Gramercy could not join the Bondholder Process" and "the full process is not open to Gramercy."[641] While the Treaty does indeed require claimants to waive initiating local proceedings, Gramercy omits to mention that Peru was willing to discuss Gramercy's potential participation in the Bondholder Process prior to the constitution of the Tribunal.

287. For example, observations prepared by Peru's representatives for a meeting with Gramercy on September 21, 2017 state: "[e]ven though Gramercy has renounced local proceedings, we understand that it could still be possible for Gramercy to put aside the treaty proceeding and participate in the procedure available to all legitimate bondholders," and that "it would be a missed opportunity to ignore the opportunity to realize value and instead

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[637] Wühler II ¶ 6.

[638] Wühler II ¶ 47.

[639] Protect Our Pensions Now, 2 June 2019 (Doc. R-1130).

[640] *See, e.g.*, Peru's Statement of Defense, (R-34), ¶ 133.

[641] Statement of Reply ¶¶ 254-256.

arbitrate, which would be risky… Peru has a procedure through which you could realize value."[642]

288. Even after consultations with Gramercy had ended, Peru wrote to Gramercy, stating: "Peru continues to emphasize … an openness to consultations with Gramercy on a without prejudice basis to focus in a positive manner on how to realize value on holdings of Agrarian Reform Bonds and resolve the Treaty proceeding."[643]

289. Despite this, Gramercy continued refusing to participate. The issue for Gramercy was one of valuation, not authentication, registration or form of payment.[644] Gramercy is being disingenuous when it criticizes the Bondholder Process for providing part of the payments in Peruvian sovereign bonds,[645] as there are multiple instances on the record where Gramercy has confirmed its willingness to accept non-cash payments of precisely this sort.[646]

290. With respect to the alleged Bonds at issue in this proceeding (assuming their authenticity were established), their current value would be approximately US$ 34 million under the Bondholder Process.[647] For Gramercy to state that the Bondholder Process would yield "just 2% of the Land Bonds' real current value,"[648] is false and misleading insofar as it takes for granted that the "current value" of the Bonds is US$ 1.6 billion per Gramercy's unilateral determination. In fact, this valuation is 100% of their "current value" in accordance with Peruvian law.

291. Ultimately, Gramercy's critique of the valuation Bondholder Process merely belies a Gramercy's allegation that bondholders will not be able to determine the value of their Bonds in the Bondholder Process.[649] Gramercy has not participated in the Bondholder Process not because of some incapacity to understand the formula in the Bondholder Process, but because it has applied the formula and wants more.

iii. Gramercy's Documents Confirm That It Seeks a 5000% Windfall, Far More Than It Paid And Far More Than Its Own Contemporaneous Valuations

292. Gramercy seeks a massive windfall for itself at the expense of Peru and Peruvians. Indeed, Gramercy has admitted that it purchased the Agrarian Reform Bonds for approximately US$ 33.2 million.[650] Now, a mere eleven to thirteen years later, it seeks US$ 1.8 billion for the same bonds – a return of approximately 5,000%, consistent with the

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[642] *See* Peru Observations of Peru, 21 September 2017 (Doc. R-610).

[643] *See* Letter from Peru to Gramercy, 21 November 2017 (Doc. R-1107).

[644] *See* Letter from Peru to Gramercy, 8 November 2017 (Doc. R-197).

[645] *See* Statement of Reply ¶ 259.

[646] *See, e.g.*, Gramercy Letter to President of Peru, 7 May 2009 (Doc. R-261); Letter from Gramercy to Special Commission of Peru, 28 March 2016 (Doc. R-47); Letter from Peru to Gramercy, 8 November 2017 (Doc. R-197).

[647] Third Amended Notice and Statement of Claim ¶ 3.

[648] *See, e.g.*, Statement of Reply ¶ 259.

[649] *See* Statement of Reply ¶ 387.

[650] Lanava ¶ 13.

calculations of Reuters.[651] In fact, the difference in return is similar to that Gramercy would have received had it chosen to participate in the Bondholder Process – US$ 33.57 million[652] – a difference of approximately 5,000%. In fact, as the Quantum experts explain, rather than settling for a haircut, as Gramercy claims (and Peru rejects), Gramercy is seeking in this proceeding a hair extension of 890,677,400% the value of its Bonds at the time of the closure of the Agrarian Bank.[653]

293. Peru has no obligation to pay Gramercy the windfall it seeks, nor can Gramercy reasonably expect to receive one.

294. Peru has shown that it is a fiscally responsible sovereign, committed to macroeconomic stability and fiscal responsibility, and has been, as Professor Guidotti explained, "a success story."[654] Leading ratings agencies and the market continue to demonstrate high confidence in Peru.[655] It would not be responsible for Peru to give Gramercy special treatment.

295. Gramercy seeks to use Peru's stability and reliability to its own benefit, referring to Peru's successful fiscal management, and itself refers to Peru's "well-known commitment to, and a proven track record of, promoting foreign investment and fiscal responsibility."[656] Likewise, one of its expert states that "Peru has always honoured its debt obligations,"[657] and one of its witnesses describes Peru as "a country that has done so many things right and honorably."[658]

296. In fact, Gramercy has repeatedly sought to convert Agrarian Reform Bonds to other Peruvian sovereign bonds. For example, in May 2009, Gramercy wrote to Peru to propose a bond swap for a new long-term bond.[659] Seven years later, in March 2016, Gramercy proposed that Peru make payments to it in "newly issued and marketable sovereign bonds containing terms similar to those Peru has offered in its recent bond issuances."[660] Gramercy again confirmed its willingness to accept a non-cash payment in the form of new Peruvian sovereign bonds in late 2017.[661]

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[651] Davide Scigliuzzo, *Contentious Peru bond could pay off handsomely for Gramercy fund*, Reuters, 8 July 2016 (Doc. R-1145).

[652] Third Amended Notice of Arbitration and Statement of Claim ¶ 3.

[653] Quantum II ¶ 103.

[654] Guidotti Report (RER-4), ¶ 13.

[655] *See*, *e.g.*, Ministry of Economy and Finance, Annual Public Debt Report, 2018, 31 May 2019, at 3 (Doc. R-1133) (showing that during 2018 the principle ratings agencies Standard & Poor's, Moody's and Fitch Ratings all maintained Peru's investment grade ratings and confirmed that its outlook was "stable."); Moody's Investor Service: Rating Action: Moody's affirms Peru's A3 ratings, maintains stable outlook, 25 June 2019 (Doc. R-1134) (Peru's very high fiscal strength reflects the government's low debt burden, its continually improving debt structure that decreases rollover risk, and its prudent fiscal policy framework, which has led to the accumulation of substantial fiscal savings over the last decade.").

[656] *See*, *e.g.*, Reply (C-53), ¶ 304.

[657] Olivares-Caminal Report (CER-8), ¶ 105.

[658] Reply Statement of Koenigsberger (CWS-4), ¶ 48.

[659] Letter from Gramercy to Peru, 7 May 2009 (Doc. R-261).

[660] Letter from Gramercy to Peru, 28 March 2016 (Doc. R-47).

[661] Letter from Gramercy to Peru, 8 November 2017 (Doc. R-197).

297. Whether Peru can pay does not mean that it should pay whatever value Gramercy unilaterally assigns to the Bonds. As the Quantum experts explain: "even if Peru had the financial capacity to pay more does not mean Peru is liable to pay more or should pay more in the present case."[662]

e. Gramercy's Endless Campaign

298. As Peru has explained, when Gramercy notified Peru of a dispute under the Treaty, it "channeled the dispute into a neutral procedural mechanism" and "subjected itself to the norms regulating the investor-State dispute settlement system and the integrity of the arbitration process," as Professor Reisman has explained.[663] Nonetheless, in violation of these international norms, Gramercy further escalated the dispute by amplifying its pressure at the international level. As Peru has extensively documented,[664] Gramercy aligned diverse elements of the "mercenary campaigns" that have become commonplace for hedge funds seeking "whatever policy outcome will make their leveraged bet pay off."[665]

299. Peru maintains its objections with respect to Gramercy's conduct, and notes that the Tribunal issued Procedural Order No. 5, which, at Peru's request, and over Gramercy's objection, required that the Parties abstain from any conduct that may result in aggravation of the dispute. Subsequently, the Tribunal has confirmed that ruling on multiple occasions.[666] The Tribunal further ruled that it was an "undisputed principle" that the "Parties must respect the role of the non-disputing Party," i.e., the United States, and that it "directs the Parties to channel all their communications concerning the conduct of this arbitration or the settlement of the underlying dispute solely in the manner indicated by each Party in the Terms of Appointment." Peru has repeatedly warned of Gramercy's aggravation of the dispute, and flagged ongoing conduct last December, February, April and since. As the Tribunal has reaffirmed on a teleconference:

> If what you are saying is "Claimants are … paying lobbyists, or doing something or other, you will probably want to submit some evidence…. I think this is much more sensitive, and of course, it's a breach of an order of the tribunal, so it's a serious matter…. Whenever you think that aggravation has taken place, and you have the evidence to prove it, make a submission to the tribunal. We will look at it, we will look at the evidence, and we will give an appropriate time period to the other party to react. If necessary we will have another conf. call. Because to me, non-compliance with orders of the tribunal is a serious matter. We devote, as you notice, a lot of time to trying to orderly organize the procedure. If parties

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[662] Quantum II ¶ 200.

[663] Reisman I ¶¶ 76-77.

[664] *See* Diagrams, The Gramercy Campaign.

[665] Ryan Grim and Paul Blumenthal, The Vultures' Vultures: How a New Hedge Fund Strategy is Corrupting Washington, Huffington Post, 13 May 2016 (Doc. R-233) ("What makes the hedge fund pressure campaign distinctive is the ambivalence, or even nihilism, that lies behind the public policy suggestions. Hedge funds want whatever policy outcome will make their leveraged bet pay off. . . . The same playbook applied to entire countries . . . amplifies the threat exponentially.").

[666] Procedural Order No. 6, 8 March 2019, ¶ 6; Procedural Order No. 9, 20 July 2019, ¶ 83.

> don't obey the orders, that is 'el mundo al reves,' as we say in Spanish, so this is a serious question.[667]

300. Procedural Order No. 9 contains the following further admonishment:

- "The Parties must abstain from any action that may result in an aggravation of the dispute."
- "Once Parties have entrusted the adjudication of their dispute to a legally regulated procedure, the most sensible course of action is to cooperate with its efficient management, by avoiding unreasonable, external disruptions. In this arbitration, the Parties have been, and will continue to be, given full opportunity to present their case, so that the Tribunal can issue in due course a legally enforceable award that brings the dispute to an end. Within this context, any action that could potentially exacerbate the controversy, grossly vex the Parties or their counsel, or encumber the arbitration amounts to a waste of resources and a violation of the Tribunal's directions."
- The "Tribunal would like to emphasize the significance of maintaining the relationship between each Party and its counsel free from outside interference. The relation between an attorney and its client is of a fiduciary nature. The client puts its confidence, good faith, reliance, and trust in its counsel to obtain help, advice, and protection. Nobody is authorized to interfere - directly or indirectly - in this relationship with the purpose of damaging or even questioning it. The prohibition is specially strict as regards the counterparty and the counterparty's counsel. To the extent that such interference might have happened in this arbitration, such course of action is improper and should not occur again."[668]

301. Despite the Tribunal's orders related to aggravation, evidence demonstrates that Gramercy's aggravation campaign and disregard for the established channels of communication is ongoing, as Peru has previously brought to the attention of the Tribunal, including through its December Statement of Defense, its February correspondence, the April 2019 telephonic conference and in recent correspondence.

302. In its Statement of Reply, Gramercy alleges that Peru's longstanding efforts to bring Gramercy's aggravating conduct to light are "vague and misplaced" and an attempt to "shift attention from its misconduct."[669] Peru has set forth repeatedly and in detailhow Gramercy's conduct has prejudiced Peru and threatened the integrity and legitimacy of this proceeding.[670] In fact, Peru has detailed Gramercy's multipronged long-term campaign to attack Peru in an effort to pressure it into changing its law for Gramercy's benefit and to interfere with Peru's fundamental right to defend itself in these proceedings, including, among other things, by targeting Peru's counsel directly and by name as part of Gramercy's ongoing misinformation campaign to U.S. policymakers.

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[667] Tribunal Telephonic Conference, 9 April 2019 (formal audio recording).

[668] Procedural Order No. 9, 20 July 2019, ¶¶ 83-85.

[669] Statement of Reply ¶ 6.

[670] *See*, *e.g.*, Letter from Peru to Tribunal, 18 June 2019 (R-59); Statement of Defense, ¶ 133; Submission on Procedural Safeguards; Second Submission on Procedural Safeguards. .

303. For the avoidance of doubt, Peru once again highlights its ongoing commitment to its longstanding alliance with the Non-Disputing Party, the United States, with which it first established diplomatic relations over 190 years ago, just after Peru achieved its independence. Peru and the United States are strategic partners and Treaty partners with shared key values. Peru and the United States are key economic and trade partners. Peru remains concerned that Gramercy, directly and through lobbyists, front organizations and misinformation, has provided inaccurate or incomplete information to U.S. officials and the international markets, with the specific aim of inflicting harm on Peru in an effort to force an exorbitant settlement. The record makes plain that Gramercy intended to use lobbying and to abuse the nascent Treaty since even before the Treaty was signed and Gramercy began acquiring any Bonds, as Peru detailed in its Response and in its Statement of Defense, and as Professor Reisman discusses in detail. It intended to aggravate, and it has never stopped.

304. Gramercy also seeks to pressure Peru and suppress participation in the Bondholder Process by spreading misinformation through surrogates. For example, Gramercy has paid lobbyists from the Daschle Group since 2015, which contemporaneously approached the Peruvian Embassy in Washington, DC over a period of months with respect to the Agrarian Reform Bonds, only disclosing in response to an Embassy query that it was acting for Gramercy. Gramercy's payments to Daschle, among others, have continued even after Peru noted their impropriety, and even after Procedural Order No. 5. Peru has learned that the Daschle Group continues to spread misinformation to the Non-Disputing Party, about Peru and its counsel, including that Peru's counsel is blocking resolution to this matter. In sum, Gramercy has paid US$ 1,050,000.00 to Daschle's firm, Baker Donelson, for lobbying activities.

305. In fact, publically-filed lobbying disclosure forms confirm that Gramercy, directly and through counsel, has been paying lobbyists a total of millions of dollars to influence the Non-Disputing Party the U.S. Government since 2015. In particular, disclosure forms for the second quarter of 2019 confirm Gramercy's continuing efforts to politicize the dispute across government branches and agencies has continued since the Tribunal's non-aggravation order – paying over US$280,000 in recent months to continue lobbying the Office of the Vice President, U.S. Department of State, U.S. Senate, and U.S. House of Representatives.[671] Notably, Gramercy's lobbying activity actually appears to be increasing. In the first quarter of 2019, Gramercy spent US$200,000.[672] Gramercy spent US$90,000 in the fourth quarter of 2018[673] and US$ 150,000 in the third quarter.[674] The examples below are illustrative.

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[671] *See* Lobbying Report, Baker Donelson Bearman Caldwell & Berkowitz / The Daschle Group, House Identification 308730279 and Senate Identification 5153-1006043, 22 July 2019 (Doc. R-1126); Lobbying Report, Clark Hill, PLC, House Identification 370480076 and Senate Identification 287771-773, 22 July 2019 (Doc. R-1127); Lobbying Report, Chartwell Strategy Group LLC, House Identification 439230021 and Senate Identification 401104750-214, 18 July 2019 (Doc. R-1128).

[672] Lobbying Report, Chartwell Strategy Group LLC, House Identification 439230021 and Senate Identification 401104750-214, 18 April 2019 (Doc. R-1022); Lobbying Report, Clark Hill, PLC, House Identification 370480076 and Senate Identification 287771-773, 21 April 2019 (Doc. R-1023); Lobbying Report, Baker Donelson Bearman Caldwell & Berkowitz / The Daschle Group, House Identification 308730279 and Senate Identification 5153-1006043, 22 May 2019 (Doc. R-1024).

[673] Lobbying Report, Clark Hill, PLC, House Identification 370480076 and Senate Identification 287771-773, 22 January 2019 (Doc. R-1020); Lobbying Report, Baker Donelson Bearman Caldwell & Berkowitz / The Daschle Group, House Identification 308730279 and Senate Identification 5153-1006043, 22 January 2019 (Doc. R-1021).

- ***U.S. Department of State.*** A 1 February 2019 letter from members of the U.S. Congress to U.S. Secretary of State Michael Pompeo regarding the Bonds ("February Letter")[675] asks the Secretary to "use all available means," including "blocking Peru's admittance into the OECD" in order to "encourage" Peru to negotiate. As previously highlighted, blocking OECD admittance is one element of Gramercy's attack campaign. Indeed, when asked if Gramercy would stop aggravating the dispute, its representative stated that it would stop "when Peru stops seeking membership in the OECD." The same misleading messaging that Gramercy has sought to use in this proceeding and elsewhere time and again (and which Peru has already refuted) is reflected in the February Letter and in a letter dated 2 May 2019 from other members of the U.S. Congress to Secretary Pompeo regarding the Bonds.[676] Gramercy subsequently has been identified as being "behind this operation."[677] The messaging includes, among others:

  - *Non-payment*. The letters state that Peru "has refused and continues to block payments on their debt owed" and "refus[ed] to honor its obligations to repay agrarian reform bonds," respectively. In fact, Peru is paying legitimate bondholders through a process established under Peruvian law, as Peru has detailed and documented, including in its publicly-available Statement of Defense.

  - *Workers.* The February letter states that it brings attention to "an ongoing issue with U.S. pension funds invested in Peru's Agrarian Reform Bonds," which "creates uncertainty within U.S. pension funds and casts doubts on the ability for an employee to draw the pension that they've dutifully contributed to." The May letter alleges that "[n]ationwide, nearly $2 billion in debt is held across 30 states," and that "Peru's refusal to pay its obligations threatens the heard-earned benefits that these Americans have earned." In fact, Peru never placed the Bonds in the U.S. or marketed them to American workers. Moreover, Gramercy has stated that "Gramercy is the only legal entity that acquired Land Bonds as an investment"[678] and solicits investments from U.S. pension funds. Gramercy now admits that not all beneficial owners are U.S. nationals.

  - *Negotiations.* The February Letter states that Peru "has previously agreed to enter into good faith negotiations with U.S. Bondholders at the request of the U.S. House of Representatives," and that "negotiations have yet to occur." In

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[674] *See* Lobbying Report, Baker Donelson Bearman Caldwell & Berkowitz / The Daschle Group, House Identification 308730279 and Senate Identification 5153-1006043, 22 October 2018 (Doc. R-580); Lobbying Report, Clark Hill, PLC, House Identification 370480076 and Senate Identification 287771-773, 22 October 2018 (Doc. R-700).

[675] Letter from certain U.S. Members of Congress to U.S. Secretary of State Michael Pompeo, 1 February 2019 (Proposed Exhibit Doc. R-1025).

[676] Letter from certain U.S. Members of Congress to U.S. Secretary of State Michael Pompeo, 2 May 2019 (Doc. R-1026).

[677] Alonso Ramos, 50 years later, Hildebrandt, 23 August 2019 (Doc. R-1129).

[678] Second Amended Witness Statement of Robert S. Koenigsberger, ¶ 38.

fact, Peru participated in consultations with Gramercy, the self-described "only legal entity that acquired [] Bonds as an investment."[679]

In meetings in Peru shortly after the February Letter, the U.S. Secretary of State raised the issue of the Bonds with the Minister of Foreign Relations of Peru, among other Peruvian officials. Out of an abundance of respect for the Non-Disputing Party, Peru will not disclose further details.

- ***U.S. Senate*.** A Peru representative recently received an unsolicited call from the U.S. Senate regarding the Bonds. Among other things, it was stated that Gramercy lobbyists have continued to disparage Peru's counsel, and to inaccurately suggest that counsel to Peru is blocking a resolution of this matter.[680]

- ***Governor***. An 11 April 2019 letter from the Governor of Pennsylvania to the Ambassador of Peru regarding the Bonds references American workers (located in Pennsylvania in this case) who have "invested" through "pension plans."[681]

306. Gramercy's conduct has implications in Peru and frequently appears in Peruvian press. In fact, the 2 May 2019 letter from members of the U.S. Congress to Secretary Pompeo regarding the Bonds recently appeared in Peruvian press confirming that "Gramercy was behind the operation."[682]

307. Gramercy also continues to publically disseminate misinformation about Peru and the Bonds, and refuses to correct or withdraw previous misinformation. The dissemination of negative information could impact participation in the Bondholder Process, as Dr. Wühler confirms: "public criticism of the procedure" "may have impacted participation."[683]

308. Peru has also demonstrated how Gramercy has sought to harm the functioning of the Bondholder Process by seeking to discourage bondholders from participating for its own benefit.[684] As part of its campaign to discourage participation, Gramercy has repeatedly attacked the Bondholder Process publically, including calling it a "sham," saying that it offers participants "no value" and referring to any bondholders who would participate as "unsophisticated."[685]

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[679] Signatories to the letter include at least one member who has met with Gramercy, has been copied on correspondence by Gramercy, has raised Gramercy in discussions to various Peruvian representatives, and according to Gramercy, was "promised" by Peru to "negotiate a settlement of the land bonds." *See, e.g.*, Letters from Gramercy to President of Peru, 29 September 2017 and 29 November 2017 (Docs. R-192, 201); Email from U.S. Congressional Staffer to Office of President of Peru, 8 August 2017 (Doc. R-242).

