In the matter of

Gramercy Funds Management LLC
Gramercy Peru Holdings LLC
Claimants

v.

The Republic of Peru
Respondent

Post-Hearing Brief on Jurisdiction of The Republic of Peru

1 JULY 2020

RUBIO LEGUÍA NORMAND
Lima

WHITE & CASE
Washington, D.C.

Post-Hearing Brief on Jurisdiction of the Republic of Peru

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1. The Republic of Peru ("Peru") hereby submits its Post-Hearing Brief on Jurisdiction in accordance with Procedural Order No. 11.

I. Overview

2. In this proceeding under the Peru-United States Trade Promotion Agreement (the "Treaty"), it is the purported claimant, Gramercy, that has grossly disregarded the Treaty and demonstrated ongoing disdain for the dispute resolution mechanism established therein, for the Tribunal's orders and admonitions, and for the lawful steps undertaken by Peru that are bringing the Agrarian Reforms Bonds to a comprehensive resolution, notwithstanding Gramercy's outrageous conduct and exorbitant demands that are contrary to law and prejudicial to the Treaty, Peru, and the Peruvian people.

3. The truth of Gramercy and the Agrarian Reform Bonds is now known: Gramercy admits that it paid US$ 33 million funded from third parties for decades-old paper; Gramercy admits that it could receive US$ 34 million if it submitted to the lawfully established payment process through which Peru continues to pay bondholders; yet Gramercy continues to demand US$ 2 billion to which it has no right. Peru reserves the right to address the merits implications of these issues in its next Post-Hearing Brief. Further to the Tribunal's instructions, this submission is focused on the myriad jurisdictional deficiencies fatal to Gramercy's claims.

4. Gramercy has failed to meet its burden of proving that the elements of jurisdiction are met. The Tribunal cannot ignore Gramercy's failure to comply with the Treaty, and all of Gramercy's claims must be dismissed.

Facts On Jurisdiction Confirmed And Uncovered At The Hearing

5. Gramercy has failed to submit claims in accordance with the Treaty and failed to meet its burden of proof with respect to the existence of jurisdiction. The testimony of the witnesses and experts has confirmed the factual basis for Peru's objections to jurisdiction. Indeed, the core facts were admitted by Gramercy's own executives and experts during the Hearing. Among other things, the record establishes the following:

- **Gramercy Purchased Uncertain Bonds To Acquire Claims Against Peru**

  Agrarian Reform Bonds are decades-old instruments with unique characteristics. Gramercy chose to speculate in the Bonds after hyperinflation and repeated currency changes had made them worthless on their face and their value was uncertain and the subject of numerous litigations. By its own admission, Gramercy purchased "claims" and sought to "catalyze" a settlement with Peru.

- **Gramercy Never Authenticated The Uncertain Bonds**

  The decades-old pieces of paper upon which Gramercy rests its purportedly $2 billion case have never been authenticated, lawfully or otherwise. Despite recognizing the need to authenticate the Bonds as a prerequisite to payment, by its own admission, Gramercy did not submit the Bonds to the authentication process established by Peruvian law, nor did it perform an independent authentication, nor has it even attempted to explain the numerous problems evident on the face of the photographs on which it relies in this proceeding.

- **Gramercy Committed No Capital To Buy The Bond Claims**

  Gramercy admits that it paid US$33 million of other people's money to acquire the Bonds for which it demands US$ 2 billion. By its own admission, Gramercy committed no capital (or any other asset) of its own to acquire the Bond claims, and its interest in them is *de minimis* and indirect. Gramercy relied on third parties for funding, and then sold interests in the claims to the third-party beneficial owners. Gramercy itself does not stand to make any real profit or loss from its alleged "investment," but either way it collects its fees from third parties.

- **Gramercy Sought To Pressure Peru Through An Attack Campaign**

  Gramercy contemplated a lobbying campaign to force a settlement of pre-existing claims even before acquiring any Bonds, and admits that it sought to engage in a multi-front effort to pressure Peru into abandoning its legitimate defenses and settling the claims. It has hired lobbyists, commissioned reports, and funded astro-turf bondholder associations, in addition to wielding the Treaty arbitration as a cudgel against Peru. Despite the Tribunal's admonition at the hearing, Gramercy continues to lobby and disseminate misinformation.

- **Gramercy Made Secret Bond Acquisitions During Its Arbitration And Attack Campaign**

  A hearing bombshell was Gramercy's unexpected admission that it had continued to acquire Agrarian Reform Bonds as part of a strategy of pressuring Peru to agree to a global settlement. Incredibly, this acquisition was at a time that these arbitration proceedings were underway and while Gramercy continued to make false public accusations that Peru was in default on the Bonds. The Tribunal has ordered Gramercy to produce, *inter alia*, "any other internal document prepared by Gramercy and/or any of its affiliates to justify the 2017 Purchase" and "any agreement entered into between Gramercy and/or any of its affiliates and the sellers regarding the 2017 Purchase." Gramercy, however, has made only a paltry production, and Peru continues to reserve all of its rights in this regard.

6. The facts relevant to jurisdiction are addressed in *Section II*, together with the responses to corresponding Tribunal queries.

Gramercy's Mischaracterization Of The Treaty Framework Has Proven Baseless

7. The Treaty is an agreement between two sovereign States, which makes the submission of disputes to arbitration subject to express conditions and limitations on consent. As is evident from the submissions of the Contracting Parties to the Treaty in this proceeding, the United States and Peru agree on the interpretation of the Treaty, and agree that claims

submitted to arbitration that do not comply with the Treaty must be dismissed. The Tribunal is bound to respect the common understanding of the United States and Peru.

8. Throughout this proceeding, Gramercy has sought to mischaracterize the Treaty and its jurisdictional requirements. Not only does this fly in the face of the agreement between the United States and Peru, it is also entirely unsupported as a matter of law, as has been shown by Professor Michael Reisman, a renowned expert on public international law. Professor Reisman's legal opinions give further support to Peru's arguments in this proceeding, which is why Gramercy (which was unsupported by any expert in international law) sought to disqualify him at the last minute. As addressed in *Section III*, Gramercy's abusive treatment of Professor Reisman during the hearing failed, and his testimony at the hearing reconfirmed why this case should be dismissed.

Gramercy Has Failed To Establish Jurisdiction Under The Treaty

9. Gramercy has failed to rebut Peru's various objections to jurisdiction and admissibility, any one of which is fatal to its claims:

- Gramercy has abused the Treaty and cannot be entitled to its protections.
- Gramercy has failed to prove it complied with the Treaty's preconditions to arbitration, including the Treaty's temporal and waiver requirements.
- Gramercy failed to prove it made a protected "investment" under the Treaty.
- Gramercy failed to prove it is an "investor" under the Treaty.

10. As addressed in *Section IV*, Gramercy has failed to prove that its claims are subject to Treaty jurisdiction. Despite having multiple chances and repeated do-overs, Gramercy has never (and could never) proved jurisdiction exists. The Treaty is not an excuse for abusive profiteers to attack a diligent sovereign; it is not *carte blanche* to submit frivolous claims as to disputes that not only are time-barred by the statute of limitations, but preexist the Treaty itself; it does not afford protection to claimants that did not make any contribution of money or other assets, never bore any risks, and never contributed to Peru's development; it is not a blunt tool to be wielded on behalf of third parties by claimants who have no standing of their own.

11. Throughout this proceeding, Gramercy has done its utmost to deprive Peru of due process and aggravate the proceeding, disregarding the Treaty and repeated orders and admonitions by the Tribunal; it has withheld documents, made massive redactions to what few documents it produced, and all the while continued to spread misinformation to the public. Peru has already been prejudiced. Now, the Tribunal has the chance to stop Gramercy's efforts to subvert the Treaty and suppress the truth. This case must be dismissed and Peru awarded all costs for this abusive proceeding.

II. Facts Related To Jurisdiction Confirmed And Revealed At The Hearing

A. Gramercy Admitted That It Acquired Claims In A Preexisting Domestic Dispute Over Agrarian Reform Bonds

12. In the course of this proceeding, Peru has established that the Agrarian Reform Bonds are decades-old instruments with unique origins and characteristics relevant to jurisdiction. Gramercy knew of the unique history and longstanding dispute with respect to the Bonds when it decided to acquire Bonds. Indeed, as the record establishes, Gramercy's alleged investment was *expressly predicated* on the idea that it could profit from a preexisting dispute among Peruvians over facially worthless Bonds.

13. The Agrarian Reform Bonds are old physical instruments provided decades ago as compensation for land in Peru, in local currency and subject to Peruvian law and jurisdiction; that 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.[1] This was confirmed during the hearing by, among others, Vice-Minister Sotelo, who confirmed that the Agrarian Reform Bonds are not comparable to modern sovereign bonds issued by Peru.[2] It is undisputed in this proceeding that the nominative values of the Agrarian Reform Bonds became worthless when Peru was struck by hyperinflation in the years following their issuance.[3] It is likewise undisputed that beginning in the 1990s, various branches of the Peruvian Government attempted to establish how much, if anything, should be paid for the Bonds,[4] and that this was the subject of various local litigations,[5] as has been addressed in this proceeding.[6]

14. It was in this context of ongoing litigation in courts and ongoing debate in the political branches that Gramercy chose to acquire Bonds. The record has long shown that Gramercy's lone due diligence memorandum in January 2006 highlighted the longstanding

[1] *See, e.g.*, Statement of Rejoinder ¶ 5.

[2] *See, e.g.*, Hr'g Tr. 898:9-899:2 (Day 3) (Sotelo Direct) ("The Agrarian debt, compared to the Bonds that the State in modern times has placed, is a physical instrument. It is not registered in the stock market, it is not an electronic instrument. It was placed directly to pay for the expropriation of the lands. It was not auctioned in the New York market. It is not governed by the laws of New York. It is a domestic debt, and the legal regime that underlies it has to do with internal debt. It's Peruvian legislation. There is no secondary market, and those are the differences, as compared to the modern sovereign bonds that are issued by the Peruvian State."); *see also* Hr'g Tr. 2277:8-2281:14 (Day 6) (Guidotti Direct); Guidotti Expert Presentation (H-13) at 4-5 (explaining that "Agrarian Reform Bonds are very different from modern sovereign bonds," focusing on specific issues of substance, including "purpose for the issuance of bonds, the trading in secondary market, and the risk protection, which have to do with whether, for instance, bonds are protected against inflation or not, whether they are rated by a credit rating agency, and also, of course, the governing law and courts that apply to these contracts"); *id.* Hr'g Tr. 2282:14-2283:6.

[3] *See, e.g.*, Hr'g Tr. 924:21-22 (Day 3) (Sotelo Cross) ("At the time, the obligations related to the Bonds was equal to 1 cent of nuevos soles."); *see also,* Amended Expert Report of S. Edwards, 13 July 2018 ¶ 27 (CER-4) ("[T]he Land Bonds had become virtually worthless."); Second Quantum Expert Report, 13 Sept. 2019 ¶ 55 (RER-11).

[4] *See, e.g.*, Republic of Peru, Opening Statement (H-2) at 23 *et seq.*; *see also* Law No. 26597, 22 Apr. 1996, Art. 2 (RA-256).

[5] *See e.g.,* Constitutional Tribunal Sentence in Record No. 022-96-I/TC, 15 Mar. 2001, at 4 (RA-211); Constitutional Tribunal Sentence, Record No. 0009-2004-AI/TC, 2 Aug. 2004, at 11 (R-417).

[6] Per Tribunal instructions, this submission is limited to jurisdictional objections. Peru will address the implications of the various bills, draft bills, court decisions, and other facts relevant to the merits at the appropriate time.

history and ongoing dispute with respect to the Bonds.[7] The testimony of Gramercy's executives further underscored that Gramercy intended to acquire, and did acquire, claims in a preexisting domestic dispute.

15. At the hearing, Mr. Koenigsberger confirmed his written testimony that Peru had purportedly "defaulted" on the Bonds "long before [he] learned about them"; that the Bonds "had been issued in an outdated and massively devalued currency"; and that the face value of the Bonds was "worthless" before Gramercy acquired them.[8] He further confirmed that Gramercy's due diligence included "looking at court rulings at the highest court of the land, looking at local courts, conversations with counsel."[9] According to Mr. Koenigsberger, Gramercy also was aware, in the weeks prior to its first Bond acquisition, that the president of Peru had vetoed a pending Agrarian Reform bill. In Mr. Koenigsberger's view, this showed that the government "wanted to kick the can to the next administration," and that "part of the difficulty for bondholders over many years is this notion that no government has really wanted to deal with it, and they have just kind of moved it to the next government."[10]

16. In other words, Mr. Koenigsberger and Gramercy understood that, for many years, the Bonds had been subject to litigation in Peruvian courts and various unsuccessful attempts at resolution in the Peruvian political branches. Indeed, the fact that the Bonds were burdened with this preexisting domestic dispute is precisely why Gramercy viewed them as appropriate for its distressed asset portfolio.[11]

17. Gramercy's acquisition of claims is likewise evidenced by the more than 21,000 pages of purchase contracts and associated documents which Gramercy previously withheld from the Tribunal. The purchase contracts underscore, among other issues, that Gramercy acquired claims in a preexisting domestic dispute.

- The very first provision of the contract recites a history of the Bonds, beginning with the 1969 Land Reform Act, the land expropriation process, and various decrees and court decisions beginning in 2000 that sought to shape the resolution of decades-old questions regarding Bond valuation and payment.[12]
- The first provision also defines the "Assets" being assigned as the Bonds *and* "[t]he claim against the Peruvian State," including "any ancillary litigious and/or inchoate rights as may pertain to said Bonds."[13] Gramercy's own Peruvian law

[7] The memorandum stated, for example, that the Bonds were offered as part of Peru's Agrarian Reform and "issued in the currency of the 1970s"; had been "in default for a period of 18 years"; were "now worthless"; Peruvian bondholders were "fighting" in Peruvian courts; and the "long and hard fought legal battles" by Peruvians in Peruvian court purportedly had "helped pave the road for some form of resolution." Any such resolution, however, remained elusive, and the domestic dispute continued: the bondholder organization ADAEPRA, for example, was "pursuing a parallel strategy" that involved "negotiating a settlement," along with a "judicial track demanding payment" in Peruvian courts. Gramercy Memorandum, 24 Jan. 2006 (Doc. CE-114) at 1-3.

[8] Hr'g Tr. 461:22-462:7, 464:18-21 (Day 2) (Koenigsberger Cross); *see also* Second Amended Koenigsberger (CWS-3) ¶ 21.

[9] Hr'g Tr. 380:2-4 (Day 2) (Koenigsberger Direct).

[10] Hr'g Tr. 489:2-11 (Day 2) (Koenigsberger Cross).

[11] *See, e.g.*, Hr'g Tr. 405:6-9 ("Q. Mr. Koenigsberger, my question was whether the Peruvian Land Bonds fall into the Gramercy category of emerging markets distressed. A. Yes, it does."); Second Amended Koenigsberger (CWS-3) ¶ 21 ("I thought the Land Bonds might be a good opportunity . . . .").

[12] *See, e.g.*, Contract for the Assignment of Rights, 20 Oct. 2006, Art. 1 (Doc. CE-339.001).

[13] *Id.* Art. 1.7(ii).

expert testified that the Assets under the contract "include all the supplementary rights or the rights to sue."[14]

- The third clause provides that the seller guaranteed that the "compensation payable to her, derived from and related to the Assets, is awaiting payment by the Peruvian State," and that, "notwithstanding the time elapsed, it has not been possible for her to collect the debt that the Peruvian State maintains payable to her."[15] Underscoring this point, it states that the "possibility of actual collection of the compensation derived from the Assets constitutes an expectative right whose materialization is at the risk of [Gramercy]."[16] As Dr. Hundskopf explained, an expectative right is not one for which there is certainty of payment: "It's a gamble . . . . It is something that could be remotely possible, even."[17]

18. Thus, on its face, the Gramercy purchase contract confirmed that the Bonds and claims associated therewith were already subject to dispute, and that the matter of compensation remained unresolved. Indeed, as seen at the hearing – consistent with Gramercy's purchase of "claims" under the contract – Gramercy repeatedly characterized its acquisition as "claims" or even "legacy claims" in internal documents and communications with clients,[18] and also valued the acquisition as a claim in its financial statements.[19]

19. Notably, Mr. Koenigsberger also testified that Gramercy "*took over the existing litigations*" by Peruvian bondholders in Peruvian court as to certain Bonds it acquired.[20] And Gramercy placed considerable emphasis in both argument and testimony on the 2001 Constitutional Tribunal decision in Peruvian bondholder litigation.[21] The plain fact that bondholder litigation had been ongoing at various levels of the Peruvian judiciary for years, and that Gramercy "took over" claims already pending in Peruvian court, leaves no doubt that there was a preexisting domestic dispute with respect to the Bonds well before Gramercy sought to acquire them.

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[14] Hr'g Tr. 1899:11-12 (Day 5) (Bullard Direct).

[15] Contract for the Assignment of Rights, 20 Oct. 2006, Arts. 3.2(i), (vi) (Doc. CE-339.001).

[16] *Id.* Art. 3.2(vi).

[17] Hr'g Tr. 2014:22-2015:3 (Day 6) (Hundskopf Direct). The relevance of these and other provisions, and associated testimony, with respect to Gramercy's claims on the merits will be addressed in Peru's forthcoming submission.

[18] *See, e.g.*, Republic of Peru, Opening Statement, at 83; Hr'g Tr. 676:15-17 (Day 2) (Lanava Cross) ("Q. So, Gramercy wanted to make sure that it bought authentic claims; right? A. Correct."); Gramercy, "Check List of Items to Cover in Our Due Diligence" (Doc. R-1095) (stating, *inter alia*, "We need . . . to make sure we *purchase claims that are authentic*"; "We should be able to use the Peruvian legal system to *defend our rights as claim holders*"; "We should pre-negotiate fees . . . on *subsequent trades of these claims*") (emphasis added); [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY]; [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY].

[19] *See, e.g.*, Hr'g Tr. 2430:3-4 (Day 7) (Quantum Direct) [redacted] and concluding, "[y]ou don't calculate Fair Market Value based on legal and political strategies. *That is not valuing the Bonds. That is valuing a claim*") (emphasis added).

[20] Hr'g Tr. 635:18-19 (Day 2) (Koenigsberger Cross) (emphasis added); *see also, e.g.*, Third Amended Statement of Claim ¶ 157 (stating that "Land Bonds had originally been issued through a process that included the initiation of Peruvian legal proceedings," and Gramercy "became eligible to apply to become a party to these legal proceedings").

[21] *See, e.g.*, Hr'g Tr. 120:1 (Day 1) (Gramercy Opening) (characterizing the 2001 Constitutional Tribunal decision as "seminal"); *see also infra* Section IV.B.1.