[680] This is not a first for Gramercy. Gramercy previously made misrepresentations about Peru's counsel to the Office of the Presidency of Peru, to no avail. *See, e.g.*, Letter from Gramercy to President of Peru, 29 September 2017 (Doc. R-192); Letter from Gramercy to President of Peru, 29 November 2017 (Doc. R-201).

[681] Correspondence between Governor of Pennsylvania and Ambassador of Peru (Proposed Exhibit Doc. R-1027).

[682] Alonso Ramos, 50 years later, Hildebrandt, 23 August 2019 (Doc. R-1129).

[683] Wühler II ¶ 47.

[684] Second Submission of Peru on Procedural Safeguards, ¶ 74.

[685] Gramercy, Gramercy Once Again Responds to False Accusations Contained in Peru's Response on Land Bonds, PR Newswire, 6 July 2016 (Doc. R-238); Gramercy, Gramercy Responds to False Accusations by Peruvian Government on Land Bonds, 3 June 2016 (Doc. R-1125).

309. Gramercy also continues to interfere with Peru's right to counsel. Although it is well established that the right to counsel is "of fundamental importance,"[686] Gramercy repeatedly has sought to circumvent Peru's counsel. Gramercy has disregarded the established channels of communication through counsel, despite Peru's myriad requests and rules of professional responsibility. Among other examples, Gramercy sought to disparage counsel to the Office of the Presidency of Peru, to no avail.[687] Even very recently, Gramercy lobbyists have been disparaging Peru's counsel with inaccurate information, as discussed above.

310. Gramercy has not denied any of the foregoing, or any of the other aggravating conduct highlighted by Peru throughout this proceeding. Nor can it. Instead, Gramercy has not disputed and has expressly admitted "public advocacy activities"; "coordination with [bondholder] organizations" as a "component of Gramercy's original investment strategy"; and "hiring lobbyists, engaging experts, and speaking to ratings agencies."[688]

311. In fact, in a recent submission, Gramercy has again acknowledged that it has been "engaging lobbyists to protect its interests," but argued that Peru seeks a "a one-sided gag order preventing Gramercy from discussing the dispute, even privately and with elected representatives in the United States, and foreclosing responsible public comment on this issue of public concern within democratic fora."[689] This fails to account for the choice that Gramercy itself made to invoke the Treaty and channel the dispute into the Treaty's neutral dispute mechanism. When it did so, Gramercy foreclosed the possibility of pursuing a political solution through its elected representatives, or of litigating the matter in the media.

312. Rather than change its procedural misconduct, Gramercy has sought to shift the focus to Peru.[690] However, in stark contrast to Gramercy, Peru has not engaged in any action or conduct that could result in an aggravation of the dispute or sought to circumvent the established communications for this proceeding. Gramercy's allegations to the contrary are unfounded and incorrect. Moreover, they are a transparent attempt to distract from Gramercy's own aggravating conduct. In particular:

- ***SEC disclosures***. Gramercy attacks Peru's June 2019 SEC filing, which Gramercy claims to be "incomplete" because it does not refer to disputes related to the Agrarian Reform Bonds.[691] Gramercy fails to mention, however, that it "incorporate[es] by reference" "Peru's most recent Annual Report" filed on 11 June 2019, which expressly refers to Gramercy and this proceeding.[692]

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[686] *See* Gary Born, International Arbitration: Law and Practice (Second Edition) (2015), at 267 (RA-359).

[687] *See* Letter from Gramercy to President of Peru, 29 September 2017 (Doc. R-192); Letter from Gramercy to President of Peru, 29 November 2017 (Doc. R-201).

[688] *See*, *e.g.*, Claimants' Response to Peru's Interim Measures Application, 15 June 2019 (C-28), ¶¶ 28-29.

[689] Gramercy Letter to the Tribunal dated July 8, 2019, at 13, 17.

[690] Letter from Gramercy to Tribunal, 8 July 2019 (C-62).

[691] Letter from Gramercy to Tribunal, 8 July 2019 (C-62).

[692] Republic of Peru, Prospectus Supplement, June 2019, at S-3 (CE-754); Republic of Peru, 18-K, 11 June 2019, Exhibit D, D-27 (Doc. R-1131); *see also* Republic of Peru, 18-K, 28 September 2018, Exhibit D, D-26 (Doc. R-1132).

- ***Meetings with Officials***. Gramercy attacks Peru's Embassy for meeting with U.S. Officials.[693] In particular, it alleges that on 18 June 2019, the Ambassador of Peru to the United States met with "multiple members of the U.S. Congress to discuss the Land Bonds, at meetings that were scheduled at the request" of Peru's Ambassador.[694] Gramercy has produced no evidence at all to support or corroborate this. Peru notes only that its Embassy routinely interacts with U.S. Officials, including Members of U.S. Congress, to discuss a broad range of bilateral issues. None of these meetings has been for the purpose of discussing the Agrarian Reform Bonds, though others have raised the issue during meetings with the Ambassador. Peru reserves all of its rights in this regard.

- ***Peru's Embassy and Website***. Gramercy also attacks Peru's Embassy in the United States, which is describes as "an entire political and diplomatic apparatus that [Peru] deploys to lobby in its favor with the U.S. Government."[695] Gramercy further attacks the Embassy's website for publishing, according to Gramercy, a "misleading account of the Bondholder Process" and "declar[ing] falsehoods about Gramercy."[696] Peru's diplomacy and statesmanship in the United States is, of course, a bedrock of its sovereignty and entirely distinct from lobbying. Moreover, Peru's Embassy routinely provides information to the public about Peru and matters of public interest. In this context, it has made available to the accurate public information on the Agrarian Reform Bonds, including on the Bondholder Process and how bondholders may participate, as well as limited related information on the status of this proceeding.[697]

313. Gramercy's continuing aggravation of the dispute and suppression of participation in the Bondholder Process continues to prejudice Peru and Peruvians, including for the reasons Peru has previously detailed.[698]

C. Gramercy Fails To Prove Any Treaty Violations

1. Gramercy Fails To Prove An Expropriation

314. Peru has demonstrated that it did not expropriate Gramercy's alleged "investment" in Bonds because (1) the challenged measures did not substantially deprive Gramercy of the value of its claimed holdings, but rather established a valuation and payment procedure for instruments that otherwise are indisputably worthless on their face; (2) Gramercy had no legitimate expectations, as Gramercy was aware it was making a speculative investment in a preexisting dispute clouded by longstanding legal uncertainty; and (3) Peru's measures served the legitimate public purpose of resolving the historic Bond

[693] Letter from Gramercy to Tribunal, 8 July 2019 (C-62).

[694] Letter from Gramercy to Tribunal, 8 July 2019 (C-62).

[695] Letter from Gramercy to Tribunal, 8 July 2019 (C-62).

[696] Letter from Gramercy to Tribunal, 8 July 2019 (C-62).

[697] Embassy of Peru, Peruvian Agrarian Reform Bonds (Doc. CE-753).

[698] Peru's Submission on Procedural Safeguards, (R-20); Peru's Second Submission on Procedural Safeguards, (R-27).

question in a non-discriminatory manner, further to the State's sovereign prerogatives of ensuring fiscal security and promoting the public welfare.[699]

315. In each respect, Peru demonstrated compliance with Treaty Article 10.7.1 and the particular requirements set forth in Annex 10-B. That Annex provides that the Contracting "Parties confirm their shared understanding" that an expropriation analysis "requires a case-by case, fact-based inquiry that considers, among other factors," the "economic impact" of Government action; the extent to which that action interferes with "distinct, reasonable investment-backed expectations"; and the "character" of the action.[700] Annex 10-B further specifies that the fact that any measure "has an *adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred*," and that, "*[e]xcept in rare circumstances*, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives . . . *do not constitute indirect expropriations*."[701] The United States confirms the Contracting Parties' agreement that Annex 10-B of the Treaty "provides specific guidance as to whether an action constitutes an indirect expropriation."[702]

316. Gramercy all but ignores Annex 10-B and instead applies the wrong legal framework. Gramercy summarily argues that Peru committed an indirect expropriation by "destroying" the value of its Bonds. This argument ignores the particular Treaty requirements and flies in the face of the factual record, including Gramercy's own internal valuations. Gramercy then contends that Peru did not meet the Treaty requirements for a lawful expropriation. This inquiry is entirely irrelevant unless and until an expropriation has actually been established. Gramercy has not, and cannot, make any such showing.

a. Gramercy Cannot Show Any Substantial Deprivation

317. As Peru established, the Treaty provides that "an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred."[703] In its Submission, the United States reaffirms the Contracting Parties' express agreement on this important point.[704] Gramercy chooses to ignore it entirely.

318. Peru also established that an investor claiming an indirect expropriation must "establish the *substantial, radical, severe, devastating or fundamental deprivation* of its rights or the *virtual annihilation*, effective neutralisation or *factual destruction* of its investment, its value or enjoyment."[705] The United States reaffirms that "[i]t is a fundamental principle of international law that, for an expropriation claim to succeed a claimant must demonstrate that the government measure at issue *destroyed all, or virtually all, of the*

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[699] Statement of Defense ¶¶ 218-246.

[700] Treaty, Annex 10-B ¶ 3(a).

[701] Treaty Annex 10-B ¶¶ 3(a), 3(b) (emphasis added).

[702] US Submission ¶ 23.

[703] Treaty, Annex 10-B ¶ 3.a.i; *see also* Statement of Defense ¶ 222.

[704] US Submission ¶ 24.

[705] Statement of Defense ¶ 223 (quoting *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability dated 30 Nov. 2012 (RA-123) ¶ 6.62 (emphasis added)); *see also, e.g.*, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award dated 28 Sept. 2007 (RA-88) ¶ 285 (requiring that "the value of the business has been virtually annihilated").

economic value of its investment."[706] Gramercy itself acknowledges that it must show a "total or substantial deprivation of the value" of its alleged investment.[707]

319. The United States further specifies, in accordance with well-established principles, that when assessing economic impact:

> [T]he first point of comparison is the economic value of the investment immediately before the expropriation took place . . . . The second point of comparison is the economic value immediately after the alleged expropriatory measure(s) have been implemented, but *must exclude any adverse economic impact caused by acts, events or circumstances not attributable to the breach*. With respect to both points of comparison, the economic value of an investment must be reasonably ascertainable, and *not speculative, indeterminate, or contingent on unforeseen or uncertain future events*.[708]

320. Gramercy's expropriation claim founders in all respects.

321. *First*, Gramercy argues that it is a "fiction" that the Bonds were effectively worthless at the time that Gramercy allegedly acquired them, years before any of the challenged measures.[709] This is not fiction, but fact – a fact that is reinforced by Gramercy's own assessments. Gramercy repeatedly determined as part of its decision to invest in the Bonds, for example, that the "face value of the Land Bonds as denominated in Soles de Oro was *worthless* even in 2005,"[710] and that the "original nominal value and original currency are now *worthless*."[711] Gramercy's expert, Professor Edwards, likewise acknowledges that "the Land Bonds had become virtually worthless as the Peruvian currency lost value."[712] Indeed, Gramercy made its alleged investment *precisely because* the Bonds had been subject to adverse economic impacts for decades prior to its acquisition – let alone any of the measures beginning in 2013 on which Gramercy relies. Gramercy saw these admittedly "worthless" instruments as a "good opportunity" for its distressed asset business model.[713]

322. *Second*, Gramercy argues that the current value principle was the "law of the land," and thus that the Bonds had "enormous value" before Peru implemented measures beginning in July 2013.[714] In fact, Peru has demonstrated that any economic value that Gramercy hoped to recover through its alleged Bond acquisitions was inherently speculative, and contingent on unforeseen and uncertain developments in the Peruvian legal framework.

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[706] US Submission ¶ 24.

[707] Statement of Reply ¶ 250 (quoting *Tza Yap Shum*, Award (CA-50) ¶ 144).

[708] US Submission ¶ 25 (emphasis added). The United States further confirms that "[t]he same principles apply in determining damages." *Id.* n.41.

[709] *See, e.g.*, Statement of Reply ¶ 223.

[710] Second Amended Koenigsberger (CWS-3) ¶ 21 (emphasis added).

[711] January 2006 Gramercy Due Diligence Memorandum (Doc. CE-114) (emphasis added).

[712] Edwards (CER-4) ¶ 27. Peru's Quantum Experts explain that, as of 1992, when the Agrarian Bank closed and Peru stopped accepting coupons for payment, the fair market value of the entirety of Gramercy's alleged Bond holdings was a mere US$ 0.20. Quantum II ¶ 12.

[713] *See* Second Amended Koenigsberger (CWS-3) ¶ 21.

[714] Statement of Reply ¶¶ 224, 240.

The Quantum experts, for example, have explained that "the 'Current Value Principle' is not a universally recognized economic or financial concept," and that "until the July 2013 CT Decision the parameters and calculations necessary to implement the 'Current Value Principle' were not defined."[715]

323. Even Gramercy's own account reinforces that the law remained in a state of uncertainty for years, until July 2013. Gramercy, for example, states that the Peruvian Congress "took seriously the current value principle," and "*made efforts* to implement it."[716] In other words, as detailed above,[717] Congress attempted repeatedly to pass various draft bills into law in order to resolve longstanding questions of Bond valuation and payment – but always failed to do so. Contemporaneously, in fact, Gramercy itself described these "efforts" at a legislative solution as "Failed Government Initiatives to Settle its Agrarian Debt."[718] That same internal Gramercy report, dated shortly before its last alleged Bond acquisition, also concluded that "[t]here are no currently active initiatives to settle the agrarian reform debt on the part of the Alan Garcia administration, Congress, or from bondholder groups."[719] No legal resolution arrived until the Constitutional Tribunal decision of July 2013, which for the first time provided clarity on Bond valuation, conclusively rejected Gramercy's preferred CPI method, and ordered the implementation of payment procedures.

324. Gramercy's contention that the Bonds had a non-speculative "inherent value" also is belied by its own documents and witnesses. An internal report, for example, reveals that Gramercy focused on acquiring "small less expensive blocs" of Bonds from poorer bondholders who were willing to sell "in the range of 20% of the claims [sic] current value."[720] Gramercy's Chief Financial Officer testifies that Gramercy "purchase[d] the Land Bonds at substantial discounts."[721] Gramercy's witness, bondholder [redacted] likewise confirms that Gramercy told her that it would "pay around 20% of the total updated value," and that she sold her Bonds to Gramercy "at a significant discount."[722]

325. In other words, Gramercy preyed on the uncertainty faced by small bondholders. If the pre-July 2013 legal framework and valuation of the Bonds were anywhere as certain as Gramercy now suggests, it is highly unlikely, at best, that it could have acquired the Bonds at such deep discounts. Indeed, even Gramercy's own inflated

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[715] Quantum II ¶ 13, 18; *see also id.* ¶ 18 ("[T]he 2001 CT Decision left undefined the manner in which to calculate the value of the Coupons."); *id.* ¶ 217 ("After the 2001 CT Decision, all that was clear is that Peru could not pay the virtually worthless Unclipped Coupons at nominal value. No one knew, including Peru, what it was required to pay.").

[716] Statement of Reply ¶ 233 (emphasis added).

[717] *See supra* Section IV.B.1.

[718] Gramercy Email 23 May 2008 at 2 (CE-731).

[719] Gramercy Email 23 May 2008 at 3 (CE-731).

[720] Emails from J. Cerritelli, May 23, 2008 (CE-730 and CE-731)..

[721] Joannou ¶ 5.

[722] [redacted]

valuations, which expressly relied on "[redacted]"[723] did not approach anything resembling the value it now claims.[724]

326. *Third*, Gramercy argues that the Bondholder Process "has as its genesis not breathing value into worthless bonds, but finding a way not to pay that value."[725] To the contrary, Peru has demonstrated that the purportedly expropriatory measures served to resolve the longstanding uncertainty over the Bonds by establishing valuation and payment mechanisms for the first time. In this way, the measures functioned effectively to impart value to the otherwise facially worthless Bonds, and did not substantially deprive them of value. Peru's Quantum experts conclude that "Peru has not offered a 'haircut' on the virtually worthless Unclipped Coupons," as Gramercy alleges, but rather "has *uniquely offered a massive 'hair extension' that is unprecedented in modern history*."[726] Further, as Peru demonstrated, the value Gramercy could have recovered under the Bondholder Process actually *exceeds* the amount that Gramercy paid to acquire the Bonds.

327. In the Reply, Gramercy finally acknowledges, for the first time in this proceeding, that it paid only US$33.2 million for its alleged bonds – a mere fraction of the nearly US$2 billion that it seeks in this arbitration – and that it could have received US$33.57 million if it had participated in the Bondholder Process.[727] Nonetheless, Gramercy seeks to downplay these facts by contending that the "current value of the Land Bonds is not the same as the price that Gramercy paid for them."[728] In fact, tribunals repeatedly have held that acquisition price is relevant, including in the expropriation context.

328. In *Tecmed v. Mexico*, for example, the tribunal found that there was a "remarkable disparity" in party valuations; a "considerable difference" between the acquisition price and amount claimed, which was "likely to be inconsistent with the legitimate and genuine estimates on return on the Claimant's investment at the time of making the investment"; and no "market supported by a sufficient number of similar transactions that may be used as a guide to determine . . . value."[729] Accordingly, the tribunal accepted the acquisition price as the value of the asset.[730] Likewise, in *OAO Tatneft v. Ukraine*, "[i]n the face of [] uncertainty," the tribunal "attache[d] particular importance to the transactions through which the Claimant purchased its shares," and concluded that it "takes

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[723] *See, e.g.,* [redacted]

[724] *See supra* Section IV.B.2.

[725] Statement of Reply ¶ 244.

[726] Quantum II ¶ 86 (emphasis added).

[727] *See, e.g.*, Lanava ¶ 12 ("Over the course of two years, Gramercy transferred US$33,222,630.29 from accounts or funds held in the United States to the accounts of individual Peruvian bondholders, and Gramercy received in exchange more than 9,600 Land Bonds."); Statement of Reply ¶ 259.

[728] Statement of Reply ¶ 260.

[729] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (RA-65) ¶¶ 186, 191.

[730] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (RA-65) ¶ 195. The tribunal also considered additional investments made by the claimant, along with profits generated during operations of the landfill. No such considerations apply here.

guidance from the Claimant's own contemporaneous estimate of what [the investment] was worth, as it is implicit in the price that the Claimant found appropriate to pay."[731]

329. Here, Gramercy initially valued the Bonds at the cost of acquiring them, which was "consistent with how Gramercy valued illiquid positions," where "assets are either *hard to value*, or will require restructuring."[732] Gramercy's efforts to distance itself now from the purchase price, which Gramercy itself viewed as the proper way to value the Bonds – and represented accordingly to third-party investors – are without merit. The fact remains that there can be no "substantial deprivation" because Gramercy could have recovered more under the challenged measures than it initially paid to allegedly acquire Bonds. This is the opposite of the "destr[uction of] all, or virtually all, of the economic value of its investment."[733]

330. *Fourth*, in an unfounded attempt to deny the recovery that was available to it, Gramercy argues that the Tribunal should not even consider the Bond payment offered under the 2017 Supreme Decrees, and instead should limit its inquiry to the 2014 Decrees.[734] Gramercy's cherry-picking to support its merits claim – while arguing inconsistently at the same time, for purposes of jurisdiction, that "creation of the Bondholder Process can also be analyzed as a composite act"[735] – is without merit, including for the following reasons:

- Gramercy suggests that "the scope of this arbitration" should be limited to the formulas that predated the "commencement of this arbitration."[736] The Tribunal, however, specifically afforded Gramercy an additional opportunity to address any subsequent developments, including the 2017 Decrees, beginning with its July 2018 Third Amended Notice and Statement of Claim.

- Gramercy argues that it could not have been paid pursuant to the 2017 Supreme Decrees because this Treaty proceeding and the Bondholder Process are mutually exclusive.[737] In fact, even after Gramercy commenced arbitration, Peru repeatedly offered Gramercy the opportunity to participate in the Bondholder Process, including the latest advances under the 2017 Supreme Decrees.[738]

- It is undisputed that the valuation formula in the 2014 Decrees was refined in the 2017 Decrees – and, further, that bondholders have only been paid pursuant to the 2017 formulas. By insisting on application of the 2014 Decrees, Gramercy would make itself the lone bondholder subject to the superseded formula.

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[731] *OAO Tatneft v. Ukraine*, PCA UNCITRAL, Award on the Merits, 29 July 2014 (RA-361) ¶ 608.