B. Gramercy Admitted That Its Alleged Bonds Have Not Been Authenticated, Lawfully Or Otherwise

20. As Peru has raised throughout these proceedings, the decades-old pieces of paper upon which Gramercy rests its purportedly $2 billion case have never been authenticated.[22] Gramercy has relied solely on photographs of some 9,600 certificates, and made a show at the hearing of presenting two certificates to the Tribunal, without any indication of how they could be authenticated. In fact, Gramercy's own executives confirmed the importance of Bond authentication in their testimony:

> Q. Gramercy couldn't expect to get paid if it acquired invalid pieces of paper; right?
>
> A. That's right. We obviously wanted to make sure that we were acquiring valid Bonds, real Bonds, right.
>
> Q. Right. So Bond authentication then is important. It's necessary.
>
> A. Correct.
>
> ….
>
> Q. Can we agree, Mr. Lanava, that a photocopy or a scan or a photograph wasn't going to be good enough for Bond authentication?
>
> A. For who?
>
> Q. Well, according to Gramercy's own assessment in this memo that we were just looking at. It required three documents, the certificate, the title, the *sentencia*. It required physical review, and it required satisfaction that all of those documents were authentic; right?
>
> A. Correct.[23]

21. Thus, Gramercy determined, prior to its acquisitions, that physical review of original Bond certificates was one of several mandatory steps to confirm the validity of the Bonds. Further, Mr. Koenigsberger acknowledged that Peru "also considers it important to authenticate old Land Bonds before making any payment on them."[24]

22. Notwithstanding the undisputed need for authentication, Gramercy's executives confirmed at the hearing that Gramercy did not engage any forensic (or other) expert to perform an independent verification of the Bonds, let alone the exacting authentication required as part of Peru's Bondholder Process.[25] Instead, Gramercy hired Deloitte simply to photograph Bond certificates and create an inventory of the photographs. The resulting report includes a "Disclaimer" specifying that Deloitte "does not express any certification, attestation, or opinion of any kind other than as explicitly set forth herein. This

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[22] *See, e.g.*, Statement of Defense ¶¶ 67-68; Statement of Rejoinder ¶¶ 247-254.

[23] Hr'g Tr. 673:5-12, 681:16-682:4 (Day 2) (Lanava Cross).

[24] 468-19-469:9 (Koenigsberger Cross) ("Q. And you've acknowledged . . . more recently that you understand, of course, that the Peruvian State also considers it important to authenticate old Land Bonds before making any payment on them. You understand that; right? A. I understand that that would be important for Peru, yes."). While Gramercy's initial due diligence memo referred to various steps to authenticate and acquire the Bonds, Gramercy has withheld, on the basis of privilege, a series of later memos regarding requirements under Peruvian law for a valid acquisition. *See* Gramercy Memorandum, Jan. 2006 (Doc. CE-114); Gramercy Privilege Log, 16 June 2020, at 3-8..

[25] *See, e.g.*, Hr'g Tr 551:21-552:8 (Day 2) (Koenigsberger Cross) ("Q. This [Doc. R-649] is an expert graphotechnical report by the National Police of Peru that is in the record as an example of the authentication process undertaken as part of the Peruvian Bondholder proceeding managed by the Ministry of Economy and Finance. Just to confirm, you have not obtained any type of authentication document like this; is that correct? A. I don't believe so.") *id.* 696:8-13 (Day 2) (Lanava Cross) ("Q. Gramercy didn't hire these guys [forensic experts from the Peruvian National Police] to authenticate the Bonds, did it? A. I don't know. Q. Okay. Gramercy didn't hire any forensic experts to authenticate the Bonds, did it? A. I don't know.").

includes attestations on the authenticity of the Bonds inspected, validity of signatories or notaries present on the Bonds, or present valuation of the Bonds."[26]

23. In this proceeding, Gramercy did not conduct an expert review of its alleged Bonds, or even make a serious proposal for any authentication process. Instead, it resorted to an eleventh-hour stunt, where it brandished two alleged Bond certificates on the first day of the hearing, and attempted to present them to a member of Peru's team for purported inspection in the hallway during a break.[27] On the sixth hearing day, Gramercy again made a point of recording on the transcript that the Bonds were "available" if Peru "would like to look at them."[28] Peru strongly objected and underscored that none of Gramercy's Bonds, including the two alleged Bonds presented in the hallway, have ever been authenticated.[29] The President of the Tribunal confirmed: "*we know that they are not authenticated*."[30]

24. In fact, the unauthenticated – and, indeed, unreliable – nature of Gramercy's alleged Bonds was on display for all to see during the cross-examination of Mr. Lanava. Mr. Lanava had detailed Gramercy's acquisition process in his written statement, including a representation that "all of the Land Bonds that Gramercy acquired are valid and authentic."[31] On cross-examination, however, he repeatedly testified that he had no experience in or knowledge of Gramercy's review of the Bonds, and could not speak to authentication issues.[32] He acknowledged that Gramercy withdrew over 100 Bonds from this proceeding due to discrepancies that were discovered years after Gramercy purportedly authenticated all Bonds.[33] And he had no explanation for why the document Gramercy submitted as Bond Number 023679 dated February 1972 was instead a computer printout dated September 2006.[34] Indeed, it was plain on the face of the document that it could not be the Bond alleged.

C. Gramercy Admitted That It Acquired Bond Claims Using Client Funds, And Sold All But A *De Minimis* Interest To Third Parties

25. From the outset of the case, and through multiple successive amended pleadings, Gramercy has maintained that the only relevant facts with respect to ownership of the Bonds are that Claimant GPH allegedly holds title to Bonds, and Claimant GFM controls Bonds by virtue of managing GPH. Through its first eight filings, Gramercy submitted a total of *one* corporate document to this effect. Beginning with the discovery phase, however, a more complicated picture emerged with respect to the Gramercy structure, and the manner in which Gramercy acquired and held its alleged Bonds. At the hearing, Gramercy made a point of noting that Peru first raised certain objections regarding these issues in its Statement of

[26] Deloitte Report, 12 Jan. 2017 (Doc. CE-224A); *see also, e.g.*, Hr'g Tr. 699:3-8 (Day 2) (Lanava Cross) ("Q. So, we see here, consistent . . . with the scope of what Gramercy hired Deloitte to do. They are – expressly disclaimed any certification as to authenticity of the Bonds; right? They didn't do it? A. They weren't asked.").

[27] *See, e.g.*, Hr'g Tr. 93:7-94:17 (Day 1) (Gramercy Opening).

[28] Hr'g Tr. 2160:18-22 (Day 6).

[29] Hr'g Tr. 2162:8-2164:21 (Day 6).

[30] Hr'g Tr. 2163:1-3 (Day 6) (emphasis added).

[31] Lanava ¶ 12.

[32] *See, e.g.*, Hr'g Tr. 672:15-21, 677:10-11, 679:14-16, 679:22-680:1-3, 682:13-17 (Day 2) (Lanava Cross).

[33] *See, e.g.*, Hr'g Tr. 686:16-687:2, 688:21-689:2 (Day 2) (Lanava Cross) ("Q. So, this is long after Gramercy supposedly authenticated all the Bonds at the time of acquisition; right? A. It would be.").

[34] Hr'g Tr. 692:2-695:14; *see also* Bond No. 023679, Bond Package No. 76 (Doc. CE-224A, Appendix B, Bates No. GMCY-0004634).

Rejoinder.[35] Indeed, it was not until after Gramercy was ordered to produce relevant documents, after the first round of briefing, that Peru was able to piece together the true nature of the alleged investment, which Gramercy had long obscured.[36]

26. The hearing testimony of Gramercy's three executives confirmed, *inter alia*, that (i) Gramercy relied entirely on funding from its third-party clients to acquire the Bonds, and committed no capital, or any other asset, of its own; (ii) Gramercy set up a network of funds, and third-party funds invested in Gramercy funds, to sell interests in the Bonds to third parties who are the ultimate beneficiaries of the alleged Bond "investment"; and (iii) GPH has no real economic interest arising from its alleged title to the Bonds, and GFM has only a *de minimis* indirect interest through holdings in another Gramercy entity.

1. Testimony Confirmed That Gramercy Used Client Funds To Acquire The Bonds

27. Gramercy created Claimant GPH as a vehicle whose sole purpose was to acquire and hold title to Bonds.[37] When GPH purchased Bonds from 2006 to 2008, it was wholly owned by an offshore Cayman Islands entity called Gramercy Emerging Markets Fund ("GEMF").[38] Mr. Koenigsberger testified that GEMF, set up in 1999, was the "initial vehicle" through which Gramercy raised the capital it later used to purchase the Bonds.[39] As he further explained, GEMF actually "wasn't set up to acquire Bonds" and the "purpose of [GEMF] was not to invest in Peruvian Bonds," but rather "to do diversified investing in emerging markets."[40] When raising client funds through GEMF, Gramercy did not disclose that their money might be used to acquire Peruvian Land Bonds.[41]

28. Mr. Lanava likewise confirmed that the US$33 million GPH used to acquire the alleged Bonds was raised from Gramercy clients, via GEMF.[42] In fact, GPH needed to receive a wire transfer from GEMF for each Bond purchase:

> Q. [T]his happened with each transaction; right? . . . [T]here was no capitalization of $33 million in 2006. GPH, to begin with, had an empty bank account and then over time, as GPH needed money for each Bond acquisition, it received a wire transfer from GEMF; right?
>
> A. That's correct. When . . . GPH was originally established, it didn't have any money. [redacted]. . . . It ultimately received capital from its parent, [GEMF], and then made investments into Land Bonds locally in Peru. And, as I stated, it did this over time, so the very first transfer from GEMF would have been the first money that would have hit [redacted] account for GPH.
>
> ....