[732] Joannou ¶ 9 (emphasis added).

[733] US Submission ¶ 24.

[734] Statement of Reply ¶¶ 252-257.

[735] Statement of Reply ¶ 195.

[736] Statement of Reply ¶ 256.

[737] Statement of Reply ¶¶ 253-255.

[738] *See, e.g.*, Letter from Peru to Gramercy, 8 November 2017 (Doc. R-192) ("Peru had suggested and remains open to consultations with Gramercy to discuss without prejudice how to realize value with respect to Agrarian Reform Bonds pursuant to the latest advances in the procedure."); Observations of Peru, 21 September 2017 (Doc. R-610) ("Even though Gramercy has renounced local proceedings, we understand that it could still be possible for Gramercy to put aside the treaty proceeding and participate in the procedure available to all legitimate bondholders. . . . [I]t would be a missed opportunity to ignore the opportunity to realize value and instead arbitrate, which would be risky. . . . Peru has a procedure through which you could realize value.").

- Gramercy argues that consideration of the 2017 Supreme Decrees "would permit Peru to keep changing the rules of the game even during the course of the arbitration."[739] In fact, it is well-established that a tribunal may, and should, account for developments occurring after the commencement of arbitration, particularly if they impact issues of liability or damages.[740] This is not a valid basis to ignore the valuation formula that Peru actually has applied to Bonds in favor of an outdated formula that was never applied.

331. Indeed, if anything, Gramercy's argument highlights that it does not have standing to challenge the Bondholder Process under *either* the 2014 or 2017 Supreme Decrees. Despite repeated invitations by Peru, even after the commencement of arbitration, Gramercy unilaterally opted to boycott the Bondholder Process entirely. As the tribunal in *Generation Ukraine v. Ukraine* observed:

> *The fact that an investment has become worthless obviously does not mean that there was an act of expropriation; investment always entails risk.* Nor is it sufficient for the disappointed investor to point to some governmental initiative, or inaction, which might have contributed to his ill fortune. Yet again, it is not enough for an investor to seize upon an act of maladministration . . . ; *to abandon his investment without any effort* at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated *virtual expropriation*.[741]

332. Gramercy had ample opportunity to tender its alleged Bonds into the Bondholder Process, including in the years between issuance of the 2014 Supreme Decrees and the initiation of arbitration in 2016 – a period when, contrary to Gramercy's suggestion, the Treaty's waiver provisions would not have precluded Gramercy from availing itself of the judicial review expressly provided under the Supreme Decrees.[742] Gramercy, however, made no such effort to participate in the administrative or judicial avenues available to it. Instead, Gramercy initiated Treaty arbitration based on the "virtual expropriation" allegedly effected by a procedure in which Gramercy chose not to participate.

333. Ultimately, none of Gramercy's various arguments can alter the fact that it made a speculative investment in an asset subject to longstanding uncertainty which significantly predated any allegedly expropriatory measure – and that, had Gramercy participated in the Bondholder Process, it could have received a payout that exceeded the

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[739] Statement of Reply ¶ 256.

[740] *See, e.g.*, *Hochtief Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014 ¶ 184 (RA-362) ("[T]he facts that a tribunal may take into account in order to decide the claims are not confined to those facts that occurred prior to the date of the signature or registration of the Request for Arbitration and / or the Memorial. The quantum claimed may clearly need to be updated in the light of later events; and even matters bearing upon liability may be affected by developments up to the date of the hearing – for example, if action by the Respondent amounts to timely reparation for an earlier action that had caused injury to the Claimant.").

[741] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 ¶ 20.30 (emphasis added) (RA-363); *see also id.* ("In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction.").

[742] *See* Statement of Reply ¶ 255.

price it paid for its speculative acquisition. Accordingly, Gramercy cannot establish any substantial deprivation of its alleged Bond holdings, let alone destruction of value, as the Treaty and fundamental principles of international law require.

b. Gramercy Cannot Show Any Legitimate Expectations

334. As Peru established, Annex 10-B of the Treaty also requires consideration of "the extent to which the government action interferes with distinct, reasonable investment-backed expectations."[743] The United States reaffirms that "[t]he second factor – the extent to which that action interferes with distinct, reasonable investment-backed expectations – requires an *objective inquiry of the reasonableness* of the claimant's expectations, which may *depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made*."[744] Gramercy makes no mention of this expectations requirement. Indeed, it is clear that Gramercy cannot satisfy it.

335. The overwhelming evidence of record, including Gramercy's own contemporaneous assessments, confirms that the challenged measures could not "interfere" with any "reasonable" expectation as to the Agrarian Reform Bonds. To the contrary, the Bonds were embroiled in a preexisting domestic dispute and longstanding uncertainty – which is precisely why Gramercy decided to purchase Bonds in the first place, further to its distressed asset business model. No objective inquiry could demonstrate that Gramercy reasonably expected a Bond investment to perform as it now alleges in this arbitration. The evidence conclusively establishes otherwise, including among other elements:

- ***Gramercy's business model involves significant speculation.*** Gramercy invests in distressed assets that pose the risk of being "a total write-off."[745] Gramercy openly advertises that "[t]here can be no assurance that the objectives associated with any of Gramercy's investment strategies will be met or that the Firm will achieve profitable results. Investments involve risk of loss, and clients *must be prepared to bear the loss of their entire investment*."[746]

- ***Gramercy assessed that the Bonds were speculative.*** Gramercy's due diligence prior to any alleged acquisitions confirmed that the Bonds were worthless on their face and were the subject of a preexisting domestic dispute, including longstanding uncertainty reflected in years of unsuccessful attempts in the political branches and the judiciary to produce any resolution.

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[743] Treaty, Annex 10-B ¶ 3.a.i; *see also* Statement of Defense ¶ 228.

[744] US Submission ¶ 26 (emphasis added).

[745] Robert L. Rauch, David Herzberg, Carlos Gomez, Larry Ge, *Distressed Debt Investing – An Overview*, 31 August 2010, at 9-10 (Doc. R-503) ("This *risk goes up significantly* if the underlying debt instruments are with much smaller companies, *in local currency governed solely under local law*, and so it is important to carefully consider the process risk elements before engaging in this.") (emphasis added)

[746] Gramercy Funds Management LLC, Brochure, March 29, 2018, at 9 (emphasis added) (Doc. R-540) (emphasis added); *see also, e.g.*, Gramercy, Distressed Debt Investing – An Overview, 31 August 2010 (R-577) (stating as to emerging market distressed asset investment that, "while financial and economic analysis is again the starting point for assessing value, it merely tells the investor what they deserve to get, not what they can expect to get").

- ***Gramercy attempted to change the legal landscape.*** Belying any allegation that the framework governing the Bonds was certain, a central component of Gramercy's "investment" strategy was to lobby to change the law in its favor. This reflects Gramercy's understanding that the framework was uncertain, at best. Further, the fact that Gramercy never achieved the legal changes that it sought underscores the uncertainty lingering even after any alleged purchase.

- ***Gramercy allegedly acquired Bonds at a deep discount.*** Gramercy preyed on the uncertainty faced by other bondholders and, with no established secondary market, acquired Bonds at "substantial discounts."[747] If the value of the Bonds were as certain as Gramercy now claims, no reasonable bondholder would have accepted Gramercy's offer.

- ***Gramercy's advisers confirmed the uncertainty.*** The investment bank UBS, engaged by Gramercy to pitch a "solution" to the Government, stated in 2010 – years after all alleged Bond acquisitions were complete – that the Bonds "since the 1990's have not been serviced and *currently have an uncertain situation*."[748]

- ***Gramercy's Bond valuations reflected ongoing uncertainty.*** Gramercy's financial statements expressly rely on [redacted],"[749] and caution that its valuations "[redacted]."[750]

- ***Gramercy advises third parties that recovery is uncertain.*** Gramercy's monthly "performance metrics" for funds through which third parties own Bond interests state that "[redacted]."[751]

336. Gramercy contests the characterization of its business or its alleged investment in Bonds as "speculative," as well as the relevance of that fact. As Gramercy's documents reflect and Professor Guidotti confirms, however, Gramercy's entire "business model involves significant speculation."[752] This is decidedly relevant to the question of

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[747] Joannou ¶ 5; *see also* Guidotti II ¶ 29 ("Gramercy knew (or should have known) the characteristics of the Agrarian Reform Bonds when it bought them, and that those characteristics included an illiquid secondary market. In fact, the lack of an established secondary market is one of the factors that allowed it to speculate on the [Bonds].").

[748] UBS Tender Offer and New Issue Proposal, August 2010 (CE-152) (emphasis added); *see also* Koenigsberger (Second Amended) (CWS-3) ¶¶ 46-49.

[749] *See, e.*[redacted]

[750] *See, e.g.*, [redacted]

[751] [redacted]
[DESIGNATED AS CONFIDENTIAL BY GRAMERCY]

[752] Guidotti I ¶ 50; *see also* Guidotti II ¶¶ 25, 27 (confirming that "distressed assets trade at very low prices, as their price reflects essentially a low and uncertain recovery value of such security," and that "purchasers most likely take advantage of the very low prices typically associated with the business of speculation in distressed or highly illiquid assets").

REDACTED CONTENT DESIGNATED AS CONFIDENTIAL BY GRAMERCY

expectations. In *Antaris v. Czech Republic*, for example, the tribunal held with respect to a speculative investment:

> [Claimant] was essentially an *opportunistic investor* who saw a window of opportunity and who was aware, or should have been aware, that [he was] dealing with . . . [a] *controversial political issue*. . . . [H]e also was aware that the Czech Government had been deeply concerned about the [sector] and should have been aware that other legislative changes . . . were in the air. . . . The Tribunal considers that [his] actions were *essentially opportunistic*, and that *the investment protection regime was never intended to promote and safeguard those who . . . 'pile in' to take advantage of laws which they must know may be in a state of flux* . . . . [He] had 'a *speculative hope – as opposed to an internationally-protected expectation*.'[753]

337. Much like the "opportunistic" investor in *Antaris*, Gramercy had a "speculative hope," and sought to take advantage of the considerable financial, political, and legal uncertainty burdening the Bonds. In such circumstances, there can be no legitimate, Treaty-protected expectations. Rather, Gramercy's own documents repudiate any claim to "reasonable" expectations, including as to Gramercy's claims that it could expect that a US$33 million acquisition of Bonds – from individual bondholders selling at a deep discount in a climate of longstanding uncertainty – would soon be worth US$2 billion.

c. Gramercy Cannot Show Any "Rare Circumstances" To Overcome The Presumption Against Expropriation

338. As Peru established, Annex 10-B of the Treaty also requires consideration of "the character of the government action," and further specifies that, "*[e]xcept in rare circumstances*, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives . . . *do not constitute indirect expropriations*."[754] The United States reaffirms the Contracting Parties' agreement that:

> Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. This principle is not an exception that applies after an expropriation has been found, but rather is a recognition that certain actions, by their nature, do not engage State responsibility. . . . Where a State proclaims that it is enacting a non-discriminatory statute or regulation for a *bona fide* public purpose, courts and tribunals rarely question that characterization.[755]

339. Further to well-established principles of international law, the Treaty thus underscores that non-discriminatory regulatory measures are accorded considerable deference

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[753] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018 ¶¶ 431, 433, 435 (emphasis added) (citations omitted) (RA-364).

[754] Treaty Annex 10-B ¶¶ 3(a)(iii), 3(b) (emphasis added); *see also* Statement of Defense ¶ 239.

[755] US Submission ¶¶ 22, 27.

and, indeed, cannot constitute an indirect expropriation "except in rare circumstances." Gramercy makes no mention of this Treaty presumption against expropriation – which Gramercy must overcome – and instead purports to reverse the burden of proof, arguing that Peru must show that its measures served a public purpose.[756]

340. In this regard, Gramercy seeks to apply the wrong legal framework under Article 10.7.1(a), which concerns the requirements for a lawful expropriation and thus is only relevant when an expropriation has been established. Here, the Treaty first requires an inquiry into public purpose to determine *whether* an expropriation ever took place. Gramercy fails to show that Peru's measures were anything other than non-discriminatory regulatory actions, designed and applied to protect legitimate public interests.

341. *First*, Gramercy argues that "Peru could have paid the CPI-updated value of the Land Bonds," and therefore the challenged measures were not supported.[757] As the Quantum experts have explained, however, whether or not Peru has the financial capacity to pay in accordance with Gramercy's preferred valuation method is utterly irrelevant.[758] Peru specified at length the specific public welfare objectives that underlay the Constitutional Tribunal's rulings and subsequent regulatory measures – and, indeed, were expressly articulated in those rulings and related documents.[759] Those objectives, further to constitutional mandates, included promoting the general welfare and sustainable development of the Nation, ensuring basic services that satisfy the fundamental rights of all Peruvians, and maintaining fiscal balance and sustainability.[760] Indeed, as Peru also established, resolving the longstanding historic issue of the Agrarian Reform Bonds was, in and of itself, a legitimate public interest for Peru and its citizens to whom the Bonds were granted.

342. Gramercy offers no valid response to the range of legitimate public interests which Peru's measures served to protect. Instead, Gramercy second-guesses the *bona fide* nature of the measures and speculates, without any evidence whatsoever, that they were actually designed to destroy Bond value and discriminate against Gramercy. Gramercy also relies on several cases that are readily distinguishable because they involve after-the-fact

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[756] Statement of Reply ¶ 263.

[757] Statement of Reply ¶¶ 264-265.

[758] *See, e.g.*, Quantum II ¶ 200 (concluding that "whether or not Peru has the financial capacity to afford to pay more to Agrarian Bondholders is irrelevant"); Quantum I ¶ 155 (concluding that "[t]here is a marked distinction between fiscal capacity and fiscal responsibility," and that "Professor Edwards fails to take into account that as a financially responsible sovereign, it would be fiscally irresponsible for Peru to comply with Claimants' damages claim").

[759] *See, e.g.*, Statement of Defense ¶¶ 241-242.

[760] *See, e.g.*, Constitutional Tribunal Resolution dated 16 July 2013 (RA-286), Whereas Clause ¶ 25 (specifying, *inter alia*, the State's duty under Article 44 of the Constitution "'to promote the general welfare, which is based on justice and on the overall and sustainable development of the Nation,' which entails addressing a series of basic services (that satisfy a series of fundamental rights of all Peruvians)"); *id.* Whereas Clause ¶ 29 (specifying "the principles of balance, sustainability and budgetary progressiveness, contained in Articles 77 and 78 of the Constitution, bearing in mind that it is financially impossible to make a payment of this nature and magnitude in a single sum without impacting fiscal resources, and consequently the basic services for the poorest population of our country"); Report No. 055-2014-EF/42.01, Office of Public Debt of the Ministry of Economy and Finance, 17 January 2014, ¶¶ 3.3 (MEF Office of General Counsel confirming "the MEF, based on the principles of fiscal balance and financial sustainability, as well as on fiscal rules and the multiannual macroeconomic framework, shall define the options" for payment, and that MEF also "maintain[] an appropriate management of the public assets"); *see also* Quantum I ¶ 156 ("The July 2013 CT Decision corresponds to the concept of a fiscally responsible nation. The Peruvian state must balance all of its obligations, including the promotion of the general welfare, which mandates that there should no preference to any one of its obligations, such as the Agrarian Bonds.").

invocations of budgetary crises as part of a *force majeure* defense to payment in State-to-State debt disputes.[761] Here, in contrast, Peru's measures were implemented in order to update, verify, and pay Bond obligations – not to repudiate them – as reflected in careful deliberations by the Judicial and Executives Branches in the contemporaneous record.[762]

343. *Second*, Gramercy argues that Peru's measures were discriminatory because "Peru has not denied that the MEF intended to single Gramercy out for differential treatment."[763] To the contrary, Peru has shown that Gramercy's allegation is entirely unsupported. Gramercy's sole basis for the discrimination claim remains the prioritization of cash payments for certain categories of bondholders under the Bondholder Process. As Peru established and again addresses further below, the structure for cash payments reflects a legitimate policy decision, pursuant to constitutional principles and consistent with international best practices, to make reasonable distinctions between various bondholders – including the elderly and non-elderly, original and non-original holders, individuals and legal entities, and legal entities acquiring under different circumstances.[764]

344. Further, Peru has affirmed, in response to a Gramercy request, that it did not locate any documents showing that the MEF had assessed which cash payment category would cover Gramercy, let alone showing that a category was created solely to "single out" Gramercy.[765] Gramercy's contention remains entirely unsupported. In any event, as Peru also demonstrated, Gramercy cannot allege any way in which the prioritization of cash payments actually benefitted Peruvian bondholders over Gramercy because Gramercy refused to participate in the Bondholder Process, had previously expressed a willingness to receive payment in bonds, not cash, and alleges to hold Bonds far exceeding the limit of 100,000 Soles (approximately US$30,000) for cash payments.[766] The purported discrimination with respect to cash payments is hypothetical at best. Gramercy offers no response.

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[761] *See* Statement of Reply ¶ 266 (citing *Russian Claim for Interest on Indemnities*, PCA Award, 11 November 1912 (CA-175); *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, 1929 P.C.I.J. (ser. A) No. 20–21, Judgment No. 15, 12 July 1929 (CA-94); *Case Concerning the Payment of Various Serbian Loans Issued in France*, 1929 P.C.I.J. (ser. A) No. 20-21, Judgment No. 14, 12 July 1929 (CA-95)).

[762] Gramercy also continues to rely on *ADC v. Hungary*. Statement of Reply ¶ 271. Peru previously demonstrated that *ADC* is readily distinguishable because the State in that case had made "half-hearted *ex post facto* attempt[s] at justification" for its measures, which the tribunal found supported "no genuine interest of the public." *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶¶ 262-285, 429-433 (RA-80). Gramercy offers no response to these differentiating elements.

[763] Statement of Reply ¶ 273.

[764] *See, e.g.*, Resolution of the Constitutional Court dated 16 July 2013 ¶ 29 (applying prioritization criteria "in consideration of criteria of equity, and taking into account the special constitutional protection provided in Article 4 of our Constitution"); Constitution of the Republic of Peru, Art. 4 ("The community and the State extend *special protection* to children, adolescents, mothers, and the elderly . . . .") (emphasis added); Hundskopf ¶ 127.

[765] *See* Procedural Order No. 6, Annex A, Request 15 (voluntarily undertaking that, "[n]otwithstanding and reserving its objections, Peru will produce relevant and material documents *located in response to this request, if any*") (emphasis added); *see also* Affidavit of President of the Special Commission that Represents the State in Investment Disputes, 22 March 2019 (declaring, *inter alia*, that "Peru has carried out a reasonable search," "[n]o document which Peru was ordered or voluntarily undertook to produce has been destroyed or concealed," and that "Peru has produced all Documents which it was ordered or voluntarily undertook to produce").

[766] *See, e.g.*, Gramercy Letter to President of Peru, 29 September 2017 (R-192) ("Gramercy is willing to accept a non-cash payment in the form of new Peruvian sovereign bonds . . . even if Peru desires to pay cash to Peruvian citizens . . . ."); Debevoise & Plimpton LLP Letter to President of the Special Commission that Represents the State, 28 March 2016 (R-47) at 5 (proposing payment through "newly issued and marketable sovereign bonds"); Gramercy Letter to President of the Council of Ministers, 31 December 2013 (Doc. CE-185) at 2 (proposing bond issuance).

345. Accordingly, this case does not present the "rare circumstances" in which regulatory action taken to protect legitimate public welfare objectives might constitute an expropriation. Gramercy has not made, and cannot make, any showing that would overcome this presumption against expropriation through regulatory action, as Annex 10-B of the Treaty requires and as the subsequent agreement of the Contracting Parties confirms.

2. Gramercy Fails To Prove A Minimum Standard Of Treatment Violation

346. In the Statement of Defense, Peru demonstrated that Gramercy's Article 10.5 claim must be dismissed because (1) even assuming, as Gramercy alleges, that legitimate expectations were a component of the minimum standard of treatment, Gramercy could not have had any such expectations when it made its speculative investment at a time of longstanding legal uncertainty; (2) Peru did not commit a denial of justice through the 2013 Constitutional Tribunal proceeding, which produced a repeatedly-validated decision in accordance with Peruvian law and which, in any event, Gramercy as a non-party has no standing to challenge; and (3) Peru's measures were non-arbitrary, just, and in accordance with due process, producing for the first time a clear framework for payment of the Bonds pursuant to a transparent, detailed, and carefully regulated procedure.

347. Gramercy suggests that Peru "barely defends" the "substance" of its claims, and that Peru did not adequately "justify its Supreme Decrees or defend them as providing current value."[767] Gramercy's attempt, yet again, to reverse the burden of proof cannot make up for its failure to make a case. Peru previously established, and the United States confirms, the indisputable principle that "[t]he burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law," and that, "[o]nce a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule."[768] Gramercy has not satisfied, and cannot satisfy, that burden. Its Article 10.5 claim is meritless and should be dismissed.

a. Gramercy Cannot Show Any Legitimate Expectations

348. At the outset, Gramercy suggests that "Peru does not dispute that Gramercy's legitimate expectations are protected under Article 10.5 of the Treaty."[769] To the contrary, Peru expressly predicated its analysis on the *assumption* that, as Gramercy had alleged, legitimate expectations are a "dominant element" of fair and equitable treatment.[770] The United States, in fact, confirms that legitimate expectations are not even a component element, let alone dominant element, of the customary international law standard:

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[767] Statement of Reply ¶ 281.

[768] US Submission ¶¶ 34-35; *see also* Statement of Defense ¶¶ 160-165.

[769] Statement of Reply ¶ 285.

[770] Statement of Defense ¶ 252 ("Gramercy argues that the 'dominant element' of fair and equitable treatment is 'the notion of legitimate expectations.' *Even assuming for the sake of argument that were accurate*, the absence of any legitimate expectations in this case underscores the absence of any violation of Article 10.5.") (emphasis added).

> The concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation. . . . The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.[771]

349. Various other authorities underscore that Gramercy's reliance on legitimate expectations for its Article 10.5 claim is misplaced.[772] Indeed, as the Treaty provides, Article 10.5 "prescribes the customary international law minimum standard of treatment," and the "concept of 'fair and equitable treatment' . . . do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights."[773] In any event, Gramercy's case on legitimate expectations is so lacking that – even assuming for the sake of argument that legitimate expectations are relevant – it only underscores the absence of any Treaty breach, including for the following reasons.[774]

350. *First*, as to the legal standard, Gramercy states that legitimate expectations "are, in some cases, derived from specific representations made to the investor."[775] It is undisputed, however, that Peru made no specific representations to Gramercy (or any other foreign investor) with respect to the Agrarian Reform Bonds. Accordingly, Gramercy relies on the proposition that an investor "may also hold legitimate expectations 'based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor.'"[776] As Peru demonstrated, however, this does not entitle Gramercy to a frozen regulatory framework.[777]

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[771] US Submission ¶ 38; *see also id.* ¶ 40 ("The concept of 'transparency' also has not crystallized as a component of 'fair and equitable treatment' under customary international law giving rise to an independent host-State obligation.").

[772] *See, e.g.*, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009 ¶ 620 (RA-101) (holding that "[m]erely not living up to expectations cannot be sufficient to find a breach of" the minimum standard of treatment); *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 ¶ 290 (RA-365) ("No evidence … has been placed before the Tribunal that there is such a [legitimate expectations] requirement in the NAFTA or in customary international law, at least where such expectations do not arise from a contract or quasi-contractual basis."); PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, at 158-159 (2013) (RA-366) ("[T]here is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations.").

[773] Treaty, Art. 10.5.2.

[774] This includes with respect to Gramercy's expropriation claim, for which the Treaty requires (and Gramercy ignores) an examination of "distinct, reasonable investment-backed expectations." *See supra* Section IV.C.1; *see also* Treaty, Annex 10-B ¶ 3.a.ii.

[775] Statement of Reply ¶ 288.

[776] Statement of Reply ¶ 288 (quoting *Murphy*, Partial Award (CA-144) ¶ 248.

[777] *See, e.g.*, *EDF Services Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 Oct. 2009 (RA-103) ¶ 217 ("The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life."); *see also Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award dated 11 Sept. 2007 (RA-87) ¶¶ 332, 334; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability dated 27 Dec. 2010 (RA-112) ¶ 120; Statement of Defense ¶¶ 253-254.

351. Notably, moreover, many of the cases cited by Gramercy involved specific commitments or preexisting, well-defined regulatory regimes that were later subject to change.[778] Here, in contrast, Gramercy purports to rely on a legal "framework" comprised of a longstanding dispute, evolving court decisions, and failed draft laws which together reflect that the Bonds had been subject to decades of uncertainty prior to Gramercy's alleged investment – and remained so for years after. Gramercy's authorities that assess expectations in view of a set legal framework that offered pre-investment clarity and certainty are entirely irrelevant. On the other hand, several of Gramercy's cases reinforce that there can be no legitimate expectations when the investment environment is uncertain.[779]

352. *Second*, as to the evidence, Gramercy remarkably contends that "Peru does not engage with any of the evidence Gramercy provided," including its lone January 2006 due diligence memorandum.[780] To the contrary, Peru demonstrated in detail that Gramercy's own memorandum and witness testimony highlighted the considerable uncertainties regarding the legal framework and the potential for payment of the Bonds.[781] Peru has now further shown, with respect to additional evidence that Gramercy has since produced, that Gramercy's own documents repeatedly reinforce that it was well aware of the prevailing uncertainty at the time it made its alleged Bond acquisitions, and made its alleged investment specifically in an attempt to capitalize on that uncertainty. Indeed, Gramercy fails to engage with much of *its own* evidence, including, *inter alia*:

- Gramercy represents to third parties that its investments risk "a total write-off," and "clients must be prepared to bear the loss of their entire investment."[782]
- Gramercy concluded in its due diligence memorandum that it saw "good value" in lobbying to change the law, a key component of its strategy that confirms that the law was nowhere near as certain as Gramercy now claims.[783] Further,

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[778] *See, e.g.*, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (CA-15) ¶ 275 (finding that pesification measures "did in fact entirely transform and alter the legal and business environment" by dismantling prior tariff regime and its relationship with a dollar standard); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1 (CA-31) ¶ 134 (involving "guarantee[s] laid down in the tariff system"); *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award (CA-144) ¶ 273 (involving specific contractual commitments); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (CA-42) ¶¶160, 167 (involving specific commitments); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 (CA-35) 181,184, 191(noting that "the [contractual] framework under which the investment was made and operates has been changed in an important manner" through an interpretation that was "manifestly wrong").

[779] *See, e.g.*, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL (CA-39) ¶¶ 359-360 (rejecting legitimate expectations where it was "undisputed between the parties that Czech Law failed to provide effective mechanisms to enforce loan security," these "legal shortcomings must have been known to [claimant] when it made its investment," and thus any "expectation that such shortcomings would quickly be fixed by the Czech legislature would have been unfounded"); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (RA-87) ¶¶ 335, 337 (ruling that "no expectation that the laws would remain unchanged was legitimate" because, at the time of investment, "the political environment in Lithuania was characteristic of a country in transition," "legislative changes, far from being unpredictable, were in fact to be regarded as likely," and the claimant "was aware of the risk that changes of laws would probably occur").

[780] Statement of Reply ¶ 290.

[781] *See, e.g.* Statement of Defense ¶¶ 59-60, 231-232; *see also supra* Section IV.C.1.

[782] Robert L. Rauch, David Herzberg, Carlos Gomez, Larry Ge, *Distressed Debt Investing – An Overview*, 31 August 2010, at 9-10 (Doc. R-503); Gramercy Funds Management LLC, Brochure, March 29, 2018, at 9 (Doc. R-540).

[783] Gramercy Due Diligence Memorandum, January 2006 (Doc. CE-114) at 3.

Gramercy's repeated reliance on *draft* legislation as an indicator of certainty underscores that Gramercy never achieved the changes it hoped to make.[784]

- Gramercy acquired its Bonds at a deep discount, and required in the contracts that bondholders acknowledge that they not been able to collect payment, that Gramercy was taking on the "risk" of an "expectative right" as to the "possibility of actual collection," and that the low contract price was therefore "adequate."[785]

- Gramercy's financial statements repeatedly caution that its valuations of Bonds [redacted][786]

- Gramercy advises investors in its Bond funds that [redacted][787]

353. Gramercy's own assessments are fatal to its claim of legitimate expectations. Its selectiveand misleading presentation of the evidentiary record cannot change that fact.

354. *Third*, as to the Treaty, Gramercy contends that Peru "had a well-known commitment to, and a proven track record of, promoting foreign investment and fiscal responsibility," and had "actively solicited foreign investment for years, including by entering into the Treaty."[788] It is undisputed that Peru is a fiscally responsible sovereign, with an earned reputation for careful debt management. But, as Peru demonstrated, its efforts to attract foreign investment, through the Treaty or otherwise, have nothing to do with the Agrarian Reform Bonds. Indeed, the Contracting Parties understood that the Treaty would cover contemporary sovereign bonds (issued on international markets to secure financing for Government needs) and not the Bonds (issued domestically as compensation to landowners for lands expropriated in Peru), which were never even raised during negotiations.[789]

355. Gramercy concedes that the Bonds were not marketed, let alone issued, to foreign investors, but contends that this should not "preclude Gramercy from benefitting from the protections available to foreign investors."[790] Rather, the fact that the Bonds do not constitute "investments" and Gramercy is not an "investor" under Article 10.28 precludes

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[784] *See, e.g.*, Statement of Reply ¶¶ 235, 241, 300, 316-318. According to Gramercy, the "most serious and credible legislative initiative to resolve the Land Bonds debt" was a 2011 bill which, like all others before it, never became law. *Id.* ¶ 326.

[785] *See, e.g.*, Contract for the Assignment of Rights 20 October 2006, Art. 3.2 (Doc. CE-339.001); *see also supra* Section IV.B.2.

[786] *See, e.g.*, [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[787] [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[788] Statement of Reply ¶¶ 304-305.

[789] *See, e.g.*, Herrera ¶¶ 33-34 ("Throughout the negotiations, the understanding and focus of the concept of public debt (including bonds) as an 'investment' was always as an instrument aimed at obtaining financing in international markets. . . . Neither Peru nor the United States considered that the Agrarian Reform Bonds would be covered by the Treaty. . . . The Agrarian Reform Bonds simply are not the type of instrument that the Contracting Parties had in mind when negotiating Treaty provisions regarding 'bonds,' 'debt,' and 'public debt.'"); *see also supra* Section III.D.

[790] *See, e.g.*, Statement of Reply ¶ 308.

Gramercy from benefitting from Treaty protections.[791] Otherwise, the fact that Peru did not create the Agrarian Reform Bonds as an instrument for foreign investment, never marketed the Bonds to foreign investors, never placed them on foreign markets, and never made specific assurances to Gramercy or other foreign investors regarding the Bonds, underscores that Gramercy could not have legitimate expectations with respect to its alleged acquisitions. In any event, as Peru established, "[e]xcept where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable."[792]

356. *Fourth*, as to the challenged measures, Gramercy argues that the 2013 Constitutional Tribunal orders, Supreme Decrees, and Bondholder Process "completely reversed the legal framework that Gramercy relied on in making its investment."[793] As the preceding discussion and Gramercy's own evidence establishes, however, there was no set framework in place at the time of Gramercy's alleged acquisitions for Peru to later "reverse." The Constitutional Tribunal orders and subsequent implementing measures do constitute a turning point, insofar as they for the first time *provided clarity* and *established a legal framework* for valuation and payment of the Bonds. Gramercy cannot credibly argue that the creation of a specific regulatory regime to fill a longstanding void constitutes a "reversal" of prior assurances or commitments never made under a nonexistent legal framework.

b. Gramercy Cannot Show Any Denial Of Justice

357. In all of its *six* prior submissions – two Notices of Intent and four Notices of Arbitration and Statement of Claim – Gramercy alleged that Peru committed a denial of justice because the 2013 Constitutional Tribunal proceedings were a "deeply tainted judicial process."[794] In response, Peru demonstrated that (1) Gramercy had no standing to challenge proceedings to which it was not a party; (2) Gramercy failed to satisfy the prerequisite exhaustion of local remedies; and (3) even assuming that Gramercy did have standing and did exhaust local remedies, it could not sustain a claim under the demanding denial of justice standard because Gramercy had not alleged any "exceptionally outrageous or monstrously grave breaches of municipal law,"[795] and indeed the July 2013 Order was rendered in accordance with Peruvian law and has since repeatedly been validated.[796]

358. In the Reply, Gramercy spends relatively little time attempting to prop up its denial of justice claim as previously formulated – *i.e.*, with an exclusive focus on the 2013 Constitutional Tribunal proceedings. Instead, given the claim's many manifest flaws, Gramercy seeks to reformulate it by arguing that those proceedings "heighten" the "arbitrariness" of the Bondholder Process, and that the "totality of the Bondholder Process" is

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[791] *See supra* Sections III.C-D.

[792] Statement of Defense ¶ 253 (quoting *EDF Services Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 Oct. 2009 (RA-103) ¶ 217).

[793] Statement of Reply ¶ 328.

[794] *See, e.g.*, Third Amended Notice of Arbitration and Statement of Claim ¶ 208.

[795] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 83 (2005) (RA-72).

[796] Statement of Defense ¶¶ 261-269.

a denial of justice because it deprives Gramercy of access to the courts. Both Gramercy's partially rehashed and newly-minted arguments are wrong. The claim remains without merit.

i. Gramercy's Original Denial Of Justice Claim Is Fundamentally Flawed

359. Gramercy's Reply cannot salvage its fundamentally flawed claim.

360. *First*, Gramercy incorrectly maintains that it can experience a "substantive denial of justice" because the 2013 Constitutional Tribunal decision "affects Gramercy's rights even if was not a named litigant."[797] To the contrary, as Peru demonstrated, a claimant cannot bring a denial of justice claim unless it – or, at minimum, its local investment vehicle – participated as a party in the proceedings it seeks to challenge.[798] Gramercy concedes that investment treaty jurisprudence has considered the possibility of a claim by a non-party only in the narrow circumstance of "a vertical relationship between the local litigant and the international claimant."[799] This follows from the fact that certain treaties provide denial of justice protection to "covered investments," as the Treaty does in Article 10.5. This does *not* create a far broader right for unrelated third parties to bring claims based on proceedings in which they did not participate, as Gramercy proposes without any supporting authority.[800]

361. The United States confirms that "in the context of a claim for denial of justice under Article 10.5.1, a claimant . . . must establish that *it or its covered investment . . . was, or sought to be but was prohibited from becoming, a party to adjudicatory proceedings* in order for the treatment accorded to result in a denial of justice by virtue of those proceedings."[801] Gramercy cannot meet that standard, as well established under international law and agreed by the Contracting Parties, because it is undisputed that Gramercy never participated or sought to participate in the Constitutional Tribunal proceedings. The claim fails on that ground alone. For the same reasons, moreover, Gramercy also fails to meet the exhaustion of local remedies requirement.

362. *Second*, in an unfounded attempt to second-guess the decisions of Peru's highest court on matters of Peruvian law, Gramercy challenges the level of deference owed to the judiciary as a matter of international law. Gramercy, however, relies almost exclusively on cases decided in contexts other than a denial of justice claim, with respect to non-judicial measures.[802] These irrelevant authorities cannot alter the requirements of international law and the agreement of the Contracting Parties. Peru established, and the United States confirms, that the denial of justice standard accords considerable deference to the decisions of domestic courts applying domestic law:

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[797] Statement of Reply ¶¶ 450-453.

[798] *See, e.g., Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 April 2013 (RA-128) ¶ 435 (holding that a denial of justice claim "can only be successfully pursued by a person that was denied justice through court proceedings in which it participated as party"); *see also* Statement of Defense ¶ 263.

[799] Statement of Reply ¶ 452.

[800] *See* Statement of Reply ¶ 452 (suggesting that cases involving denial of justice claims with respect to a local subsidiary's participation "are all consistent with the broader rationale that non-parties have standing to bring international claims for denial of justice when their rights are affected by proceedings to which they are not party").

[801] US Submission ¶ 43 (emphasis added).

[802] *See* Statement of Reply ¶¶ 428-430.

> The *high threshold required* for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. . . . [T]he actions of domestic courts are accorded a *greater presumption of regularity* under international law than are legislative or administrative acts. Indeed, as a matter of customary international law, international *tribunals will defer to domestic courts interpreting matters of domestic law* unless there is a denial of justice. In this connection, it is well-established that international tribunals, such as U.S.-Peru TPA Chapter Ten tribunals, are *not empowered to be supranational courts of appeal on a court's application of domestic law*.[803]

363. Likewise, Peru established and the United States confirms that, in view of this deference, the denial of justice standard demands a "grotesque" or "outrageous" violation in order to constitute an international law breach:

> A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a 'notoriously unjust' or 'egregious' administration of justice 'which offends a sense of judicial propriety.' . . . A manifestly unjust judgment is one that amounts to a travesty of justice or is grotesquely unjust. To be manifestly unjust a court decision must 'amount[] to an outrage, bad faith, willful neglect of duty, or an insufficiency of governmental action recognizable by every unbiased [person].'[804]

364. Gramercy, in fact, concedes that a denial of justice requires "gross judicial impropriety" such as a "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."[805]

365. *Third*, Gramercy continues to rely heavily on alleged irregularities in the Constitutional Tribunal proceedings that are not even factually supported, let alone legally sufficient to meet the high threshold for a denial of justice. To the contrary, as detailed above,[806] Gramercy persists in offering mischaracterizations and baseless inferences that ignore the evidence of record, and cannot overcome the presumption that the Constitutional Tribunal acted properly in accordance with Peruvian law. For example:

- Gramercy abandons its prior claims that a dissenting opinion was a "forgery," and fails to mention that the official investigation confirmed that the use of liquid

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[803] US Submission ¶ 46 (emphasis added); *see also* Statement of Defense ¶¶ 265-268.

[804] US Submission ¶¶ 44-45 (citing authorities); *see also, e.g.*, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 60 (2005) (RA-72) ("The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice."); Statement of Defense ¶¶ 265-268.

[805] Statement of Reply ¶ 416 (quoting *Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award, 26 June 2003 (CA-32) ¶ 132).

[806] *See supra* Section IV.B.2.

paper was a "habitual practice" of the Court that "never varied the decision" and was used only for "formal corrections."[807]

- Gramercy fails to mention that the Magistrates have denied any pressure from the Executive, including Magistrate Eto Cruz's 2019 testimony before the Peruvian Congress's Subcomission on Constitutional Accusations that "never in my life has the Executive established any type of pressure, we have never had it."[808]

- Gramercy fails to mention that the Magistrates have denied receiving any document from the MEF, including for example Magistrate Urviola's 2019 testimony that "I reject absolutely, that we had received from the Ministry of Economy and Finance a draft, this is absolutely false."[809]

- Gramercy continues to allege that "Minister Castilla spooked the justices" in a secret meeting so that they would rule as they did, notwithstanding Minister Castilla's testimony that he recalled no such meeting – and, in fact, the MEF filed to declare the decision null and void.[810] Minister Castilla reaffirms that he "did not try to 'spook' or 'pressure' the Constitutional Tribunal," does not recall any meetings with any members in the days before the July 2013 ruling, and that the Ministry's visitor logs do not show any record of such a visit.[811]

- Gramercy fails to mention that Magistrates Urviola and Eto Cruz both voted to confirm the July 2013 Resolution, as confirmed for example in the contemporaneous "acta" of the Constitutional Tribunal deliberations and Magistrate Eto Cruz's testimony that "the resolution was always going to be the same" as it reflected the position of Magistrate Ramirez.[812]

366. Stripped of its unfounded – and, indeed, disproven – theory of a "devious" conspiracy between the MEF and Constitutional Tribunal acting with "malice,"[813] Gramercy's claim boils down to a complaint that the Court allegedly considered inaccurate budgetary information and arrived at an incorrect conclusion. Even if that were the case, however, it is hardly enough to sustain a denial of justice claim. It is undisputed, and the United States confirms, that "*erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice*."[814] In any event,

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[807] *See, e.g.*, Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 44, 51 (Doc. R-1100).

[808] Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 37 (Doc. R-1100).

[809] Congress of the Republic, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 14 (Doc. R-1100). Magistrate Eto Cruz likewise testified during this proceeding that "we have never had any type of document signaled by the Ministry of Economy and Finance, as we should know," and Magistrate Alvarez testified that "we would not have accepted a draft coming from an institution, normally this would have been a scandal." *See id.* at 24, 37.

[810] Castilla I ¶¶ 32, 37.

[811] Castilla II ¶ 8; Ministry of Economy and Finance, Visitor Guide, 9-17 July 2013 (Doc. R-1144).

[812] Constitutional Tribunal, Record of Full Session of Tuesday 16 July 2013, 16 July 2013, at 33 (Doc. R-1101).

[813] *See, e.g.*, Statement of Reply ¶¶ 280, 435.

[814] US Submission ¶ 45 (emphasis added).

Gramercy also cannot dispute that the Constitutional Tribunal's July 2013 Order has been repeatedly affirmed and remains valid, final, and binding.[815]

367. Thus, even assuming that Gramercy had standing to bring a denial of justice claim as to the proceedings – it does not – the fact remains that Gramercy has not shown any "travesty of justice" that rises to the "grotesque" or "outrageous" threshold required.

ii. Gramercy's Newly-Manufactured Denial Of Justice Claim Is Fundamentally Flawed

368. In tacit acknowledgment that the claim as presented in multiple prior submissions could not succeed, Gramercy attempts to shift focus from the 2013 Constitutional Tribunal proceedings. Gramercy now suggests that the Bondholder Process itself effected a denial of justice. This new theory is equally unfounded and must be rejected.