[35] *See, e.g.*, Hr'g Tr. 47:8-48:16 (Day 1) (Gramercy Opening).

[36] *See, e.g.* Statement of Rejoinder, Section III.C.

[37] *See, e.g.*, Hr'g Tr. 704:3-14 (Day 2) (Lanava Cross).

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

[39] Hr'g Tr. 422:10-14, 423:1-9 (Day 2) (Koenigsberger Cross).

[40] Hr'g Tr. 423:4-9 (Day 2) (Koenigsberger Cross).

[41] Hr'g Tr. 531:11-532:12 (Day 2) (Koenigsberger Cross).

[42] *See, e.g.*, Hr'g Tr. 715:7-22 (Day 2) (Lanava Cross) ("Q. [T]hat's where the capital needed to buy the Bonds came from; right? Gramercy raised it from its various third-party clients? A. [redacted] [GEMF], [redacted] [GEMF] [redacted] Gramercy used the money it raised from its clients to purchase the Bonds – right? – at a total purchase price you have in your Statement of roughly $33.2 million? A. So, [redacted] GEMF, [redacted] GEMF [redacted] [GPH] [redacted] [redacted] GPH [redacted]. . . .").

MR. DRYMER: [T]o sum up your discussion . . . GEMF would inject capital into GPH. Over time, is it correct to say 'as and when needed' for specific Bond purchases by GPH?

A. It is safe to say that . . . .[43]

29. Like GPH, Claimant GFM also did not contribute capital (or anything else) to the Bond acquisitions; in fact, GFM was not even formed until after the 2006-2008 purchases. Thus, from the outset, Gramercy has merely been gambling with other people's money, with no "investment" of its own within the meaning of the Treaty.

2. Testimony Confirmed That Gramercy Sold Bond Interests To Third-Party Beneficiaries

30. While acquiring Bonds with its clients' money, Gramercy set up an extended structure involving additional Gramercy entities and third-party funds in order to sell interests in the Bonds to thousands upon thousands of investors. Mr. Lanava explained that, "*[o]f course*, Gramercy set up other 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."[44] Indeed, this was the Gramercy plan from the outset. A 2005 Gramercy pre-acquisition diligence checklist covered during Mr. Lanava's testimony included, among other items, "Financial Product Structuring" to "facilitate . . . trading" in the Bonds.[45]

31. The Gramercy structure evolved over time; the underlying aim of selling products to clients – and generating management fees – did not. As shown in organizational charts produced by Gramercy, together with the testimony of Mr. Lanava, principal features of the structure include:[46]

- Claimant GPH, the alleged title holder of the Bonds, is wholly owned by Cayman Island entity Peru Agrarian Reform Bond Company, Ltd. ("PARB").
- PARB has [redacted] direct owners. [redacted] are Cayman Island entities: [redacted] and [redacted] The [redacted] is [redacted] which is wholly owned by the UK entity [redacted]
- [redacted][47]

[43] Hr'g Tr. 725:4-21, 726:7-12 (Day 2) (Lanava Cross); *see also, e.g.*, Lanava I ¶¶ 11-12 (CWS 5); [redacted]

[44] Lanava ¶ 20 (emphasis added); *see also* Hr'g Tr. 706:8-18, 708:3-4 (Day 2) (Lanava Cross) (explaining that referenced written testimony is "a way to say that Gramercy's clients made an investment in the economic interest of the Land Bonds through these other entities," and that "other folks came and got invested in these along the way").

[45] Gramercy, "Check List of Items to Cover in Our Due Diligence" (Doc. R-1095); *see also* Hr'g Tr. 674:7-677:16 (Day 2) (Lanava Cross) (testimony regarding Doc. R-1095).

[46] *See, e.g.*, [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY]; [redacted] DESIGNATED CONFIDENTIAL BY GRAMERCY]. [redacted] Hr'g Tr. 710:5-11.

[47] *See, e.g.*, Hr'g Tr. 749: 5-11 (Day 2) (Lanava Cross) ("And what those [upstream] entities are, are the investors into the [redacted] and, again, we don't know who the ultimate investors in those funds are. It's likely that there are pension funds and there are hundreds of thousands of teachers and firemen and policemen that are invested

32. The many third parties who invested, directly or indirectly, in Gramercy's "investment products" are the ultimate beneficiaries of the Bonds – *not* Claimants. Mr. Lanava confirmed that these third parties hold the economic interest in the underlying Bonds:

> Q. You've testified in your written testimony that Gramercy's clients are the ultimate beneficiaries of Gramercy's Bonds; right?
>
> A. The ultimate beneficiaries, correct. They will have the economic interest in the underlying Land Bonds.
>
> ….
>
> Q. [W]e're talking about these thousands of entities and individuals that now have an interest in the Bonds. They have that interest because they invested in Gramercy; correct? This is a structure set up by Gramercy. They invested in Gramercy. That's how these beneficial owners have an interest in the Bonds.
>
> A. That's correct.[48]

33. Mr. Koenigsberger likewise confirmed – on examination by Gramercy's own counsel – that third parties, not Gramercy, hold the economic interest in the Bonds:

> Q. Whose investment do you think you are managing? Is this Gramercy's investment?
>
> A. Predominantly, the investment is for the underlying investors and funds that have economic interest in the Bonds.[49]

34. Thus, rather than affirm (as counsel plainly intended) that the Bonds are "Gramercy's investment," Mr. Koenigsberger instead underscored the predominant interests of third parties. In fact, "predominant" is an understatement: Gramercy's documents reveal, and testimony confirmed, that its clients (and clients of clients) hold greater than a ***99%*** beneficial ownership interest in the Bonds.[50]

3. Testimony Confirmed That Gramercy Holds Only A *De Minimis* Interest In The Bonds, While Generating Fees Based On Its Own Invented Valuations

35. In comparison to the third parties who beneficially own the vast majority of the Bonds, Claimants GPH and GFM hold a *de minimis* interest, at best. GPH is an investment vehicle which Gramercy "[c]reated for the sole purpose" of owning the Bonds.[51] GPH ultimately stands to gain (or lose) nothing from its alleged title to the Bonds. It relied entirely on client funds to acquire its holdings. And its Operating Agreement provides that any "profits and losses shall be allocated to the Member" – *i.e.*, its sole owner, PARB – and that all distributions likewise are to be made "to the Member."[52] In fact, as Mr. Lanava

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in those funds."); [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY].

[48] Hr'g Tr. 747:7-12, 769:2-9 (Day 2) (Lanava Cross); *see also, e.g.*, Koenigsberger Rebuttal ¶ 28 ("All of these presumably many thousands of people and entities are in some sense beneficial owners in that they stand indirectly to derive an economic benefit from monetization of Gramercy's investment in the Land Bonds.").

[49] Hr'g Tr. 626:12-16 (Day 2) (Koenigsberger Redirect).

[50] *See, e.g.*, [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY]; Hr'g Tr. 756:16-20 ("Q. According to this chart, that's the totality of GFM's beneficial interest in the Bonds, right, [redacted]percent? A. Through [redacted]Well, yeah, I guess looking through, correct.").

[51] *See, e.g.*, Hr'g Tr. 704:9-14 (Day 2) (Lanava Cross).

[52] GPH Amended & Restated Operating Agreement, 31 Dec. 2011, Arts. 2, 8 (Doc. CE-165). The same provisions were included in GPH's original Operating Agreement. *See* GPH Operating Agreement, 17 Apr. 2006, Arts. 2, 8.

explained, "[w]hen and if Gramercy monetizes its Land Bonds investment – whether through a settlement with Peru or through an award in this arbitration – the proceeds will be distributed by PARB *exclusively* to the [redacted] existing owners of PARB."[53] Thus, in the event that Gramercy is somehow able to monetize its Bond claims, any proceeds will be passed from GPH to PARB – and, from there, further up the chain of ownership to the many thousands of beneficial owners who hold interests through the Gramercy structure.[54]

36. GFM, the investment manager of GPH, likewise stands to gain very little (or to lose nothing) based on GPH's Bond holdings. GFM does not hold title and made no contribution whatsoever to the Bond acquisitions; it was not even formed until after the 2006 to 2008 purchases were complete.[55] GFM is expressly insulated from liability in connection with its management of GPH (and, by extension, the Bonds).[56] After being inserted into the structure years later, GFM holds a mere [redacted]**%** beneficial interest in the Bonds, via indirect holdings in PARB.[57] By comparison, Mr. [redacted] holds a [redacted] times greater interest, and thus a greater financial interest in the outcome of this case than either Claimant.[58]

37. Mr. Koenigsberger's testimony further confirmed that GFM's true interest lies instead in the management fees it has charged to third parties – based on Gramercy's own Bond valuations over time – along with possible future performance-based fees:

> Q. And how are those management fees calculated?
>
> A. Management fees are typically calculated on the amount of assets that are managed.
>
> Q. Okay. And so, would your management fee be based on a valuation of the Agrarian Bonds?
>
> A. In part.
>
> Q. Okay. So, under the management fee approach, the calculation of the valuation of the Bonds, in turn, determines the management fee to which Gramercy is paid; is that correct?
>
> A. Yes.
>
> ….
>
> Q. Does Gramercy use performance-based compensation as well?
>
> A. Yes, we do.