369. *First*, Gramercy suggests that "Peru mischaracterizes Gramercy's case," because it "does not claim that it has been subjected to unjust treatment by the courts *as a litigant*, but that Peru – through the totality of the Bondholder Process – deprived bondholders like Gramercy of any access to the courts."[816] Gramercy's express admission of the indisputable fact that it was not subject to mistreatment "as a litigant" in Peruvian courts is fatal to its claim, as set out above. In any event, *Gramercy itself* argued that its claim turned on the validity of the 2013 Constitutional Tribunal proceedings, as plainly stated in all of its prior submissions.[817] Peru has not mischaracterized Gramercy's case. Rather, following its well-established pattern in this proceeding, Gramercy chose to reformulate its case after Peru identified glaring defects under the applicable Treaty standards.

370. *Second*, Gramercy newly argues that Peru committed a "procedural denial of justice" by "shutting the courthouse doors" to Gramercy as part of the Bondholder Process.[818] Gramercy contends superficially that a "State can obviously be internationally responsible for denying a claimant access to a judicial remedy."[819] Gramercy ignores that the types of misconduct rising to the level of a procedural denial of justice – as indicated in the authorities Gramercy cites – include, for example, abusive formalities or conditions, such as an exaggerated bond requirement; the threatening of sanctions if an investor seeks to pursue remedies; granting amnesty to parties that committed torts or contractual breaches against an investor; or the imposition of manifestly unjust litigation delays.[820] It also generally entails an element of discrimination against foreign investors, whose access to the courts is hindered in

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[815] *See, e.g.*, Hundskopf I ¶¶ 88-121.

[816] Statement of Reply ¶ 444 (emphasis added).

[817] *See, e.g.*, Third Amended Notice of Arbitration and Statement of Claim ¶¶ 208, 211, 213 (alleging a denial of justice on the basis that the Constitutional Tribunal "follow[ed] a deeply tainted process" that "violated [its] own legal framework and internal procedures," and because "[u]sing white-out and a typewriter to manufacture a fraudulent dissent . . . is conduct that 'shocks a sense of judicial propriety'").

[818] Statement of Reply ¶¶ 445, 449.

[819] Statement of Reply ¶ 446.

[820] *See, e.g.*, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 137 (2005) (CA-156); *Mondev v. United States*, Counter-Memorial on Competence and Liability of the United States at 43-44 (CE-398).

a way that is not also applied to host State nationals.[821] No such abusive or arbitrary improprieties are at issue here, and any limitations were applied equally to all bondholders.

371. Gramercy also ignores – again, from its own cited authorities – that the right of access to courts is not unlimited, and indeed that "[l]imitations are accepted when they are motivated by a legitimate public purpose, when the means are proportional to that objective, and when the very essence of the right is not impaired."[822] Here, the alleged limitations challenged by Gramercy were established as part of the detailed regulatory framework Peru carefully tailored, implemented, and applied equally to all bondholders, in order to meet legitimate public interests. Indeed, Peru has established that:

- The (near) exclusivity of administrative remedies under the Bondholder Process is a common feature of compensation procedures and consistent with international best practices, as Dr. Wühler has concluded.[823]

- The Supreme Decrees expressly establish recourse to both administrative and judicial appeals as part of the Bondholder Process.[824] Gramercy's own bondholder witnesses availed themselves of those procedures, which included the opportunity to file a brief and expert report on valuation, and for their (Gramercy-affiliated) experts and lawyers to present conclusions at a hearing.[825]

- Beyond these particular due process protections under the Bondholder Process, Peruvian law provides several additional judicial and administrative avenues, including contentious administrative actions, "popular actions" before the courts, and *amparo* actions before the courts, as Dr. García concludes.[826]

372. Accordingly, Gramercy cannot sustain its allegation that Peru "shut[] the courthouse doors." To the contrary, all of these "doors" remained open to Gramercy, as they did equally for all other alleged holders of Bonds. Gramercy chose to pass them by when it boycotted the Bondholder Process.

373. Indeed, Gramercy's new denial of justice claim hinges on the alleged infringement of judicial avenues which Gramercy largely repudiated even in the years prior to the Bondholder Process. On Gramercy's own account, from the time it first acquired Bonds

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[821] *See, e.g.*, C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) (RA-367) ("Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint."); *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111, 6 March 1956 (RA-368) ("The modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of 'free access' is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.").

[822] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 138 (2005) (CA-156).

[823] Wühler II ¶ 28 (confirming that the Bondholder Process "is not, however, entirely exclusive," and that the "provisions in the Bondholder Process regarding exclusivity are thus in line with, and even more accommodating than, the standard practice of comparable programs"); *see also* Wühler I ¶¶ 64, 66.

[824] *See, e.g.*, Supreme Decree No. 242-2017-EF (RA-23), Arts. 2.2, 9.2, 14.2, 17.7, Final Complimentary Disposition.

[825] *See generally* Wühler II ¶ 42.

[826] García ¶¶ 105-111.

in 2006, Gramercy participated in only seven local proceedings, as to some unspecified portion of its Bonds. Gramercy consistently speaks favorably of those few proceedings. If Gramercy's ability to pursue payment through the Peruvian courts were as critical to its investment as it now suggests, Gramercy would and could have pursued claims accordingly as to all of its Bonds. Instead, Gramercy, chose largely to forego judicial remedies in favor of an abusive lobbying and attack campaign designed to pressure Peru to pay even more than provided under Peruvian law. Gramercy's newfound emphasis on judicial remedies is disingenuous – and, in any event, does not offer any basis for a denial of justice claim.

c. Gramercy Cannot Show That Peru's Measures Were Arbitrary, Grossly Unfair, Or Unjust

374. Gramercy's Article 10.5 claim insofar as it concerns non-judicial measures is equally flawed. Gramercy concedes that the minimum standard of treatment requires conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic."[827] Peru similarly demonstrated that this requires conduct that is "manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety),"[828] and that the "threshold is a high one."[829] Gramercy resorts to mischaracterizations of legal standards and the factual record in an unfounded attempt to meet the high threshold required. Its efforts are unavailing.

375. *First*, with respect to the international law standard, Gramercy seeks to fault Peru for "encourag[ing] the Tribunal to exercise 'deference.'"[830] In fact, Peru established, and the United States confirms, that "[d]etermining a breach of the minimum standard of treatment 'must be made in the light of the *high measure of deference* that international law generally extends to the right of domestic authorities to regulate matters within their borders.'"[831] Gramercy's lack of deference for Peruvian measures implemented in Peru with respect to Peruvian Bonds in accordance with Peruvian law cannot change this fundamental principle of international law, as agreed by the Contracting Parties.

376. *Second*, with respect to Peruvian law, Gramercy argues that "compliance with Peruvian law is of course irrelevant to whether Peru complied with the Treaty standard."[832] Gramercy overreaches. While conformity with local law may not preclude the breach of an international law obligation, it nonetheless remains relevant to the inquiry.[833]

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[827] Statement of Reply ¶ 339 (quoting *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 Apr. 2004 (RA-69) ¶ 98).

[828] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award dated 23 Sept. 2010 (RA-108) ¶ 9.3.40.

[829] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 (RA-93) ¶¶ 597-599.

[830] Statement of Reply ¶ 281.

[831] US Submission ¶ 35 (quoting *S.D. Myers*, First Partial Award ¶ 263) (emphasis added); *see also, e.g., Thunderbird* Award ¶ 127 (noting that States have a "wide regulatory 'space' for regulation," can change their "regulatory polic[ies]," and have "wide discretion" as to how to carry out such regulatory policies).

[832] Statement of Reply ¶ 375.

[833] *See, e.g., Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (RA-369) ¶¶ 363-364 (concluding that "the Bank of Estonia acted within its statutory discretion when it took the steps that it did, for the reasons that it did," and that "[i]ts ultimate decision cannot be said to have been arbitrary or discriminatory against the foreign investors in the sense in which those words are used in the BIT," notwithstanding that "certain procedures . . . can be characterized as being contrary to

Indeed, further to the high measure of deference accorded a State's regulation of matters within its borders, it is well established that even *violations* of local law may not give rise to an international law breach. The United States confirms that a "failure to satisfy requirements of domestic law does not necessarily violate international law," and "a departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5."[834] Here, the fact that the measures were implemented as part of a detailed regulatory framework, established in accordance with Peruvian law per order of the highest court in Peru, reinforces that the measures are not arbitrary, unjust, or "nonsensical," as Gramercy alleges.

377. *Third*, with respect to the evidence, Gramercy mischaracterizes the record to allege that the Bondholder Process was developed and implemented in an arbitrary and non-transparent manner, and in fact designed specifically and maliciously to harm bondholders. Gramercy's conspiratorial allegations remain entirely unsupported. This is a matter on which Peru has been consistently transparent, in this arbitration proceeding and otherwise. As detailed above, and contrary to Gramercy's distortions, the considerable evidence Peru has submitted in this proceeding (including prior to Gramercy's document requests) confirms:

- ***The Supreme Decrees were developed through a careful deliberative process, supported by technical and legal opinions, and transparently published.*** Further to the substantial documentary record, Minister Castilla and Vice Minister Sotelo have confirmed that the MEF acted in good faith to implement the Constitutional Tribunal's ruling, and that the Decrees were backed by legal and technical documents consistent with MEF practice.[835]

- ***The Bondholder Process was developed and implemented in accordance with Peruvian law.*** Further to the mandate of the Constitutional Tribunal, the Supreme Decrees were prepared and issued in accordance with Peruvian law, meet all applicable requirements of Peruvian law, and remain valid and binding under Peruvian law, as Dr. García confirms.[836]

- ***The Bond updating formulas were developed in consultation with independent experts, and provide bondholders with a "hair extension," not a haircut.*** Minister Castilla and Vice Minister Sotelo have confirmed the process by which the MEF established the formula, which was further reviewed and clarified before it was applied to any bondholder.[837] The Quantum experts conclude that

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generally accepted banking and regulatory practice"); *Eastern Sugar B.V. v. Czech Republic*, UNCITRAL, SCC Case No. 088/2004, Partial Award, 27 March 2007 (RA-370) ¶¶ 272, 274 ("[A] BIT may also not be invoked each time the law is flawed or not fully and properly implemented by a state. . . . Otherwise, every aspect of any legislation of a host state or its implementation could be brought before an international arbitral tribunal under the guise of a violation of the BIT. This is obviously not what BITs are for. . . . Even though the [measure] was rashly introduced on an insufficient legislative basis, ineffectively implemented, and had a disturbing feature . . . the Arbitral Tribunal does not find this to amount to a violation of the BIT requirement to treat investors fairly and equitably.").

[834] US Submission ¶ 35.

[835] Castilla ¶¶ 9-11; Sotelo ¶¶ 11-20.

[836] García ¶¶ 45-104, 118.

[837] Castilla II ¶¶ 9-11; Sotelo II ¶¶ 11-20.

"Peru has been extremely generous" and that, if the payment terms "are not unprecedented in modern history, they are by any measure exceptional."[838]

- ***The Bondholder Process is a compensation procedure, not a debt restructuring, that is consistent with international best practices.*** The Bondholder Process is a viable, transparent, and structured mechanism that works to compensate legitimate holders of Bonds, and participation levels are reasonable in light of relevant circumstances, as Dr. Wühler confirms.[839]

- ***The Bondholder Process protects due process.*** As already addressed in detail, the Supreme Decrees expressly establish administrative and judicial avenues of appeal, and Peruvian law provides rights to still further administrative and judicial recourse beyond the Bondholder Process itself.

378. Accordingly, just as with its allegations regarding legitimate expectations and a denial of justice, Gramercy's allegations as to the purportedly arbitrary and unjust nature of the Bondholder Process cannot sustain an Article 10.5 claim.

3. Gramercy Fails To Prove A National Treatment Violation

379. Gramercy's national treatment claim turns on a single element: the prioritization of cash payments – up to a maximum of 100,000 Soles, or roughly US$ 30,000 – among bondholders that, unlike Gramercy, participated in the Bondholder Process. As Peru established, the claim fails to meet two fundamental requirements: (1) Gramercy is not "in like circumstances" with all Peruvian bondholders simply because it holds Bonds; and (2) Gramercy has not been accorded less favorable treatment, let alone less favorable treatment that is nationality based, under the transparent cash payment structure. Indeed, Gramercy chose to boycott the Bondholder Process, and repeatedly represented that it would accept payment in bonds,[840] and thus cannot allege any way in which the cash structure benefitted Peruvians over Gramercy. The Article 10.3 claim – concerning a process Gramercy boycotted, a payment method it offered to forego, and a payment amount covering only a fraction of its alleged claim – must be dismissed. In a cursory two-and-a-half page response, Gramercy barely attempts to argue otherwise.

380. *First*, Gramercy maintains that domestic investors in "like circumstances" for purposes of comparison include *all* "Peruvian national holders of Land Bonds."[841] To the contrary, Peru demonstrated that a foreign national is not "like" host State nationals merely because they invest in the same category of assets; a closer, fact-specific inquiry is

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[838] Quantum II ¶ 105; *see also id.* ¶ 86 ("Peru has not offered a 'haircut' on the virtually worthless Unclipped Coupons. Rather, it has uniquely offered a massive 'hair extension' that is unprecedented in modern history.").

[839] Wühler II ¶¶ 7-14, 45-47.

[840] *See, e.g.*, Gramercy Letter to President of Peru, 29 September 2017 (R-192) ("Gramercy is willing to accept a non-cash payment in the form of new Peruvian sovereign bonds . . . even if Peru desires to pay cash to Peruvian citizens . . . ."); Debevoise & Plimpton LLP Letter to President of the Special Commission that Represents the State, 28 March 2016 (R-47) at 5 (proposing payment through "newly issued and marketable sovereign bonds"); Gramercy Letter to President of the Council of Ministers, 31 December 2013 (Doc. CE-185) at 2 (proposing bond issuance).

[841] Statement of Reply ¶ 501.

required.[842] Gramercy offers no response. The United States confirms that this is fatal to the claim:

> If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, *no violation of Article 10.3 can be established*. . . . [I]dentifying appropriate comparators . . . requires consideration of more than just the business or economic sector . . . . When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to a national investor or investment that is *alike in all relevant respects but for nationality of ownership*. . . . This is an important distinction intended by the Parties.[843]

381. Gramercy has never even attempted to perform a comparison to a Peruvian bondholder that is alike in all relevant respects but for nationality. Its persistent efforts to compare itself generally and vaguely to all Peruvians, without an actual, fact-specific comparator, underscores the lack of merit of the national treatment claim. The claim can and should be dismissed on that basis alone.

382. *Second*, Gramercy contends that "placing it at the bottom of any queue for payment" must constitute "discrimination against Gramercy" in violation of Article 10.3[844] To the contrary, Peru demonstrated that Gramercy must demonstrate (with respect to a proper comparator) that any alleged difference in treatment is *nationality based*; the mere fact of differential treatment, if any, cannot alone give rise to a Treaty breach.[845] Consistent with well-established principles of international law, the United States confirms:

> [Article 10.3] is *not intended to prohibit all differential treatment* among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are 'in like circumstances' differently *based on nationality*. . . . Nothing in Article 10.3 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any national investor or any investment of a national. . . . Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 10.3.[846]

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[842] Statement of Defense ¶ 285; *see also, e.g., Champion Trading Co. & Ameritrade Int'l, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award dated 27 Oct. 2006 (RA-82) ¶¶ 154-155; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated 22 Aug. 2016 (RA-147) ¶ 563; *see also, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (RA-102) ¶ 416.

[843] US Submission ¶¶ 51-53 (emphasis added).

[844] Statement of Reply ¶ 501.

[845] Statement of Defense ¶ 287; *see also, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (RA-102) ¶ 387; *The Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003 (RA-66) ¶ 139; *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award dated 15 Nov. 2004 (RA-71) ¶ 114.

[846] US Submission ¶¶ 51, 53 (emphasis added); *see also id.* ¶ 39 ("As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.").

383. In fact, Gramercy concedes that differential treatment does not violate Article 10.3 when there is a "reasonable nexus" to a "rational government policy" that does not "unduly undermine the investment liberalizing objectives of the Treaty."[847] The United States confirms that it is relevant to consider whether the treatment "distinguishes between investors or investments based on legitimate public welfare objectives."[848]

384. Here, as Peru demonstrated, the structure for cash payments ordered by the Constitutional Tribunal and implemented by the Supreme Decrees reflects a legitimate policy decision by Peru to make reasonable distinctions between certain categories of bondholders – including the elderly and non-elderly, original and non-original holders, individuals and legal entities, and legal entities acquiring under different circumstances.[849] Taking into account "criteria of equity" and "special constitutional protection[s]," as the Constitutional Tribunal ordered,[850] it is not hard to appreciate why the payment order would differentiate between elderly original bondholders (at one end of the spectrum), institutional holders that later acquired Bonds for investment purposes (at the other end), and other types of bondholders (in between). Such categories are grounded in Peruvian law, due process, and international best practices, as Dr. Hundskopf, Dr. Wühler, and Professor Guidotti confirm.[851]

385. In any event, the differentiation between bondholder categories for purposes of cash payments through the Bondholder Process cannot violate Article 10.3 of the Treaty because it is *not nationality based*. Gramercy's speculative contention that the MEF targeted Gramercy in the formulation of the categories remains unfounded. Gramercy has not provided any evidence – nor Peru has located any, in response to Gramercy's document requests – that would support the allegation.[852]

386. Ultimately, moreover, Gramercy cannot allege any *actual* less favorable treatment that it received under the payment categories because it chose not to participate in the Bondholder Process, let alone to pursue the cash payment option. Gramercy can only speculate that the cash payment categories would have "place[d] Gramercy *in the position* to receive a treatment less favorable."[853] Together with the other fundamental flaws addressed above, this further confirms that Gramercy's national treatment claim must be rejected.

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[847] Statement of Reply ¶ 503 (quoting *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Award of the Merits of Phase 2, 10 April 2001 (CA-37) ¶ 78).

[848] US Submission ¶ 52.

[849] Statement of Defense ¶¶ 278, 288.

[850] Resolution of the Constitutional Court, 16 July 2013 ¶ 29 (RA-286) (ordering prioritization criteria "in consideration of criteria of equity, and taking into account the special constitutional protection provided in Article 4 of our Constitution"); *see also* Constitution of the Republic of Peru, Art. 4 ("The community and the State extend special protection to children, adolescents, mothers, and the elderly . . . .").

[851] Hundskopf I ¶¶ 127-128; Wühler II ¶¶ 29-32; Wühler I ¶¶ 68, 70; Guidotti II ¶ 45.

[852] *See* Procedural Order No. 6, Annex A, Request 15 (voluntarily undertaking that, "[n]otwithstanding and reserving its objections, Peru will produce relevant and material documents *located in response to this request, if any*") (emphasis added); *see also* Affidavit of President of the Special Commission that Represents the State in Investment Disputes, 22 March 2019 (declaring, *inter alia*, that "Peru has carried out a reasonable search," "[n]o document which Peru was ordered or voluntarily undertook to produce has been destroyed or concealed," and that "Peru has produced all Documents which it was ordered or voluntarily undertook to produce").

[853] Statement of Reply ¶ 498 (emphasis added).

4. Gramercy Fails To Prove An Effective Means Violation

387. Peru demonstrated that (1) Gramercy cannot invoke the MFN clause in Article 10.4 of the Treaty to import substantive protections from third-party treaties, including the "effective means" clause in a 1994 Peru-Italy treaty; (2) the Contracting Parties expressly agreed under the Treaty "not to deny justice," thus obviating any need for the seldom-used and obsolete effective means standard; (3) even if that standard were to apply, Gramercy could not prevail because its claim does not concern the effectiveness of the Peruvian judiciary as a whole, and Gramercy lacks standing to challenge judicial proceedings to which it was not a party; and (4) Peru accorded Gramercy effective means to enforce specific alleged rights through the Bondholder Process, which Gramercy unilaterally chose to boycott.[854] Gramercy's responses in the Reply cannot alter any of these conclusions.

388. *First*, Gramercy maintains that it can rely on the MFN clause to import the "effective means" clause, including because "[i]t is not for this Tribunal to seek to impose a silent limitation in the kind of 'treatment' that triggers Article 10.4 that the State Parties themselves did not see fit to include."[855] To the contrary, the United States confirms that the Contracting Parties included an *express reservation* to preclude attempts, like Gramercy's, to use the MFN clause to access differential treatment available under earlier treaties:

> [A] claimant must also establish that the alleged non-conforming measures that constituted 'less favorable' treatment are not subject to the reservations contained in Annex II of the [Treaty]. In particular, both Parties reserved 'the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.'[856]

389. This express reservation with respect to "differential treatment" in other treaties encompasses the Peru-Italy treaty, which was signed in 1994 and entered into force in 1995, well before the Treaty's entry into force. Accordingly, Gramercy has no recourse to that treaty's effective means provision. No further inquiry is warranted.