(Doc. CE-454). Mr. Lanava, who testified to the Gramercy structure and had introduced various corporate documents with his written statements, repeatedly testified that he could not speak to the meaning of the documents. *See, e.g.*, Hr'g Tr. 729:5-15, 744:1-9 (Day 2) (Lanava Cross). The documents, however, speak for themselves.

[53] Lanava II ¶ 10 (CWS-11) (emphasis in original).

[54] *See, e.g.*, Hr'g Tr. 738:6-10 (Day 2) (Lanava Cross) ("PRESIDENT FERNÁNDEZ ARMESTO: I have understood that these are special type of – 'special purpose vehicles,' where profits necessarily flow 100 percent from the subsidiary to the parent. That's where I stand to now as to my understanding of the corporate structure.").

[55] *See, e.g.*, Hr'g Tr. 738:21-739:1 (Day 2) (Koenigsberger Cross) ("Q. GFM doesn't hold title to any of the Bonds; right? A. No."); *id.* 741:11-20 (confirming that GFM was substituted into the Gramercy structure in 2011).

[56] *See, e.g.*, Amended Operating Agreement of GPH, 31 Dec. 2011 (CE-165), Arts. 3.3, 5; Hr'g Tr. 743:12-744:9 (Day 2) (Lanava Cross).

[57] *See, e.g.*, [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY]; Hr'g Tr. 756:16-20 ("Q. [T]hat's the totality of GFM's beneficial interest in the Bonds, right, [redacted] percent? A. Through [redacted] Well, yeah, I guess looking through, correct.").

[58] *See, e.g.*, [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY]; Hr'g Tr. 757:8-22 (Day 2) (Lanava Cross). [redacted] *See, e.g.*, Hr'g Tr. 761:2-8 (Day 2) (Lanava Cross).

Q. Okay. And does that typically range from 10 to 20 percent of annual capital appreciation?

A. Yes.

Q. Okay. And is performance-based compensation part of the way that the Gramercy entities before this Tribunal either make money or stand to make money in connection with the Agrarian Reform Bonds?

A. Yes.[59]

38. Thus, having made no contribution to the acquisition of the Bonds, GFM has earned management fees from its clients for years based on Gramercy's own internal Bond valuations (far exceeding the initial purchase price), and stands to generate a further performance-based fee if the Bonds are monetized.[60] Notably, while Mr. Koenigsberger acknowledged that performance-based compensation is typically in the range of 10 to 20 percent – confirming information in a publicly-available GFM brochure – Gramercy redacted the fee provisions in each and every investment management agreement it produced in this proceeding.[61] Neither Peru nor the Tribunal can know the full extent of the fees GFM has made, or stands to make, from the Bonds' ultimate beneficiaries.

D. Gramercy Admitted That It Engaged In A Long-Running Attack Campaign To Pressure Peru To Resolve The Preexisting Dispute

39. At the hearing, Gramercy claimed in its opening that, after its Bond acquisitions, Gramercy "held out its hand to work with Peru to reach a productive solution to this decades-old debt."[62] Mr. Koenigsberger similarly testified that Gramercy had sought to "aggregate" Bond claims as an "anchor block," and to engage in a constructive "dialogue" with Peru to "catalyze" a "productive" and "consensual resolution" to the Bond "problem."[63] Even accepting such statements at face value, they merely underscore that Gramercy had bought into a preexisting domestic dispute – without which, there would be no need for the solutions that Gramercy purportedly sought to provide.

40. In reality, the record shows that Gramercy's strategy as to the Bonds always featured a multifaceted effort to politicize the dispute and push for changes in Peruvian law; to damage Peru in the eyes of partner States, international organizations, and markets; and to pressure Peru into an exorbitant settlement, including under threat of Treaty claims.[64]

41. As Gramercy's documents reveal, this was its plan from the outset. Its due diligence memorandum, prior to any Bond acquisition, highlighted a "parallel strategy" involving a "transactional solution, negotiating a settlement with the government of Peru; and

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[59] Hr'g Tr. 398:20-400:9 (Day 2) (Koenigsberger Cross); *see also id.* 566:9-16 ("Q. When these valuations were inflated over time or went up over time, did Gramercy receive additional funds based on these changing valuations? A. Yes. We may have."); GFM Brochure, 29 Mar. 2018, at 6 (Doc. R-540).

[60] *See, e.g.*, Hr'g Tr. 773:10-14 (Day 2) (Lanava Re-Cross) ("Q. So essentially GFM has exposure to all upside. It makes money if the investment performs well or not, and then if the investment performs well, it makes even more money; right? A. Possibly.").

[61] *See, e.g.*, Hr'g Tr. 774:1-8; *see also* Docs. CE-524, CE-538, CE-539, CE-551, CE-571, R-1054, R-1055.

[62] Hr'g Tr. 27:21-28:1 (Day 1) (Gramercy Opening).

[63] *See, e.g.*, Hr'g Tr. 470:10-17, 622:2-6, 622:13-17, 651:11-14, 654:21-655:7 (Day 2) (Koenigsberger Direct, Redirect).

[64] *See, e.g.*, Republic of Peru, Opening Statement, at 7-9; Statement of Rejoinder, Section IV.B.2.e; Statement of Defense, Section II.F; Submission of the Republic of Peru on Procedural Safeguards, Section III; Second Submission of the Republic of Peru on Procedural Safeguards, Section III.

a judicial track demanding payment."[65] On the "transactional path," that same memo saw "good value" in lobbying timed to leverage the Peruvian election cycle to manipulate the law in Gramercy's favor.[66] In the years that followed, as the initial memo prescribed, Gramercy implemented its parallel strategy of lobbying and propaganda, on one hand, and lawsuits, on the other, to pressure Peru. Indeed, far from "holding out its hand to work with Peru," Gramercy told its investors that "[t]hese parallel strategies, negotiations and litigation, will *increase the pressure on the government* to try to resolve these claims."[67] Gramercy has never offered a response to these (and other) documents illustrating its true intentions.

42. Gramercy's attack campaign against Peru, and attendant aggravation of the dispute and abuse of this Treaty proceeding, is thoroughly documented. At the hearing, as throughout the proceeding, Gramercy did not deny the campaign – and, in fact, its Chief Financial Officer specifically confirmed certain elements. For example:

- **Lobbying.** Gramercy spent over US$ 3.8 million on lobbying, resulting in politicization of the dispute, the dissemination of misinformation, and attempts to interfere in Peru's attorney-client relationship.[68] As Minister Castilla, the former Ambassador of Peru to the United States, confirmed in hearing testimony, Gramercy's objective was to harm Peru's image and the bilateral relationship between Peru and the United States.[69] Mr. Joannou confirmed Gramercy's payments to lobbyists, as also reflected in public disclosure forms.[70]

- **Negative Reports.** Gramercy hired experts to issue reports attacking Peru outside of this proceeding to harm its reputation and standing before the US Securities and Exchange Commission, the IMF, and the OECD, among others.[71] Mr. Joannou confirmed Gramercy's payments to such experts.[72]

- **Negative Ratings.** Gramercy procured negative reports from less-regarded ratings agencies Egan Jones and HR Ratings, again with the aim of prejudicing Peru's sovereign finance.[73]

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

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

[67] [redacted]DESIGNATED CONFIDENTIAL BY GRAMERCY]; *see also, e.g.*, [redacted][DESIGNATED CONFIDENTIAL BY GRAMERCY].

[68] *See, e.g.*, Statement of Rejoinder ¶ 305; Republic of Peru, Opening Statement at 7-9 (H-2); Peru Letter to the Tribunal, 21 May 2020 (R-82).

[69] Hr'g Tr. 1181:4-20 (Day 4) (Castilla Direct) ("I returned as ambassador, at a moment when there was a very deep and positive relationship with the Government of the United States. And unfortunately, I must say, this relationship was mitigated by or made more negative by a hostile relationship with the Gramercy Fund, indirectly or directly, through lobbying and a lot of pressure brought to bear through authorities of the – with respect to authorities of the Executive and Legislative Branches of the United States with a twofold objective: One, to harm the image of Peru, and second, to harm the bilateral relationship between Peru and the United States. Therefore, my recollection during a time that I think was quite positive, my time as Ambassador of Peru, was nonetheless darkened somewhat by this experience.").

[70] Hr'g. Tr. 804:17-21 (Day 2) (Joannou Cross).

[71] *See, e.g.*, Statement of Defense ¶ 132; Republic of Peru, Opening Statement at 7-9 (H-2).

[72] Hr'g. Tr. 803:12-19 (Day 2) (Joannou Cross).

[73] *See, e.g.*, Statement of Defense ¶ 132.