390. Indeed, even absent the reservation in Annex II, the Treaty is hardly "silent" as to the kind of "treatment" that Article 10.4 covers. As Peru demonstrated, Article 10.4 obligates the Contracting Parties to accord investments and investors "treatment no less favorable than that it accords, *in like circumstances*," to investors or investments of non-Party States – thus requiring a fact-specific comparison to those in like circumstances, and not the blanket incorporation of legal standards under a separate treaty.[857] The United States confirms that, "[u]nlike many investment treaties, the MFN clause of the [Treaty] requires a claimant to demonstrate that investors of another Party or a non-Party 'in like circumstances' were afforded more favorable treatment" – and that "[i]gnoring the 'in like circumstances' requirement would serve impermissibly to excise key words from the [Treaty]."[858]

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[854] Statement of Defense ¶¶ 294-298.

[855] Statement of Reply ¶ 471.

[856] US Submission ¶ 56 (quoting Treaty, Annex II, Schedule of the United States, at II-US-8; Annex II, Schedule of Peru, at II-Peru-1).

[857] Treaty, Art. 10.4 (emphasis added); *see also* Statement of Defense ¶ 295.

[858] US Submission ¶ 57.

Gramercy's suggestion that it is enough to invoke unspecified, generic "third party investors who enjoy better investment treaty protections"[859] violates the plain language of the Treaty and the Contracting Parties' subsequent agreement, and must be rejected.

391. *Second*, Gramercy contends that the Tribunal "cannot draw any conclusion from the fact that the United States historically negotiated express effective means provisions in its treaties."[860] To the contrary, as Peru explained, the effective means standard originated in the treaty practice of the United States, which saw an effective means clause as a way "to address a lack of clarity in the customary international law regarding denial of justice."[861] The reasons why the U.S. first adopted such a clause, and then later abandoned the practice, are decidedly relevant to understanding the scope of that standard. The United States confirms that it removed the effective means provision from its treaties, and thus did not include one in this Treaty, because the denial of justice clause provides the same protections:

> This obligation [to accord the minimum standard of treatment] encompasses the same guarantees as the 'effective means of asserting claims and enforcing rights' provisions found in earlier U.S. treaty practice. The United States removed the 'effective means' provision from its investment treaties because it deemed that the customary international law principle prohibiting denial of justice rendered a separate treaty obligation unnecessary.[862]

392. Accordingly, the Tribunal certainly *can* draw conclusions from U.S. treaty practice with respect to the effective means standard. Indeed, the only correct conclusion to draw is that the denial of justice provision in Article 10.5.2 of the Treaty obviates any need to refer to an obsolete effective means provision from a separate treaty.

393. Gramercy maintains that it "is not seeking to import an entirely alien substantive obligation, but a better and more protective articulation of an existing protection: the minimum standard of treatment, which includes the obligation to provide access to justice."[863] Again, the Treaty says otherwise. Article 10.5.3 states that "a breach of another provision of this Agreement, *or of a separate international agreement*, does not establish that there has been a breach of this Article.'"[864] The United States also confirms that the MFN provision cannot "be used to alter the substantive content of the fair and equitable treatment obligation under Article 10.5, including the obligation not to deny justice."[865] Thus, even if Gramercy could import the effective means provision – it cannot – that provision could not affect the minimum standard of treatment obligation under Article 10.5.

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[859] Statement of Reply ¶ 463.

[860] Statement of Reply ¶ 480.

[861] *Chevron v. Republic of Ecuador*, UNCITRAL, Partial Award on the Merits dated 30 Mar. 2010 (RA-106) ¶ 243; *see also* Statement of Defense ¶ 296.

[862] US Submission ¶ 36.

[863] Statement of Reply ¶ 479.

[864] Treaty, Art. 10.5.3 (emphasis added).

[865] US Submission ¶ 57; *see also id.* ("Article 10.5.3 further clarifies that a 'breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.'") (quoting Treaty, Art. 10.5.3).

394. *Third*, Gramercy argues that its claim "involve[s] the system 'as a whole.'"[866] In so doing, Gramercy effectively concedes that it was wrong to argue in its Statement of Claim that the particular procedures and rulings in the Constitutional Tribunal proceedings could be the basis for an effective means claim.[867] As Peru established, even assuming that the effective means provision were to apply by operation of the MFN clause – it does not – it would require that Peru afford "effective means of asserting claims and enforcing rights with respect to investments."[868] In other words, the provision would require that Peru provide an effective judicial framework; it would *not* require particular outcomes in any given case, nor apply in the context of non-adjudicatory administrative proceedings.[869] In any event, as established, Gramercy has no standing to challenge proceedings to which it was not a party.

395. *Fourth*, Gramercy argues that Peru violated an obligation as to the judicial system as a whole because the Constitutional Tribunal and Supreme Decrees "denied GPH the ability to continue pursuing current value in Peruvian civil courts."[870] This is revealing, and only underscores the claim's lack of merit. Gramercy does not (and cannot) contend that the Peruvian judiciary was closed to it, but rather complains that the courts would not order payment of Bonds under the valuation method that Gramercy prefers. In fact, as Peru demonstrated in response to the denial of justice claim, the Supreme Decrees – which *do* provide for payment of current value – establish various administrative and judicial appeal avenues as part of the Bondholder Process, thus preserving due process rights of participating bondholders.[871] In addition, as also established, Peruvian law provides still further avenues of appeal outside of the Bondholder Process, including contentious administrative actions, "popular" actions, and *amparo* actions.[872] An effective framework for asserting claims and enforcing rights remains. Gramercy merely takes issue with the valuation method applied to reach particular outcomes within that framework.

396. Gramercy's entire claim hinges on the alleged infringement of judicial avenues to assert claims which Gramercy largely chose not to pursue for years even when they were available, as noted above. Gramercy's newly-discovered appreciation for the Peruvian courts, in a misguided effort to sustain a Treaty claim, is telling. In any event, regardless of the particular alleged means or measures which Gramercy now chooses to emphasize, Gramercy cannot circumvent the plain language of the Treaty, which unambiguously precludes recourse to the effective means provision in the Peru-Italy treaty. Gramercy's effective means claim must be rejected.

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[866] Statement of Reply ¶ 488.

[867] *See* Third Amended Notice of Arbitration and Statement of Claim ¶¶ 233-234.

[868] Peru-Italy Treaty on the Promotion and Protection of Investments of 1994 (RA-54).

[869] Statement of Defense ¶ 297; *see also, e.g.*, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Award dated 26 Mar. 2008 (RA-91) ¶ 88; *Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award dated 25 Aug. 2014 (RA-133) ¶ 9.70.

[870] Statement of Reply ¶¶ 484, 488.

[871] *See supra* Section IV.C.2.

[872] García ¶¶ 105-111.

D. Compensation

397. For all the reasons set forth above, Gramercy has failed to establish that the Tribunal has jurisdiction or that Peru is in any way liable under the Treaty. Even assuming *arguendo* that the Tribunal has jurisdiction, the fact would remain that any investment in the Agrarian Reform Bonds would have been highly speculative and that any returns would have been purely hypothetical. This is fatal to Gramercy's claim for damages.

398. Gramercy's latest submission asks that the Tribunal award it compensation under any one of three mutually exclusive measures:

> "[M]onetary damages in an amount that would wipe out all the consequences of Respondent's illegal acts, valued at an amount that is the contemporary equivalent of the Land Bonds' value at the time they were issued, which is approximately US$1.80 billion as of May 31, 2018 [….]
>
> "[M]onetary damages equal to the value Gramercy would have likely obtained, at minimum, in court proceedings in Peru, which is approximately US$842 million as of May 31, 2018 [….]
>
> "[M]onetary damages equal to the fair market value of the Land Bonds as of immediately before Peru's breaches which is approximately US$550 million, plus interest."[873]

399. All of these calculations are baseless. Tellingly, however, Gramercy's own self-serving demands for compensation are significantly different, with the highest alleged value of the Bonds being over US$1.25 billion or 325% more than their alleged FMV. Such variance merely underscores the uncertainty that would exist as to the value of the Agrarian Reform Bonds absent the July 2013 Resolution.

400. Peru has shown that Gramercy's claim for damages is legally and factually deficient and requires dismissal. Gramercy remains unable to show that it is entitled to any damages under the Treaty, much less what the amount of compensation should be.

1. Gramercy is Not Entitled to Compensation

401. Peru explained in the Statement of Defense that claimants in investor-State arbitrations bear the burden of proving their damages with reasonable certainty, *i.e.*, that the damages calculation must rely on a rational basis, and damages must be not merely possible but probable, and not too speculative or uncertain.[874] Claimants also must prove that

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[873] Statement of Reply ¶ 612.

[874] *See, e.g.*, Statement of Defense ¶¶ 299 *et seq; see also Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum dated 22 May 2012 (RA-120) ¶ 439 (applying the "standard of *reasonable certainty* to determine whether the Claimants have established their case with respect to the amount of damages incurred") (emphasis added); *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012 (RA-121) ¶ 269 (finding that claimant's claim of lost profits was "speculative," and that the tribunal would base its assessment only on "known quantities"); *Amoco Int'l Finance Co. v. Islamic Republic of Iran*, 15 IRAN-U.S. CL. TRIB. REP. 189, Award No. 310-56-3 dated 14 July 1987 (RA-51) ¶ 238 ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded. This holds true for the existence of

Respondent's actions were the proximate cause of their alleged damages.[875] It is not enough for Gramercy to simply aver that its alleged Bonds had some value; Gramercy must meet the above standard and establish that it was reasonably certain that Gramercy would have received that amount but for the alleged breaches.

402. Gramercy has failed to discharge its burden to prove damages. Despite colorful rhetoric, it remains unable to show that it has suffered a demonstrable harm, or that Peru was the proximate cause of any such harm. Had Gramercy participated in the Bondholder Process established by Peru, it might have received approximately US$34 million if its Bonds were authentic, i.e. more than it agreed to pay for them. Having rejected Peruvian law, it is now entitled to nothing. As Peru's president stated at the time Gramercy commenced this arbitration,[876] Peru does not owe Gramercy anything.

a. Gramercy Fails to Prove Damages with Reasonable Certainty

403. Gramercy makes a misguided attempt to distinguish the legal standard by characterizing the cases cited by Peru as irrelevant. According to Gramercy "the authorities cited by Peru all deal with situations where a clamant seeks to recover future damages (typically in the form of lot profits) that are deemed too uncertain to estimate reliably."[877]

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the damage and of its effect as well. . . . It does not permit the use of a method which yields uncertain figures for the valuation of damages, even if the existence of damages is certain."); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Second Partial Award dated 21 Oct. 2002 (RA-63) ¶ 173 ("[A] claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be neither speculative nor too remote."); *see also* MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW, vol. III 1837 (1942) (RA-47) (resubmitted) ("[I]n order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible.") (emphasis in original). The United Nations Compensation Commission ("UNCC") also applied "reasonable certainty" as the standard of proof for the quantum of damages under international law. *See* Decision taken by the Governing Council of the United Nations Compensation Commission during the resumed Fourth Session, at the 23rd meeting, held on 6th March 1992: Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation, U.N. Doc. S/AC.26/1992/9 dated 6 Mar. 1992 (RA-53) ¶ 19 ("In principle, the economic value of a business may include loss of future earnings and profits where they can be ascertained *with reasonable certainty*") (emphasis added).

[875] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award dated 21 Nov. 2007 (RA-89) ¶ 282 ("a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury"); *see also* MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW, vol. III 1766 (1942) (RA-47) (noting the requirement of causation for damages and commenting that "the absence of liability is frequently described in terms of 'non-proximateness,' 'indirectness,' or 'remoteness' of the loss suffered"); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002) (RA-60), Art. 31, cmt. 10 ("[R]eference may be made to losses "attributable to (the wrongful) act as a 'proximate cause,' or to damage which is 'too indirect, remote, and uncertain to be appraised,' [] a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity.'"); Submission of the United States of America ¶¶ 60-61.

[876] Katie Llanos-Small, *Peru's PPK: 'I don't think we owe [Gramercy] anything' – Exclusive*, Latin Finance, 22 August 2016 (Doc. R-62).

[877] Statement of Reply ¶ 521.

404. Contrary to Gramercy's allegations, uncertainty is an element in all damages assessment.[878] Commentators explain that full compensation for damages involves two requirements: causal link and reasonable certainty.[879] They further point out that reasonable certainty corresponds to the standard enunciated in *The Factory at Chorzów* that reparations must "reestablish the situation which would, *in all probability*, have existed if that act had not been committed."[880] Moreover, the element of speculation is part of a damages assessment because claimants have the evidentiary burden to prove their damages claim and such proof necessarily excludes speculative evidence. Here, the evidence Gramercy relies on for its damages claim is Professor Edwards' calculation, which, as discussed above and in Peru's Statement of Defense, is speculative because of the uncertainty of the bonds' value at the time Gramercy purchased them, and because it calculates the wrong thing and does so in the wrong manner.[881]

405. In fact, it is not correct that "the value taken from Gramercy is readily ascertainable," as Gramercy avers.[882] As Peru explained in its Statement of Defense, Gramercy's damages calculation is inherently speculative because until 2013 there was uncertainty and no consensus as to how to calculate the value of Agrarian Reform Bonds.[883] Professor Edwards' damages formula was based on his personal interpretation of the 2001 Constitutional Tribunal's decision, an interpretation that rewrites the terms of the bonds by adding inflators and adjustments not in the original terms of the instruments.[884]

406. Gramercy responds with several arguments that its damages are not speculative or uncertain and that it is entitled to the "intrinsic value" of its bonds. According to Gramercy, the "intrinsic" value of bonds is "an amount of money which, if awarded today, would fully preserve the purchasing power that the Land Bonds had when they were issued,"

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[878] *See, e.g., Amoco Int'l Finance Co. v. Islamic Republic of Iran*, 15 IRAN-U.S. CL. TRIB. REP. 189, Award No. 310-56-3 dated 14 July 1987 (RA-51) ¶ 238 ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded. This holds true for the existence of the damage and of its effect as well."); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Second Partial Award dated 21 Oct. 2002 (RA-63) ¶ 173 ("[A] claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be neither speculative nor too remote."); Derains & Kreindler, *Evaluation of Damages in International Arbitration* (Jan. 2006), 12 ("arbitrators will, in most cases, carefully examine the evidence in order to quantify, with an acceptable degree of certainty, the damages for which entitlement has been found").

S. Rapinsky & K. Williams, Damages in International Investment Law, (2008), at 115 ("These two elements set the most basic boundaries of legally relevant loss."), citing C. Eagleton, Measure of Damages in International Law, 39 Yale L. J. 52, 74 ("[A]scertaining what the full compensation is . . . . involves two questions: has the loss complained of been produced exclusively by the illegal act and, can the loss be calculated with reasonable certainty?").

[880] S. Rapinsky & K. Williams, Damages in International Investment Law, (2008), at 165, quoting *The Factory at Chorzów (Claim for Indemnity) (The Merits)*, (1928) PCIJ, Series A, No. 17, 47 (emphasis added); *see also, e.g., Gemplus S.A. v. United Mexican States*, ICSID Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4, Award (June 16, 2010) 13-81 (discussing Article 36 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts: "As to that compensation, Article 36 contains two express requirements, (i) that the damage be 'financially assessable', i.e. capable of being evaluated in money, and that it be 'established', i.e. such that the remedy be commensurate with the injured party's proven loss and thus make it whole in accordance with the general principle expressed in *The Chorzów Factory Case* as regards compensation for an illegal act.").

[881] Respondent's Statement of Defense ¶¶ 306-310.

[882] Statement of Reply ¶ 522.

[883] Respondent's Statement of Defense ¶¶ 303-304; *see also* Quantum II ¶¶ 62-70, 87.

[884] Respondent's Statement of Defense ¶¶ 306-308; *see also* Quantum II ¶¶ 24-25.

and must include the CPI and compound interest.[885] Gramercy contends Professor Edwards correctly calculates that value, and any rewriting of the bonds to add inflators and adjustments/guarantees in his formula was "imposed by the Constitutional Tribunal under Peruvian law."[886]

407. Gramercy's argument is without merit. First, because it is grounded on Gramercy's contention that the Constitutional Tribunal's 2001 decision granted bondholders "a clear legal entitlement to the current value of the Land Bonds and interest on the unpaid principle[.]"[887] As already discussed, that decision did not give anyone a "legal entitlement" to the Agrarian Bonds, nor did it specify the value of those bonds nor the method to be used for calculating the current value of the bonds. Second, because Professor Edwards' formula is based on Gramercy's and his interpretation of the Constitutional Tribunal's 2001 decision. Indeed, whatever intrinsic value the Agrarian Reform Bonds had was erased by 1992, as even Professor Edwards and Mr. Koenigsberger recognize,[888] and any value thereafter was a matter for the Peruvian courts and executive to determine. At the time of Gramercy's purchases from the original bondholders, there had not been a determination of the valuation method and, therefore, the value of the Agrarian Bonds remained uncertain. Professor Edwards' calculation is, thus, entirely speculative. It also is contrary to Peruvian law because it contradicts the calculation formula for valuing the bonds set by the Constitutional Tribunal's 2013 Resolution and its implementing Supreme Decrees. As the Quantum experts explain:

> Prof. Edwards' calculation is not in accordance with the "Current Value Principle" as he claims because the term was not defined in the 2001 CT Decision and had no recognized calculation methodology until the July 2013 CT Decision provided such parameters. Prof. Edwards' calculation is representative of his own personal view of what the "Current Value Principle" means to him, not any universally recognized economic or financial principle.
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> . . . .
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> [T]here is no financial or economic basis supporting Prof. Edwards retroactive application of inflation to Unclipped Coupons beginning with the Agrarian Bond issuance date. It effectively assumes Peru underpaid all coupons before any event of "non-payment." It also implies an effective and retroactive non-payment penalty. And as stated in our first expert report, it fundamentally re-writes the terms of the original Agrarian Bonds.[889]

408. Gramercy asserts incorrectly that Peru "conflates uncertainty as to the extent of Peru's obligations under the Land Bonds with uncertainty as to whether Peru would fully

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[885] Claimants' Statement of Reply ¶ 520.

[886] Claimants' Statement of Reply ¶ 524; Edwards Second report ¶ 16.

[887] Claimants' Statement of Reply ¶¶ 509, 518, 524.

[888] Edwards First report ¶ 27 ("the Land Bonds had become virtually worthless as the Peruvian currency lost value"); First Koeninsberger ¶ 34 ("[t]he Land Bonds were a debt that needed to be paid, but there was not yet any consensus about how that would actually happen."); *see also* Quantum II ¶¶ 12, 16 (calculating that the fair market value of the Agrarian Reform Bonds was US$0.20 million in 1992).

[889] Peru's Quantum II ¶¶ 24-25

comply with those obligations."[890] According to Gramercy, while there was uncertainty as to the former, there was no uncertainty to pay the current value.[891] This argument is specious. As Peru has demonstrated, while the Constitutional Tribunal's 2001 decision established that the current value principle should be applied to the Agrarian Reform Bonds, it left uncertain both how the Bonds would be paid as well as the method for calculating the current value.[892] Gramercy's own limited due diligence confirmed the uncertainty, and its varying valuations over time further belie Gramercy ever having had certainty as to the value of its alleged Bonds.

409. Indeed, Gramercy admits to the speculative nature of its damages when it claims that it "invested in the Land Bonds with the purpose of bringing its unique expertise to the table to facilitate a global solution," and "engage Peru to effect a sovereign debt restructuring."[893] Gramercy just gambled on forcing Peru to negotiate on Gramercy's terms based on Gramercy's conceited notion of its "unique expertise," and misjudged the outcome based on its conceit. In fact, there is no evidence whatsoever in the record that Gramercy's "unique expertise" brought about any progress towards a resolution of compensating Agrarian Bond holders. In reality, Gramercy's gamble is analogous to risking investment in a project at a time that is too attenuated to calculate any returns on the investment.

410. For example, in *Bear Creek v. Peru*, the tribunal limited damages to the amount invested by the claimant that had invested at a time when any calculations on returns on the investment were too speculative.[894] In particular, the tribunal found that the investment in question was a project "at an early stage" and "had not received many of the government approvals and environmental permits it needed to proceed" and rejected the claimant's damages claims related for anything more than the amount invested because the "[p]roject remained too speculative and uncertain to allow [damages pursuant to an expected profitability and discounted cash flow method]."[895] Similarly, in *Wena Hotels v. Egypt*, the tribunal held that the "proper calculation of the market value of the investment immediately before the expropriation is best arrived at, in this case, by reference to [claimant's] actual investments"[896] because claims for lost profits, lost opportunities, and reinstatement costs

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[890] Claimants' Statement of Reply ¶ 525.

[891] Claimants' Statement of Reply ¶ 525.

[892] Claimants' Statement of Reply ¶ 525.

[893] Claimants' Statement of Reply ¶ 557; *see also id.* ¶ 91 ("Gramercy's acquisition of a meaningful stake in the Land Bonds brought some cohesion to an otherwise fragmented group of bondholders and would have allowed Peru to more easily restructure the Land Bond debt. . . ."); Koeningsberger Reply ¶ 34 ("As I explained before, we invested in Peru because we thought that there was a real opportunity to open the door to a negotiated solution of the Land Bonds debt for the benefit of all parties."); id. ¶ 41 ("We thought that by accumulating a position in the Land Bonds, we could bring our expertise to the table and help Peru find a global economic solution that would work both for Peru and the bondholders.").