- **Bondholder Organizations.** Gramercy created, infiltrated, and aligned the messaging of purportedly distinct bondholder organizations, disseminating harmful misinformation about Peru in the United States, Peru, and elsewhere.[74] Mr. Joannou confirmed Gramercy's payments to such organizations.[75]

- **Propaganda.** Gramercy distributed false propaganda against Peru which has been cited by numerous alleged stakeholders, including pension funds and others with connections to Gramercy.[76] Mr. Koenigsberger acknowledged that Peru had not marketed its Bonds to pension funds or American workers, though such Gramercy clients have featured prominently in its campaign against Peru.[77]

43. Throughout its international attack campaign, Gramercy also wielded something unavailable to any Peruvian holder of Bonds: the threat of international arbitration under the Treaty. In fact, Gramercy formed Claimant GPH – the vehicle through which it acquired its Bond claims – mere days after the Treaty was signed,[78] and Gramercy has specifically represented that it viewed the Treaty as a "valuable safety net" that was "essential" to its acquisitions.[79] Thus, at the same time that Gramercy told clients that it would use litigation to "increase pressure on the government," Gramercy repeatedly invoked the Treaty in communications to Peru, years before initiating this arbitration.[80]

44. On the last day of the hearing, Gramercy once again purported to defend its abusive campaign.[81] Gramercy repeatedly has declined to respect the Treaty mechanism which the United States and Peru established, or even to respect the role of counsel and the attorney-client relationship, in gross disregard of the Treaty proceeding as well as professional ethics.[82] Gramercy's misconduct reeks of weakness. Following the exchange of

[74] *See, e.g.*, Statement of Defense ¶ 132.

[75] Hr'g. Tr. 799:16-22 (Day 2) (Joannou Cross).

[76] *See, e.g.*, Statement of Defense ¶ 132; Republic of Peru, Opening Statement at 8-9 (H-2).

[77] Hr'g Tr. 532:19-533:1 (Day 2) (Koenigsberger Cross) ("Q. Now, you would agree, wouldn't you, Mr. Koenigsberger, that the Peruvian State never went to United States pension funds or American workers and marketed Agrarian Land Bonds to them; is that correct? A. That's probably correct."); *see also, e.g.*, Hr'g Tr. 747:7-12, 769:2-9 (Day 2) (Lanava Cross) ("Q. [W]e're talking about these thousands of entities and individuals that now have an interest in the Bonds. They have that interest because they invested in Gramercy; correct? This is a structure set up by Gramercy. They invested in Gramercy. That's how these beneficial owners have an interest in the Bonds. A. That's correct.").

[78] *See, e.g.*, GPH Certificate of Formation, 17 Apr. 2006 (Doc. CE-455).

[79] *See, e.g.*, Koenigsberger Reply ¶ 35 (stating that "of 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"); Second Amended Koenigsberger ¶ 24 (affirming that the signing of the Treaty "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"); Third Amended Statement of Claim ¶ 187 (stating that the Treaty was among "specific and general assurances . . . essential in Gramercy's decision to purchase the Land Bonds").

[80] *See, e.g.*, Gramercy Letter to Peru, 1 Sept. 2010 in Conciliation Proceeding No. 547-2010, at 21 (Doc. R-266) ("[T]his document hereby communicates to the Peruvian State that the [Bonds] constitute a 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."); Gramercy (R. Koenigsberger) Letter to President of the Council of Ministers, 31 Dec. 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 [Treaty], international law, and Peruvian legislation").

[81] Hr'g Tr. 2596:1-2597:2 (Day 7) (Gramercy Comments).

[82] Hr'g Tr. 2592:16-2594:3, 2599:2-3 (Day 7) (Peru Comments) ("We're inside the stadium now. Peru ratified a Treaty to create a rules-based system to resolve problems like this. . . . So, I would like to invite Gramercy, on behalf of the Republic of Peru, let's have a little bit of order here. Let's put down the lobbying process that has persisted despite the Tribunal Orders. . . . [W]e are here acting in good faith – not all States do that – having a

the Parties, the President of the Tribunal affirmed that the dispute is to be resolved in the Treaty "arena," and admonished against any further lobbying, among other measures:

> This is a legal case. And so, I would – I think that lobbying should not continue. . . . And so, I can only repeat what we have already said: Let's all focus on this case. It is complicated enough. Let's fight it in the proper arena, which is the arena of the law of justice, and treat this as the proper way of solving this problem. . . . [W]e have to go through this procedure, and the best way to go along this procedure is just keeping no – not speaking to the press, not making press releases, no lobbying, and certainly that – I say with absolute emphasis – is no interference in the relationship between a law firm and its clients. That is manifestly improper.[83]

45. Nonetheless, recently publicized lobbying forms indicate that, in the first quarter of 2020, Gramercy paid four different firms a total of US$460,000 to lobby multiple branches and agencies of the U.S. Government.[84] This amount exceeds all other quarterly totals which Gramercy previously paid to its U.S. lobbyists since it filed this arbitration. In this context, recent statements in Washington, D.C. continue to refer to this dispute and to alleged U.S. pension fund investors in the Bonds, and reiterate various Gramercy talking points – the same kind of messaging that Gramercy plastered on a billboard before Congress even as it acquired more Bonds in 2017. Peru refrains from further comment out of respect for the Non-Disputing Party and its officials. That such statements continue to circulate attests to the lasting prejudicial impact of Gramercy's campaign. It is not a mere nuisance; it is a microcosm of the abuse that permeates, undermines, and invalidates this proceeding.

E. Gramercy Admitted That It Made Secret Bond Acquisitions Amidst The Arbitration And Attack Campaign

46. In a striking hearing moment, as detailed in Peru's 2 March 2020 Petition, Mr. Koenigsberger revealed for the first time that Gramercy undertook a secret deal in 2017 to acquire more Bonds – at the same time that it was pursuing this arbitration alleging that Peru had "destroyed" all value in the Bonds, and an attack campaign plagued with inaccuracies. Thus, even as mobile billboards drove around Washington, D.C., declaring that "Peru Defaults" and "American Workers Pay the Bill," Gramercy decided it was a "good investment" to buy more Peruvian Bonds – again paid with money from pension funds and other Gramercy clients.[85] Gramercy kept this hidden from Peru and the Tribunal for years.

47. Following these belated disclosures, the Tribunal noted that Gramercy had repeatedly represented post-2017 that its last Bond acquisitions were in 2008, and ordered Gramercy to produce several categories of previously withheld documents regarding Tranche 2.[86] In response, Gramercy produced a mere four documents. Even that paltry production, together with the testimony of Gramercy executives, is revealing across a

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Hearing, providing documents, participating in this case, and let's treat each other respectfully. Let's treat each other reasonably. Let's finish this case. Let's let the Tribunal do its job, but, really, these examples of aggravation, again, they are too far. They are too far. . . . We consider this literally to impact the validity of this proceeding.").

[83] Hr'g Tr. 2600:16-2603:2 (Day 7).

[84] *See, e.g.*, Peru Letter to the Tribunal, 21 May 2020 (R-82).

[85] *See, e.g.*, Hr'g Tr. 496:19-497:14, 499:19-22, 509:18-510:6, 531:19-532:18, 513:1-10 (Day 2) (Koenigsberger Cross).

[86] Procedural Order No. 11, 16 Apr. 2020.

multitude of issues – and further repudiates Gramercy's case on jurisdiction, the merits, and damages.[87] With respect to jurisdiction, the Tranche 2 testimony and documents reinforce:

- **Gramercy continued to acquire claims in a preexisting dispute.** Much as with Gramercy's 2006 to 2008 purchase contracts, the Tranche 2 assignment agreements confirm that the Bonds were subject to prior litigation in Peruvian courts, and transfer "rights for collecting" and "associated, litigious, or expectative rights."[88] Thus, there can be no doubt that Gramercy was acquiring claims in a preexisting dispute, even after it had commenced arbitration.

- **Gramercy used client money (even without informing its clients) and sold interests to third parties.** As with Gramercy's earlier acquisition and sale of Bond claims, the 2017 investment committee memorandum confirms that Gramercy's "participating investors" provided the "purchase proceeds" (a total of US$15 million), plus millions more in additional "transaction and operating expenses."[89] The Tranche 2 purchase agreement likewise confirms the existence of "ultimate beneficial owners . . . including, without limitation, U.S. pension funds" invested in Gramercy.[90]

- **Gramercy's strategy was to pressure Peru to settle the preexisting dispute.** By the time of the 2017 transaction, Peru had established the Bondholder Process for the final payment of Bonds. Nonetheless, Gramercy must have persuaded the holder of Tranche 2, a Peruvian entity, that it stood to gain more by selling the Bonds to Gramercy and retaining a partial interest in a possible settlement.[91] Mr. Koenigsberger testified that Gramercy acquired Tranche 2 to further "aggregat[e] a position to be able to anchor a settlement."[92] And the purchase contract refers to "monetization" scenarios that include a "settlement agreement with the Republic of Peru," as well as "litigating a claim or claims."[93]

- **Gramercy's strategy included leveraging the Treaty.** Once again, Gramercy plainly intended to leverage a Treaty arbitration or threat of Treaty claims – and appears to have led the seller to believe that this would result in a greater payout. The purchase agreement represents that "Buyer and its manager [GFM] would each qualify as an 'investor of the United States' in Peru and their investment in the Bonds would qualify as 'investment' under the TPA and thus would be

[87] Peru will address merits and damages implications of the Tranche 2 Bonds in its next post-hearing submission.

[88] *See, e.g.*, Assignment Agreement, Exhibit A to Purchase and Sale Agreement, 27 Apr. 2017 (Doc. H-19).

[89] Gramercy, Investment Committee Memorandum, 25 Apr. 2017 (Doc. H-17); *see also* Minutes of Investment Committee Meeting, 25 Apr. 2017 (addressing proposal for Tranche 2 acquisitions to be made "by various funds and accounts for which Gramercy serves as investment manager") (H-18); Hr'g Tr. 507:18-508:4; 512:16-513:10 (Day 2) (Koenigsberger Cross).

[90] Purchase and Sale Agreement, 27 Apr. 2017, at 2 (Doc. H-19); *see also, e.g.*, Hr'g Tr. 512:16-513:10 (Day 2) (Koenigsberger Cross). .