[894] *Bear Creek Mining Corp., v. Republic of Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, ¶ 640 (RA-371); see also Clayton et al v. Government of Canada, UNCITRAL, Award on Damages of 10 January 2019, ¶¶ 87, 278, 281-287 (RA-324) (limiting damages from more than US$ 443 million claimed to US$ 7 million, which includes amounts invested, because of "uncertainty affecting future income streams [that] is particularly pronounced" in the context of an investment in a project with a high degree of uncertainty as to necessary regulatory approvals).

[895] *Bear Creek Mining Corp., v. Republic of Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, ¶¶ 600, 640 (RA-371).

[896] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 Dec. 2000 (RA-372) ¶ 57 ¶ 125.

were "too speculative"[897] where the claimant had operated the underlying investment of a hotel for eighteen months, had not completed planned renovations at the time of breach, and there was a question as to the sufficiency of its finances to fund those renovations and the investment's continued operation.[898]

411. Gramercy's second hypothetical damages claim is equally speculative insofar as it asks the Tribunal to award the value "it likely would have achieved" in court proceedings in Peru.[899] The argument is inherently speculative because it is a *prediction* based on the *assumption* that Peruvian courts in *hypothetical cases* would have valued Gramercy's bonds according to Gramercy's criteria and Professor Edwards' formulas.[900] As noted above, only a minor portion of Gramercy's Agrarian Bonds were part of the local court proceedings, and there is no evidence that all of Gramercy's bonds would have been before the local courts or how the bonds would have been valued. The only evidence Gramercy presents to support its assertion as to how the Bonds would be valued in local court proceedings is a report in one such proceeding by Gramercy's own chosen expert, which was applied to only forty-four (44) Bonds. Gramercy is asking the Tribunal to assume a scenario in which but for Peru's alleged breach Gramercy would have submitted all of its Bonds to a local court proceeding, that all of its Bonds would have been found to be authentic, and that the local court would have accepted the valuations put forth by Gramercy in each case, and that all this would have happened and that it would have collected by May 31, 2018, despite Gramercy's not having sought to pursue local proceedings for the vast majority of its alleged Bonds.

412. Gramercy's third hypothetical damages claim is equally speculative insofar as it asks the Tribunal to award an alleged "fair market value" of the Bonds that has no basis in reality (as further detailed below). In fact, Gramercy is asking the Tribunal to assume the truth of Gramercy's own FMV calculations, despite the fact that the only documents it has put into evidence as to its prior approximations of FMV are financial statements that give changing valuations over time, and for which Gramercy has not provided any supporting material that would permit the Tribunal or Peru to understand the basis of Gramercy's calculations.

b. Gramercy Fails to Prove Causality

413. Even assuming that Gramercy were able to prove harm with reasonable certainty, which it cannot, it would also have to prove that the claimed amount of damages. As Peru explained in its Statement of Defense that Gramercy is not entitled to damages because its alleged damages were not proximately caused by Peru.[901] Specifically, there is no causal link between Gramercy's damages calculation and Peru's alleged breaches because

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[897] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 Dec. 2000 (RA-372) ¶ 57 ¶ 123.

[898] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 Dec. 2000 (RA-372) ¶ 57 ¶ 124.

[899] Claimants' Statement of Reply ¶ 528.

[900] Claimants' Statement of Reply ¶¶ 533-537.

[901] Respondent's Statement of Defense ¶¶ 303-306.

Gramercy's damages claim is solely based on what it *believes* should be a different calculation formula for payment on the outstanding bond coupons.[902]

414. Gramercy responds by contending its damages are not remote. It continues to argue that the Constitutional Tribunal's 2001 decision gave Gramercy "a clear legal entitlement to the current value of the Land Bonds and interest on the unpaid principle,"[903] and that Peru "eviscerated" Gramercy's entitlement by "imposition of an exclusive Bondholder Process with a nonsensical valuation formula."[904] This argument is conclusory because as, discussed above, the Constitutional Tribunal's 2001 decision did not give Gramercy or anyone else a "clear entitlement" to the Agrarian Bonds, nor did it specify the method to be used for valuing the current value of the bonds.[905] Accordingly, the value of those bonds at the time of Gramercy's purchases from the original bondholders was uncertain. Gramercy itself sought to overcome that uncertainty, unsuccessfully, by lobbying Peru to enact changes in the law. The Constitutional Tribunal's July 2013 Resolution set forth the standards for valuing the bonds and enacting the Bondholder Process. To grant damages on this basis would be to assume, counterfactually, that Gramercy would have succeeded in effecting the legal change it sought unsuccessfully for so many years but for the July 2013 Resolution.

415. Equally remote is Gramercy's alternative claim, that it should be awarded the value "it likely would have achieved" in court proceedings in Peru.[906] Gramercy contends that bondholders "had universally prevailed" in Peruvian courts, which "repeatedly ordered Peru to pay the current value of the land Bonds" based on the CPI plus interest.[907] Gramercy further contends that beginning in approximately 2011, it initiated applications in seven local court proceedings to obtain payment on the bonds it owned by then, in which it would have relied on the same arguments as other bondholders that allegedly prevailed in court proceedings concerning current value and interest at a real rate of return.[908] However, through the August 2013 Resolution, "Peru eliminated the rights of the bondholders—including Gramercy—to access the Peruvian justice system to determine current value" by imposing the Bondholder Process "as the only available alternative."[909] According to Gramercy, "[b]y effectively slamming shut the doors of its courthouses, Peru unlawfully deprived Gramercy of the right to pursue its claims in court" and obtain a final judgment awarding it the current value of the bonds and interest.[910]

416. Gramercy's alternative argument does not establish that Peru's actions proximately caused Gramercy's to not prevail before the Peruvian courts; Gramercy never submitted the vast majority of its alleged bondholding to local proceedings, and, even if it had, there is no reason to assume that Gramercy would have prevailed.

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[902] Respondent's Statement of Defense ¶ 305.

[903] Claimants' Statement of Reply ¶¶ 509-510, 518, 520.

[904] Claimants' Statement of Reply ¶¶ 509, 523.

[905] *See supra*; Respondent's Statement of Defense ¶¶ 39-40.

[906] Claimants' Statement of Reply ¶ 528.

[907] Claimants' Statement of Reply ¶ 530.

[908] Claimants' Statement of Reply ¶¶ 530, 534.

[909] Claimants' Statement of Reply ¶ 531.

[910] Claimants' Statement of Reply ¶ 532.

417. In fact, only a minor portion of Gramercy's Agrarian Bonds were part of the local court proceedings.[911] Gramercy's alternative claim, therefore, asks the Tribunal to assume a counterfactual scenario that all of Gramercy's bonds were before the local courts. Gramercy has not proffered evidence that but for Peru's alleged breach, Gramercy's bonds would have been before the local courts or how the bonds would have been valued.

418. Moreover, as noted above, the Constitutional Tribunal's 2001 decision did not define the parameters for calculating "current value" and neither Gramercy nor anyone else had an entitlement to any particular method for updating the value of the Agrarian Reform Bonds. There is no basis for granting damages on Gramercy's mere assertion that a calculations by its own experts in one proceeding would have necessarily been accepted by the competent Court and that such valuations can be extrapolated to other hypothetical proceedings that Gramercy never even filed.

419. Finally, it is a fact that Gramercy itself chose to forgo pursuing payment for its alleged Bonds in the Bondholder Process established under Peruvian law. In its Statement of Reply, Gramercy now admits that it might have received US$34 million through the Bondholder Process.[912] Even assuming *arguendo* that Gramercy had been impacted by the July 2013 Resolution and Bondholder Process, international law recognizes the duty of an injured party to mitigate damages.[913] A party that fails to mitigate damages is not entitled to those damages.[914]

c. Gramercy Fails to Prove its Interest in The Bonds

420. Since Peru filed its Statement of Defense, Gramercy has produced documents that shows that it is not the beneficial owner of the bonds.[915] Despite this, Gramercy argues in its Statement of Reply that it entitled to "the full intrinsic value of the Land Bonds."[916] This is incorrect. Damages in international law aim to compensate "the flow of benefits that the

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[911] *See, e.g.*, Proceeding Record No. 00026-1973-0-1706-JR-CI-10, MINAGRI, Third Civil Court of Lambayeque, 2013-2016 (Doc. R-616) (listing 12 bonds); Proceeding Record No. 00195-1978-0-1706-JR-CI-10, MINAGRI, Third Civil Court of Lambayeque, 2012-2017 (Doc. R-617) (listing 137 bonds); Proceeding Record No. 00258-1970-0-1706-JR-CI-10, MINAGRI, First Civil Court of Lambayeque, 2013-2017 (Doc. R-618) (listing 3 bonds); Proceeding Record No. 03272-2007-0-1706-JR-CI-10, MINAGRI, Fifth Civil Court of Lambayeque 2015-2016 (Doc. R-619) (listing 19 bonds); Proceeding Record No. 09990-2006-0-1706- JR-CI-10, MINAGRI, Fifth Civil Court of Lambayeque (Doc. R-620) (listing 44 bonds).

[912] Claimants' Statement of Reply ¶ 574.

[913] *See., e.g., Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002, ¶ 167 ("The duty to mitigate damages is not expressly mentioned in the BIT. However, this duty can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention.") (RA-373); *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of 7 October 2003, ¶ 10.6.4 ("Mitigation of damages, as a principle, is applicable in a wide range of situations. It has been adopted in common law and in civil law countries, as well as in International Conventions and other international instruments – as for instance in Article 77 of the Vienna Convention and Article 7.4.8 of the UNIDROIT Principles for International Commercial Contracts. It is frequently applied by international arbitral tribunals when dealing with issues of international law.") (RA-67).

[914] *See., e.g., Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia),* Judgment of 25 September 1997, ICJ Rep 7, ¶ 80 (RA-374).

[915] *See supra* (discussing why Gramercy is not the beneficial owner).

[916] *See, e.g.*, Claimants' Statement of Reply ¶ 593.

Claimants would have been reasonably expected to earn . . . in the state of the world in which the [wrongful act] hypothetically did not occur."[917] In the absence of a beneficial interest in an investment, there is no damage to be compensated.[918] This is because, as observed by Professor Stern in *Occidental v. Petroleum*, a claimant lacking beneficial ownership "ha[s] no right to the economic benefits [of the investment] . . . in the first place," and thus cannot have been damaged with respect to that investment.[919] Although Gramercy has myriad opportunities to prove its interest in the Agrarian Reform Bonds, Gramercy has not done so. Thus, it is not entitled to receive any, much less the entire value of the alleged Bonds.

2. Gramercy Fails to Prove the Amount of Compensation

a. Gramercy Mischaracterizes the Legal Standard

421. Peru explained in its Statement of Defense that, assuming *arguendo* Gramercy was deprived of its investment in or about 2013, then the proper measure of compensation would be the fair market value of Gramercy's interest in the Agrarian Bonds on the day before the alleged deprivation ("FMV").[920] The Quantum expert explained that given the uncertainty of the value of the Agrarian Bonds at the time of Gramercy's alleged deprivation, the acquisition price that Gramercy incurred to purchase the bonds represents the best contemporaneous assessment of the FMV.[921]

422. Gramercy' takes issue with the conclusion that the FMV is the proper measure of its damages, arguing that the FMV standard does not apply to damages for unlawful expropriations or other treaty breaches.[922] As has been observed by prior investor-State cases, the FMV is the proper measure of damages for both expropriations and other treaty breaches.[923] Moreover, to the extent that there is a different standard of damages depending on each of Gramercy's causes of action, Gramercy has failed to prove it.

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[917] *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Prof. Stern dissenting opinion ("*Occidental Dissent*"), ¶ 162.

[918] *See* H. Wehland, *Blue Bank International v. Venezuela: When Are Trust Assets Protected Under International Investment Agreements*, 34(6) J. INT'L ARB. (2017), n.64 ("[I]n the absence of any beneficial interest in an investment, there would be no damage to be compensated. . . . As a consequence, it would appear that, even if the [Blue Bank] tribunal had accepted the claimant's contention that it had made an investment, its claims should still have failed for lack of any damage affecting the claimant."). *See also Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009, ¶¶ 582-584 (reducing damages claim by half because claimant only had a 50% beneficial interest in the property at issue).

[919] *Occidental Dissent* ¶ 161.

[920] Respondent's Statement of Defense ¶ 310.

[921] Quantum I ¶¶ 121-124.

[922] Claimants' Statement of Reply ¶¶ 551-553.

[923] *See, e.g., Marion Unglaube v. Republic of Costa Rica*, ICSID case No. ARB/08/1, Award, 16 May 2012, ¶ 307 (finding a de facto expropriation, applied the fair market value standard to determine amount of compensation.) (RA-375); *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 10 June 2016, ¶ 13-94 (finding indirect expropriation, applied the fair market value to determine amount in compensation.) (RA-375); *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 3003, ¶ 187 (finding indirect expropriation, used the standard of compensation of expropriation as set forth by art 5,2 of the BIT; fair market value) (RA-65); *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Award, 14 March 2003, ¶ 511 (Finding Indirect expropriation applied the Fair Market Value to determine the value of the Claimant's investment.) (RA-376).

423. Likewise, Gramercy's arguments against the application of the FMV standard in this case are flawed:

- Gramercy' argues that the FMV ignores the "legal entitlement physically embodied in the bond" and the intrinsic value of the bond.[924] In support, Gramercy cites decisions by tribunals and U.S. courts concerning disputes involving bonds or other securities, in which the bond or security holders "obtained recognition of their right to compensation equal to the full intrinsic value of those instruments" and their right to enforce their legal entitlement to the intrinsic value.[925] This argument is misplaced for the reasons already discussed above: Gramercy did not have a legal entitlement to the bonds and those bonds did not have an intrinsic value other than what has been prescribed by the Constitutional Tribunal's 2013 Resolution and its implementing Supreme Decrees. The decisions cited by Gramercy also are inapposite because in those cases the amount or value of compensation was determinable from the face of the bond or security. That is not the case with the Agrarian Bonds in light of the uncertainty of their value prior to the 2013 Resolution, as discussed above.

- Gramercy argues that the FMV does not equate with the full reparation standard, which according to Gramercy should be based on what Gramercy actually lost.[926] This argument too is misplaced, because it assumes that as a result of the Bondholder Process, Gramercy lost its entitlement to the intrinsic value of the bonds as calculated by Professor Edwards. As discussed above, such a claimed loss is fiction.

- Gramercy argues that the amount it paid bondholders reflects a discount for the risk of delayed payment or illegal sovereign action, and that this discount cannot be included in the FMV because it would allow Peru to take advantage of its own wrongful conduct and "improperly reward Peru for its own malfeasance."[927] This argument is incorrect in that it improperly assumes there has been any wrongful conduct by Peru, and, moreover, that the Tribunal should compensate Gramercy without taking into account the risks that were priced into the Bonds at the time of Gramercy's alleged purchases.

424. Finally, because Gramercy is not entitled to any damages for the reasons stated above, it is not entitled to any interest on its claim.[928]

b. Gramercy's Damages Calculations are Meritless

425. Even if Gramercy were entitled to damages in these proceedings, its reliance on Professor Edwards is misplaced. As the Quantum experts demonstrate, Edwards' calculations are economically unsound and cannot be the basis for an award against Peru:

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[924] Claimants' Statement of Reply ¶¶ 545-550.

[925] Claimants' Statement of Reply ¶¶ 548-549.

[926] Claimants' Statement of Reply ¶¶ 554-556.

[927] Claimants' Statement of Reply ¶¶ 558-563.

[928] *See* Respondent's Statement of Defense ¶¶ 312-313.

Prof. Edwards has calculated that . . . Gramercy Bonds would yield compensation amounting to US$ 33.57 million as of 31 May 2018. Claimants and Prof. Edwards are not satisfied with the US$ 33.57 million liability calculated by Peru for Unclipped Coupon payments that had become virtually worthless in 1992. Instead, Claimants seek a payment of US 1.8 billion from Peru for their Unclipped Coupons by relying upon a calculation performed by Prof. Edwards.

Gramercy and Prof. Edwards dismiss $33.57 million as being insufficient and a breach of the Treaty because they want a calculation that effectively assigns an even greater liability to Peru for the formerly virtually worthless Gramercy Bond Coupons. Prof. Edwards has devised a calculation to claim US$ 1.8 billion rather than accept US$ 33.57 million. . . .

[I]t is our view that there is no economic basis to support Prof. Edwards' calculation or Claimants' quantum claim. The calculation and claim can be best characterized as Gramercy's desire for Peru to be more generous than it already has been. As we have already explained, there was virtually no damage caused by Peru's decision to close the Agrarian Bank in 1992 with some Coupons still pending payment. It defies economics and common sense that virtually worthless financial liabilities in 1992 could now equate to significant material liabilities today, let alone US$ 1.8 billion for the Gramercy Bonds.

To calculate this fantastic amount of US$ 1.8 billion, Gramercy and Prof. Edwards have used the issuance date of each Agrarian Bond acquired by Claimants as the starting point for determining the "Current Value Principle". By returning to the issuance date (rather than the actual non-payment date of 6 May 1992 when the Agrarian Bank closed or the more generous date of the last clipped coupon), Prof. Edwards effectively calculates that Peru should have offered hypothetical bonds with a FMV of US$ 35,989,781 as of the last clipped coupon date. This amount is more than 10 times higher than the terms offered by Peru. In essence, they seek an even more generous hypothetical bond exchange.

The significant flaw with Prof. Edwards' calculation is that it seeks to hold Peru responsible for the non-payment of Coupons that are substantially higher than the actual Coupons in existence at the non-payment event or the last clipped coupon date. In essence, Prof. Edwards simulates a non-payment event in 1992 on coupons that never existed. It is only by simulating these non-existing coupons that Prof. Edwards can mathematically obtain a calculation of US$ 1.8 billion.

Inherently, Prof. Edwards' calculation and Claimants' claims seeks to hold Peru responsible for issuing Agrarian Bonds without an inflation adjustment to the principal portion of the Coupons. Neither Claimants nor Prof. Edwards explains the legal basis for doing so.

> Prof. Edwards states that he is not "re-writing" the original terms of the Agrarian Bonds in this manner. However, Prof. Edwards' calculations reveal that Claimants are in fact claiming such damages because the Coupons associated with the Agrarian Bonds were issued without inflation adjustments and Prof. Edwards simulates coupon payments that would be inflation adjusted. As such, we believe Prof. Edwards' calculations have no use or purpose in the present arbitration.[929]

426. According to Gramercy, even under the FMV standard, its damages would exceed US$550 million.[930] This contention is also meritless, as the Quantum experts explain that "no reliance can be placed on the values in Claimants' audited financial statements as an accurate measure of FMV" because:

> 1) the value in the financial statements is a [redacted], 4) the value in the financial statements may also include the benefit of an insurance policy. As such, Claimants' carrying value on their financial statements does not undermine our view of the FMV of Gramercy Bonds as Claimants suggest.[931]

427. Finally, in a last-ditch effort, Gramercy attempts to support its exorbitant valuation of the Bonds by arguing that "the current value of the Land Bonds today must instinctively be significant, because they are intended to represent the value of land the size of Portugal that Peru expropriated nearly half a century ago."[932] Not only is Gramercy's simile legally irrelevant, its assertion is wrong as a factual matter.

428. Gramercy's own experts belie the relevance of Gramercy's reference to the size and value of the land taken during the Agrarian Reform. According to Castillo, "a claim based on the Bonds would not seek to determine the present value of the real estate underlying the Bonds," and "neither of the Parties to this arbitration argues that the correct approach would be to bypass the Bonds and value the land directly."[933] Similarly, the value of the land is not taken into account by Professor Edwards in his own (incorrect) calculations as to the value of the Bonds.

429. Gramercy's irrelevant reference to "land the size of Portugal" is a meaningless sound-bite, which previously has been used as part of Gramercy's concerted

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[929] Peru's Quantum II ¶¶ 106-111.

[930] Claimants' Statement of Reply ¶ 566.

[931] Quantum II ¶¶ 236, 240.

[932] *See* Statement of Reply ¶¶ 3, 243, 280.

[933] Castillo ¶¶ 89-90.

efforts to prevent Peru's accession to the OECD, including in a report commissioned by PABJ,[934] an organization created and controlled by Gramercy.[935]

3. Peru Is Entitled To Full Arbitration Costs And Expenses

430. Peru explained in its Statement of Defense that it was entitled to full arbitration costs and expenses, with interest, under Articles 40 and 42 of the UNCITRAL Arbitratio Rules, because of time and resources Peru has spent obtaining a procedural order countering Gramercy's ongoing campaign aimed at harassing and harming Peru.[936] Awarding such costs was further reasonable because Gramercy's initiation and pursuit of this arbitration is in bad faith, and Peru should not be penalized by having to pay for its defense.