[91] The purchase agreement provides that the Seller would be paid 62.5% of "Net Monetization Proceeds" up to $25 million, and "thereafter, 15% of such Net Monetization Proceeds." Purchase and Sale Agreement, 27 Apr. 2017, Section 1.3 (Doc. H-19). The assignment agreements state that the "Seller is a Peruvian *sociedad anonima cerrada* duly organized, validly existing and in good standing under the Laws of the [sic] Peru," and the original holder of the Tranche 2 Bonds. Assignment Agreement, Exhibit A to Purchase and Sale Agreement (Doc. H-19).

[92] Hr'g Tr. 651:3-652:4 (Day 2) (Koenigsberger Redirect); *see also id.* 604:20-605:1 (Koenigsberger Cross) ("We'd like to be able to – what we've tried to do with all our Bonds, which is to be able to sit down with the Republic of Peru and have a consensual resolution").

[93] Purchase and Sale Agreement, 27 Apr. 2017, Section 1.3 (Doc. H-19).

protected by the TPA's substantive and procedural provisions."[94] The agreement further states that GFM and its affiliates "have engaged in discussions with the Republic of Peru and its counsel regarding their arbitration claims" as to Tranche 1, and that Gramercy thus may "possess information not known to Seller regarding the Republic of Peru and its intention with respect to the [Bonds] (the 'Excluded Information')."[95] When Mr. Koenigsberger was asked on cross-examination as to the possibility of additional Treaty claims based on the Tranche 2 Bonds, counsel objected and no answer was given.[96]

48. The Tranche 2 acquisitions thus underscore a number of significant jurisdictional flaws in Gramercy's case, as detailed below.

III. Treaty Framework For Jurisdictional Objections

49. The Treaty establishes conditions and limitations on the Contracting Parties' consent to arbitrate and on the scope of Treaty coverage. Both Contracting Parties have emphasized that "[a] State's consent to arbitration is paramount," 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."[97] It is undisputed that the Treaty must be interpreted in accordance with the Vienna Convention, including that it "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."[98] The Vienna Convention further requires that "[t]here shall be taken into account" any subsequent agreement or practice of the Contracting Parties regarding the Treaty's interpretation.[99]

50. Peru previously established that its interpretation of the Treaty, including its jurisdictional requirements, comports with the ordinary meaning of the text, properly read in context and in light of the Treaty's object and purpose.[100] Peru further established, and international law expert Professor Reisman reaffirmed at the hearing, that the submissions by Peru and the United States confirm the Contracting Parties' agreed interpretation of the Treaty across a range of issues.[101] Indeed, they share a common interpretation of the Treaty that repudiates Gramercy's various misinterpretations in virtually all relevant respects.[102]

51. Gramercy has no response to the Contracting Parties' agreed interpretation. In a misguided attempt to distract from its significance, Gramercy suggested in its examination of Professor Reisman that "not a single investment treaty tribunal" has ruled that

[94] Purchase and Sale Agreement, 27 Apr. 2017, Recital F (Doc. H-19).

[95] Purchase and Sale Agreement, 27 Apr. 2017, Section 2.1 (Doc. H-19).

[96] Hr'g Tr. 605:9-13 (Day 2) (Koenigsberger Cross) ("A. At this moment, there is – I don't know with certainty what we are going to do with those Bonds. Q. Do you have the intention of brining other Treaty-based claims, for example? MR. FRIEDMAN: Objection.").

[97] *See, e.g.*, US Submission ¶¶ 2-3.

[98] Vienna Convention, Art. 31(1).

[99] Vienna Convention, Art. 31(3).

[100] *See, e.g.*, Statement of Rejoinder ¶¶ 121, 135-139; Statement of Defense ¶¶ 166-167.

[101] *See, e.g.*, Hr'g Tr. 1842:9-16 (Day 5) (Reisman Direct) ("I noted that positions . . . expressed by the United States in its submission and expressed by the Government of Peru in its written pleadings were congruent, and that seemed to me to be something that the interpreter is entitled, if not mandated, to take into account."); *see also id.* 1857:20-1858:1; Statement of Rejoinder ¶ 8.

[102] Peru addressed the Contracting Party agreement with respect to each issue throughout its Statement of Rejoinder.

briefs submitted by a disputing Party and a non-disputing Party "taken together constitute an agreement of the Contracting Parties."[103] Professor Reisman was not fazed: "I'm not aware of it, but it doesn't shake my conviction that this is right in the circumstances."[104] In fact, in several cases in the record (among others), tribunals have taken into account an agreed interpretation by the State Parties, as evidenced through written submissions, and ruled consistently with that agreed interpretation.[105]

52. Gramercy also suggested that the Contracting Parties' agreed interpretation should only be considered if application of Article 31 of the Vienna Convention produced an "absurd" result. This, too, is flat-out wrong, as Professor Reisman explained.[106] Indeed, Article 31(3) expressly provides that any such subsequent agreement or practice "shall be taken into account, together with the context." The rule is neither permissive nor dependent on the outcome of interpretation applying other elements. It is mandatory.

53. While attempting to distract from these mandatory elements of Treaty interpretation, Gramercy has relied heavily on permissive, supplementary elements – namely, alleged facts regarding the Treaty's negotiation, viewed from the U.S. perspective.[107] Even Gramercy's expert on U.S. treaty negotiations, however, conceded that the U.S. framework did not bind Peru and that, to understand the Treaty, one cannot look to the unilateral objectives or requirements of one Contracting Party.[108] This reinforces Professor Reisman's conclusion that Treaty interpretation "is fundamentally an exercise in understanding what the Contracting Parties agreed together under the international Treaty, and not the domestic legal framework or negotiating preferences of any one Party."[109] Gramercy confirmed this conclusion during its examination of Professor Reisman, thus undermining its own case.[110]

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[103] Hr'g Tr. 1858:7-13 (Day 5) (Reisman Cross).

[104] Hr'g Tr. 1858:14-15 (Day 5) (Reisman Cross).

[105] *See, e.g.*, *Mobil Investments v. Canada*, Decision on Jurisdiction ¶ 158 (CA-142) (accounting for non-disputing Party submissions and confirming that "subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight"); *ADF v. United States*, Award ¶ 179 (CA-73) (finding it "equally important to note that Canada and Mexico accept the view of the United States" in non-disputing Party submissions); *Mondev v. United States*, Final Award ¶¶ 123-125 (RA-62); *Feldman v. Mexico*, Decision on Preliminary Jurisdictional Issues ¶¶ 39-47 (CA-111).

[106] Hr'g Tr. 1856:15-1858:6 ("Q. And would they only take account of [the Contracting Parties' agreement] if the interpretation under Article 31 of the Vienna Convention is absurd? A. No. It would be subsequent behavior of the Parties."); *id.* 1892:8-13 (Reisman Redirect) ("Q. And the provision of the Vienna Convention that tells a Tribunal – or tells an interpreter that they must take into account the subsequent agreement, or subsequent practice, is that under Article 31 of under Article 32 of the Vienna Convention? A. 31.").

[107] *See* Vienna Convention, Art. 32 (providing that permissive "[r]ecourse may be had to supplementary means of treaty interpretation," including the preparatory work or circumstances of the Treaty's conclusion).

[108] Hr'g Tr. 1339:1-1340:15 (Day 4) (Allgeier Cross) ("Q. [T]his U.S. legal framework isn't binding on the counterparty to Treaty negotiations; right? A. No, of course not. We each have our own mandates…. Q. Well, is it fair to say as a general matter that, in Treaty negotiations, each State shows up with its own objectives and its own requirements? A. That is correct. Q. And the goal ultimately is to arrive at a mutual agreement that reconciles the objectives and requirements of each side? A. That is correct. Q. And at the end of the day, the Treaty reflects what both States agree together. A. … [Y]es, and what is documented in the Agreement itself. Q. And that Agreement – it doesn't document the unilateral requirements of one State? A. No. It documents what we agreed upon.").

[109] Reisman II ¶ 7; *see also id.* ¶ 15.

[110] Hr'g Tr. 1870:12-1871:1 (Day 5) (Reisman Cross) ("Q. You would agree with me, would you not, that interpreting the Treaty is fundamentally an exercise in understanding what the Contracting Parties agreed together under the Treaty and not the domestic legal framework of any one of them? A. Yes. Q. And it would be misguided, in fact, to devote considerable attention to only the United States' perspectives in interpreting the Treaty; correct? A. Yes."); *id.* 1853:22-1854:7 ("Q. [Y]ou would agree with me that one should not interpret the text of the Treaty based on extra-textual subjectivities of one of the Contracting Parties; correct? . . . A. That's right.").

54. Indeed, as the hearing underscored, Professor Reisman is the sole expert in this proceeding qualified to interpret the Treaty. Gramercy elected not to provide a rebuttal expert on international law. Instead, it petitioned to treat Professor Reisman as if he were part of Peru's counsel team, rather than a testifying expert.[111] The Tribunal properly rejected Gramercy's baseless request.[112] As part of its failed petition, Gramercy argued that cross-examining him would be "an inefficient use of already limited hearing time."[113] Gramercy's examination lived up to its own expectations. Rather than engage with Professor Reisman on his substantive conclusions, counsel spent significant time challenging a small handful of the sources cited in his reports, taking him to a website which appeared inactive, and repeatedly quoting (without attribution) from his prior publications in a fruitless attempt to elicit contradictory testimony.[114] None of the Gramercy gimmicks worked.