431. Gramercy responds that (1) Peru has neither presented evidence of such a campaign nor how such a campaign might increase the Agrarian Reform Bonds' value, (2) Gramercy's conduct outside this arbitration is irrelevant, and (3) Gramercy has not brought this arbitration in bad faith.[937] Gramercy repeats its prior allegations that it was forced to initiate this arbitration because "it could not reasonable expect justice from the Bondholder Process", and Peru rebuffed Gramercy's attempts to reach a resolution of this matter.[938]

432. Gramercy's arguments are self-serving and without merit. As discussed and *documented* above, Gramercy has (1) withheld and continues to withhold relevant and material evidence, notwithstanding Peru's requests for transparency, (2) withheld key information in order to sandbag Peru, and (3) continues to aggravate the dispute and suppress participation in the Bondholder Process, thereby prejudicing Peru and Peruvians.

433. Gramercy's conduct in this arbitration warrants the award of costs to Peru. As the tribunal in *Cementownia v. Turkey* observed, "the misconduct of an arbitration proceeding leads generally to the allocation of all costs on the party in bad faith."[939] Other tribunals similarly have awarded costs against a party that has caused significant procedural delays and engaged in other procedural misconduct, such as refusing to comply with its obligations of disclosure, candor, and good faith. In *Desert Line*, for example, the tribunal in its costs award took into account that one party "insufficiently cooperated in providing documents and testimonial evidence."[940]

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[934] *See* Hans J. Blommenstein, The Implications of Peru's Agrarian Reform Bond Default on Peru's Prospective Accession to the OECD, November 2017, ¶ 8 (Doc. R-1116); PABJ, *New Report from Peruvian-American Bondholders for Justice (PABJ) Says Peru Is Not Ready For Membership In The OECD*, PR Newswire, 4 December 2017 (Doc. R-204); BBC Mundo, Por qué hay 200 inversionistas de Estados Unidos que piden que Perú no sea admitido en la OCDE, 5 December 2017 (Doc. R-1117).

[935] *See, e.g.*, Peru's Statement on Procedural Safeguards ¶ 36; Peru's Second Statement on Procedural Safeguards ¶ 30; PABJ Certificate of Incorporation, 29 June 2015, at 4 (Doc. R-81).

[936] Statement of Defense ¶¶ 314-316.

[937] Claimants' Statement of Reply ¶¶ 603-606.

[938] Claimants' Statement of Reply ¶ 607.

[939] *Cementownia* ¶ 159.

[940] *Desert Line* ¶ 304.

V. Relief Requested

434. For all the reasons set forth above and in prior submissions, Peru respectfully requests that the Tribunal:

- Dismiss Gramercy's claims in their entirety;
- Award Peru such further and other relief as the Tribunal may deem appropriate, including with respect to the conduct and circumstances discussed herein; and
- Award Peru all costs incurred in connection with this proceeding.

Respectfully submitted,

RUBIO LEGUÍA NORMAND
Lima

WHITE & CASE
Washington, D.C.

Counsel to the Republic of Peru

13 September 2019

The Gramercy Campaign

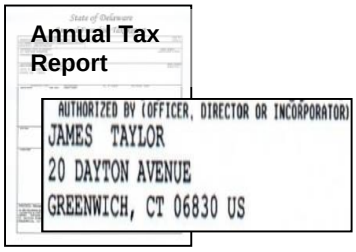
DIAGRAM 1

Gramercy Assembled the Elements of a Campaign

Gramercy

Gramercy Funds Management LLC
Gramercy Peru Holdings LLC

PABJ
Peruvian-American Bondholders for Justice



Gramercy Incorporated PABJ

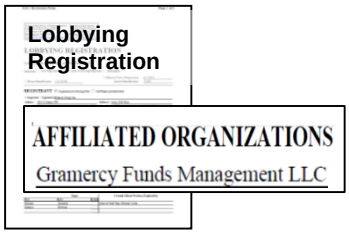
ABDA

Gramercy is signatory of ABDA petition and shares address, lawyers and spokesperson

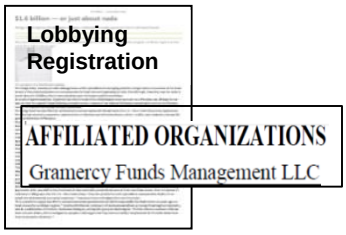
APJ
ALIANZA POR EL PAGO JUSTO DE LOS BONOS AGRARIOS

Gramercy and APJ share spokesperson

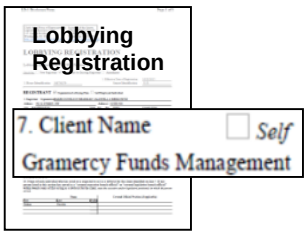
podestaGROUP



THE DASCHLE GROUP
A PUBLIC POLICY ADVISORY OF BAKER DONELSON



COGENT



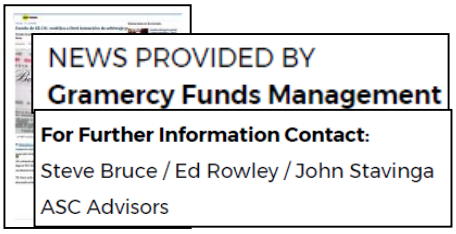
McLARTY ASSOCIATES

McLarty President: "Our principal task has been to help make sure the new [Peruvian] administration, whichever party it was, was aware of this issue and was baking it into their going forward ."

LLORENTE & CUENCA

RPP: "'Gramercy está dispuesto a hacer valer sus derechos' afirmó el abogado a través de un comunicado de la agencia Llorente & Cuenca en Lima."

ASC ADVISORS
ALTERNATIVE STRATEGIC COMMUNICATIONS



Sources: Doc. R- 21, 24, 100, 104, 138, 145, 177, 202 , 252, 254 and C-3

DIAGRAM 2

Gramercy Established a Mechanism and Messaging

Incorporation of PABJ by Gramercy / Counsel - 29 June 2015

Solicitation / Soccer Match - September 2015

"Sign up . . . And you will be eligible to win two free tickets to the Peru-US Football match" – PABJ Website

WB/IMF Annual Meeting, Lima, Peru - October 2015

Diffusion in Press – October 2015

Lining Up Lobbyists – October 2015 ►

Sources: Doc. R-21, 81, 82, 85, 86, 88, 90, 92 and CE-114

DIAGRAM 3

Gramercy Exerts Control Over the Campaign

Gramercy Letter – 28 March 2016
Gramercy's Statement of Claim "will necessarily be a highly public document which will, therefore, provide grist for the media mill for a long time."

Peru Letter – 12 April 2016
"Gramercy has handled, threatened and advanced a 'campaign' against Peru. … Having invoked the cited Agreement, Gramercy must desist from aggravating the circumstances."

Gramercy Communication – 13 April 2016
"Gramercy and others will be resuming their efforts to focus attention on the land bonds issue"

Peru Communication – 13 April 2016
"Gramercy must reconsider its continued use of threats and its negative campaign at a time when we are collaborating in a consultation process"

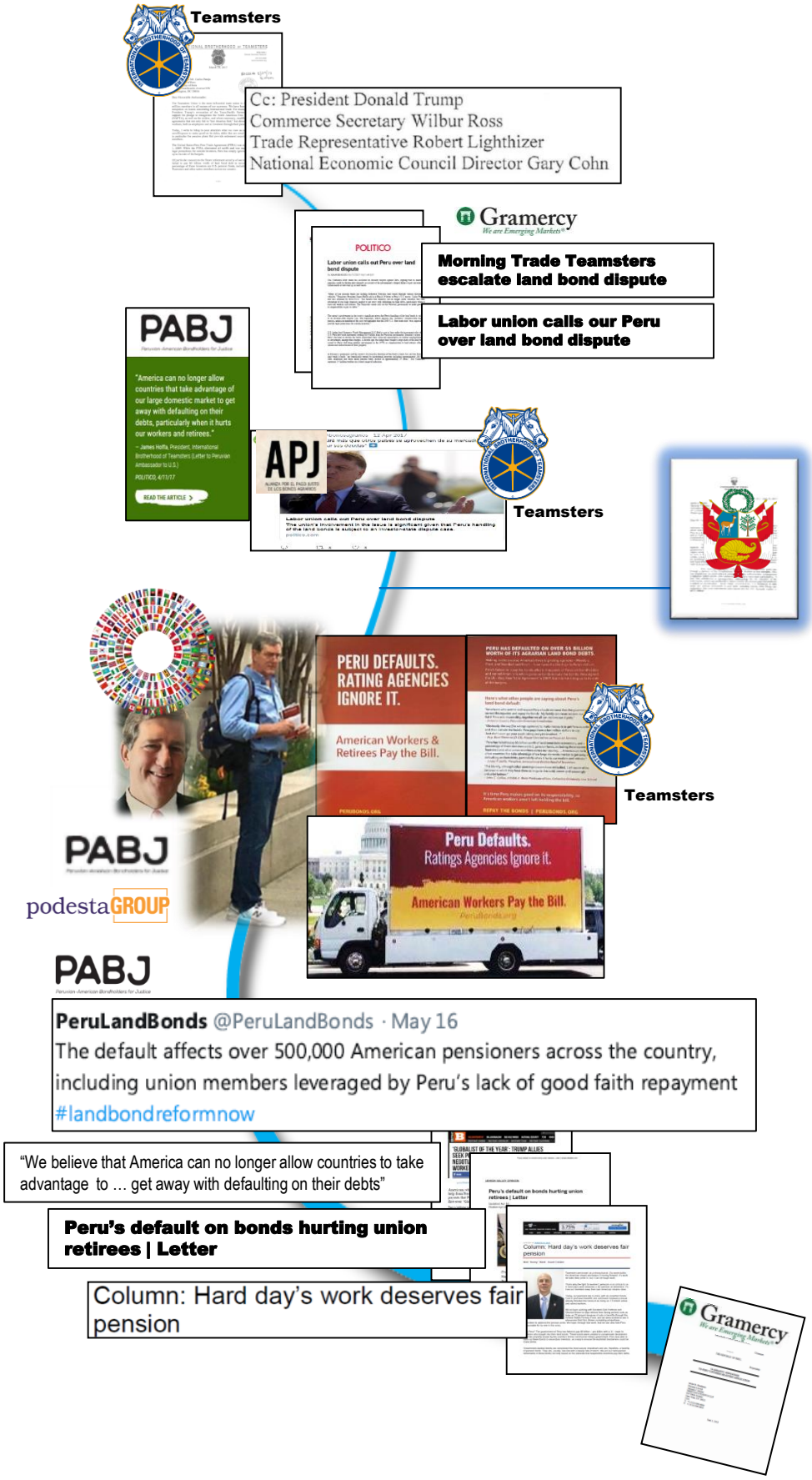
Negative Events and Press
World Bank/IMF Spring Meeting – 15-17 April 2016, Washington, DC

United Nations Meeting – 19-21 April 2016, New York, NY
Handed out propaganda and press
"PABJ" demands answers from the President

Sources: Doc. R-33, 47, 48, 117, 118, 122

DIAGRAM 4

Gramercy Adapted Its Campaign in the U.S.



Teamsters Letter - 24 March 2017
Uses inaccurate Gramercy messaging without revealing Gramercy connection:
"Peru has failed to pay $5 billion"
"pension funds are holding defaulted Peruvian land bonds through investment vehicles"

Diffusion in Press - 11 April 2017
Gramercy representatives/affiliates diffused letter to the press in Washington and Lima:
"Gramercy spokesman said … the land bonds it holds are beneficially owned by institutional investors"

Embassy Response - 18 April 2017
Respectful response, never given to or used in the press: "Bondholders may participate in the process established in Peru"
Never received a further response

Diffusion at Public Events – 21-23 April 2017
World Bank/IMF Spring Meeting, Washington
Teamsters Letter cited in propaganda distributed at public events featuring Minister

Lack of Transparency – 27 April 2017
Latin Lawyer Conference, White & Case, Miami
Gramercy counsel replies "No Comment" when asked if the Teamster bonds are the same bonds allegedly held by Gramercy

Continued Recycling – 2018

New wave of press articles citing letter but not response

Gramercy Submission – 1 June 2018
Gramercy states: "Peru's treatment of the Land Bonds is an issue of concern not only for Gramercy, but also for many American stakeholders, including a number of U.S. pension funds."

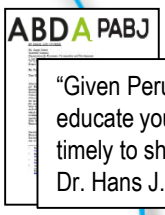
Sources: Doc. R-163, 165, 166, 167, 171, 172, 199 211, 212, 214, 218, 224 and C-22

DIAGRAM 5

Gramercy Adapted Its Campaign Internationally

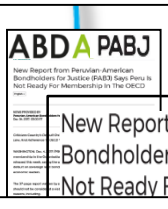
Blommestein Report – November 2017
Commissioned by PABJ and ABDA

Session with OECD in Peru – 5 December 2017



"Given Peru's desire to join the OECD and to further educate you on the Agrarian Reform Bonds, we find it timely to share with you the enclosed report, written by Dr. Hans J. Blommestein"

Letter to OECD – 3 December 2017



EL PAÍS

New Report from Peruvian-American Bondholders for Justice (PABJ) Says Peru Is Not Ready For Membership In The OECD

Cites Blommestein Report, Letter, and reference OECD, IMF, SEC, and Bolsa de Valroes

Initial Press – 3-4 December 2017
Article with PABJ and ABDA as points of contact for further information.

Peru – 5 December 2017
"the latest step in a negative campaign orchestrated by a U.S.-based fund that is seeking to force Peru to change its laws and pay it an exorbitant amount."

"Gramercy did not deliver letters to the OECD" - Carlos Anderson

Denial and Ongoing Attention – December 2017

Press and multiple tweets from the PABJ account

"bondholders intend to put pressure on the OECD, with whatever help they can get from [the U.S.], to force the OECD to make Peru pay up or lose the opportunity to join the OECD."

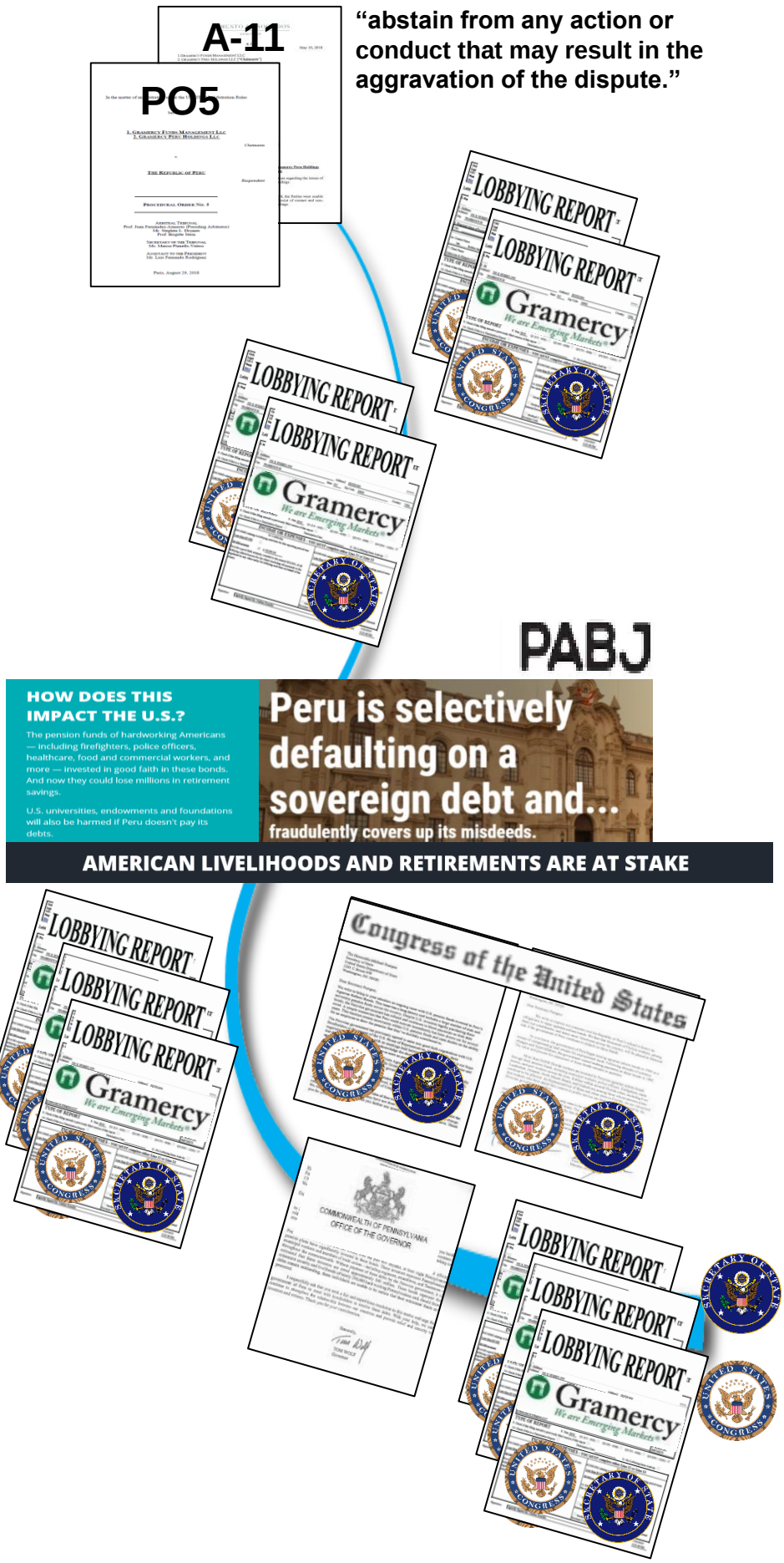
Continuing Aggravation – 11 April 2018
After a query whether Gramercy would put aside its aggravating conduct, Peru was told: "we will stop when Peru stops seeking membership in the OECD"

Gramercy Submission – 1 June 2018
Gramercy now admits to focusing its statements on the allegation "that Peru's failure to report the Land Bond debt is inconsistent with international standards, including those of the IMF, the World Bank, and the OECD."

Sources: Doc. R-199, 203, 204, 205, 206, 211, 253 and R-9

DIAGRAM 6

Gramercy Has Continued The Campaign



Tribunal Letter A-11 – 10 May 2018

Q3 2018 Lobbying Disclosure Forms
- Baker Donelson – US$ 120,000 to lobby US Senate, House & Office of President
- Clark Hill – US$ 30,000 to lobby US House & Dep't of State

Procedural Order No. 5 – 29 August 2018
"shall abstain from any action or conduct that may result in an aggravation of the dispute";
"all communications among the Parties concerning the conduct of this arbitration or the settlement of the underlying dispute shall be channeled in the manner required by each Party";
"Parties must respect the role of the non-disputing Party as established in the Treaty."

Q4 2018 Lobbying Disclosure Forms
- Baker Donelson – US$ 40,000 to lobby US Senate & House
- Clark Hill – US$ 50,000 to lobby US Dep't of State & Office of Vice President

PABJ-linked website Protectourpensionsnow.org
"The Peruvian government defaulted on billions"
Peru "refuses to repay the Americans"

Q1 2019 Lobbying Disclosure Forms
- Baker Donelson – US$ 120,000 to lobby US Senate, House & Office of President
- Clark Hill – US$ 50,000 to lobby US Dep't of State & Office of Vice President
- Chartwell Strategy – US$ 30,000 to lobby US Senate & House

Letter from Members of Congress to US Secretary of State Pompeo 1 February

Letter from Mayor of Orlando and Members of Congress to Secretary of State Mike Pompeo
2 May 2019
"Peru continues to default on these bonds"
"pension plans continue to be affected"

Letter from Governor of Pennsylvania to Embassy of Peru – 11 April 2019
"pension plans have significantly invested in these bonds"

US Secretary of State in Peru – 13 April 2019
US Ambassador raised issue of Bonds

US Congress call to Peru counsel - April 2019
Raised issue of Bonds

Q2 2019 Lobbying Disclosure Forms
- Baker Donelson – US$ 150,000 to lobby
- Clark Hill – US$ 50,000 to lobby
- Chartwell Strategy – US$ 80,000 to lobby

DIAGRAM 7

Gramercy Has Prejudiced Peru and Due Process

The Sandbagging of Due Process

Gramercy's Second Amended Statement of Claim (August 2016)	**Gramercy's Third Amended Statement of Claim (July 2018)**	**Gramercy's Statement of Reply (May 2019)**
Brief		
72 pages - 34 pages on merits, damages	82 pages, largely copied/pasted - 37 pages on merits, damages	202 pages - 122 pages on merits, damages
Witness Statements		
Robert Koenigsberger	Koenigsberger slightly amended	Koenigsberger supplement Lanava (new Gramercy representative) Joannou (new Gramercy representative) [redacted] (new on bond acquisition) [redacted] (new on Bondholder Process) [redacted] (new on Bondholder Process)
Experts Reports		
Edwards (quantum) Revoredo (Peru law)	Edwards amended Revoredo slightly amended	Edwards supplement No supplement by Revoredo (Peru law) Castillo (new on Peru law) Bullard (new on Peru law) Allgeier (new on investment) Olivares-Caminal (new on investment)
Fact Documents		
259 previously submitted	58 new documents	1,000+ new documents
Legal Authorities		
46 previously submitted	0 new authorities	136 new authorities