55. Having opted against its own international law expert, Gramercy repeatedly sought to shoehorn other experts into the role of Treaty interpretation, well outside the scope of their expertise. This was most prominent in the reports and direct testimony of Ambassador Allgeier, who opined, *inter alia*, that the Bonds fall within the definition of "investment" under Article 10.28 of the Treaty, and that his reading was supported by the Treaty's object and purpose, negotiating history, and circumstances of conclusion.[115] In other words, even while admitting that he is not a lawyer, Ambassador Allgeier attempted to counter Professor Reisman with an alternative interpretation of the Treaty, framed according to well-established rules of treaty interpretation. In fact, Ambassador Allgeier noted that he was "instructed" how a "treaty must be interpreted"; those instructions tracked nearly verbatim, without quotation or attribution, the Vienna Convention on the Law of Treaties.[116]

56. On cross-examination, Ambassador Allgeier confirmed that he was not qualified to interpret the Treaty, and could only offer perspectives on U.S. trade agreement negotiations.[117] He also confirmed that he was entirely unfamiliar with the rules of treaty interpretation that had been set forth in his report and framed his analysis:

> Q. So when you say here 'I am instructed' and you say now that you received assistance, that was from Gramercy, they instructed you what to say here?
>
> A. On this part of it. . . . I assumed that this was basic language that was put in submissions in order to fit with the way Tribunals are conducted.
>
> Q. Well, those instructions sound a lot like the rules of treaty interpretation under international law, don't they?
>
> A. No, I don't think so.
>
> Q. Okay.
>
> A. I think it is more of an editing instruction.

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[111] *See* Gramercy Letter to the Tribunal, 6 Dec. 2019 (C-72); Gramercy Letter to the Tribunal, 20 Dec. 2019 (C-77).

[112] *See* Letter from Tribunal to the Parties, 10 January 2020 (affirming that "Prof. Reisman has been presented as an expert witness in international law," and that the "Tribunal finds no reason to alter such status at this late stage").

[113] Gramercy Letter to the Tribunal, 6 December 2019 (C-72) at 4.

[114] *See, e.g.*, Hr'g Tr. 1852:9-1853:1, 1865:11-1867:6, 1868:3-21, 1874:16-1875:12, 1880:2-1881:6 (Day 5) (Reisman Cross).

[115] *See, e.g.*, Hr'g Tr. 1318:20-1319:7, 1322:7-21, 1324:20-1325:8, 1326:11-20 (Day 4) (Allgeier Direct); *see also* Allgeier I (CER-7) at 11, 17, 19 (framing conclusions under headers including "Scope of Protected 'Investment' in the [Treaty]," "Object and Purpose of the [Treaty]," and "Background to Negotiations").

[116] *See* Allgeier ¶ 11; *see also* Hr'g Tr. 1336:8-1337:8 (Day 4) (Allgeier Cross).

[117] Hr'g Tr. 1333:2-19 (Day 4) (Allgeier Cross) ("As I say, that is not part of my job. . . . I do just want to address what we were trying to do in the negotiations.").

Q. Okay. Those instructions don't track the Vienna Convention on the Law of Treaties?

A. I am not familiar with the Vienna Convention on the Law of Treaties.[118]

57. Even with respect to U.S. perspectives, moreover, Ambassador Allgeier's testimony fell short. In his report, he had stated that he was "thoroughly familiar with the U.S. Government's understanding and intention of the coverage and obligations of its free trade agreements and bilateral investment treaties."[119] He affirmed that representation on cross-examination – but then proved unfamiliar with the U.S. Submission in this case, which articulates the U.S. Government's understanding of the particular coverage and obligations of this Treaty.[120] In fact, the Ambassador's second report, filed five months after the U.S. Submission, made no mention of it. And, at the hearing, he erroneously suggested that the Submission does not reflect the position of the United States.[121] That plainly is not the case.[122]

58. Gramercy similarly had attempted to shoehorn Professor Olivares-Caminal, its sovereign debt expert, into a Treaty interpreting role. In his reports, he purported to rebut Professor Reisman's legal conclusions, including by repeatedly opining that the Bonds constitute a protected "investment" under the Treaty.[123] At the hearing, however, Professor Olivares-Caminal insisted that he was merely "provid[ing] context to the ordinary meaning of certain terms" in the Treaty, and confirmed that he was not qualified to interpret the Treaty.[124]

59. Accordingly, Professor Reisman's conclusions regarding the Treaty and the Gramercy's failure to meet its jurisdictional requirements remain unrebutted, by expert testimony or otherwise. Indeed, they are fully supported by the Treaty, the Contracting Parties' shared interpretation of the Treaty, and other relevant authorities, as detailed below.

IV. Jurisdictional Objections Confirmed At The Hearing

A. Gramercy Is Abusing The Treaty

60. A treaty claim must fail on abuse grounds when the alleged investment was acquired in view of a preexisting or foreseeable dispute, as previously detailed.[125] Among other authorities, *Phoenix Action v. Czech Republic* remains particularly relevant for its dismissal of claims where the "alleged investment was *not made in order to engage in*

[118] Hr'g Tr. 1336:8-1337:8 (Day 4) (Allgeier Cross).

[119] Allgeier ¶ 3.

[120] Hr'g Tr. 1342:15-22, 1344:17-22 (Day 4) (Allgeier Cross).

[121] Hr'g Tr. 1349:3-9 (Day 4) (Allgeier Cross) ("Q. That's the position of the U.S. Government in this case? A. No – Q. Yeah. A. – it is the position of the United States Department of State in the L Bureau. That's who signed it."); *see also id.* 1348:21-22 ("A. This is a description by the Department of State.").

[122] The U.S. Submission, captioned "Submission of the United States of America," was filed pursuant to Article 10.20.2 of the Treaty, which provides for submissions by a "non-disputing Party" (here, the United States of America) "regarding the interpretation of this Agreement."

[123] *See, e.g.*, Olivares ¶ 17 (stating that the Bonds "clearly . . . meet the definition of 'investment" and are "[p]rotected [i]nvestments [u]nder the [Treaty]"); *id.* at 9 (Heading: "The Land Bonds Are Protected Investments Under the [Treaty]"); *see also id.* ¶ 19 ("I conclude that the Land Bonds clearly meet the Treaty's definition of investment according to the ordinary meaning of its terms . . . .").

[124] *See, e.g.*, Hr'g Tr. 1479:15-19 (Day 4) (Olivares-Caminal Direct); *id.* 1484:19-21 ("[B]y no means I'm trying to interpret the Treaty; I'm just trying to give context to these terms"; *id.* 1501:7-1502:6 (Olivares-Caminal Cross) (stating "I'm not claiming an expertise on public international law" and "I will not try to interpret the Treaty").

[125] *See, e.g.*, Republic of Peru, Opening Statement, at 79-84; Statement of Rejoinder ¶¶ 24-44; Statement of Defense ¶¶ 189-194.

national economic activity, [but] was made solely for the purpose of getting involved with international legal activity," and thus the "unique goal of the 'investment' was to *transform a pre-existing domestic dispute into an international dispute* subject to ICSID arbitration."[126]

61. As Professor Reisman opined, "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."[127] At the hearing, Professor Reisman ratified his conclusion that Gramercy's claims constitute an abuse and, accordingly, must be dismissed.[128] Notably, Gramercy chose not to cross-examine Professor Reisman with respect to any of these conclusions. Indeed, the written record and hearing testimony make clear that Gramercy's claims are an abuse of the Treaty and must be dismissed.

- **Gramercy acquired Bond claims already burdened by a domestic dispute.** Gramercy's own due diligence memorandum, purchase contracts, and other documents highlighted that Gramercy acquired "legacy claims" as to Bonds that were the subject of a longstanding dispute in Peru, including years of local litigation by bondholders and ongoing disagreement in the political branches. As Mr. Koenigsberger testified, Gramercy acquired Bonds that were worthless on their face as a "distressed" asset, and "took over" claims already pending in Peruvian court. Gramercy did so precisely because it thought it could profit from that domestic dispute. Thus, the essence of Gramercy's case – a dispute over Bond valuation and payment – was the very reason for its alleged investment.[129]

- **Gramercy allegedly intended to "catalyze" a resolution of the dispute.** Even according to Gramercy's hearing argument and Mr. Koenigsberger's testimony that Gramercy sought to offer a "hand" to Peru to "catalyze" a "consensual resolution" to the Bond "problem," it is evident that Gramercy acquired Bonds already embroiled in a dispute. Indeed, absent the protracted, decades-old dispute as to the Bonds – with no resolution yet established, either through action in Peruvian courts or the Peruvian political process – there would be no Bond "problem" for Gramercy to seek to resolve.[130]

- **Gramercy leveraged the dispute and the Treaty to pressure Peru.** In any event, Gramercy did not catalyze a resolution, or in fact play any cooperative or productive role. Nor did Gramercy engage in any economic activity in Peru. Instead, Gramercy engaged in a multifaceted attack campaign *against* Peru to

[126] *Phoenix Action, Ltd. v. Czech Republic*, Award, ¶ 142 (RA-100) (emphases added); *see also, e.g.*, *Philip Morris v. Australia*, Award on Jurisdiction and Admissibility, ¶ 539 (RA-140) (canvassing jurisprudence and ruling that "a dispute is foreseeable when there is a reasonable prospect . . . that a measure which may give rise to a treaty claim will materialise," and also that "an abuse of right might also exist . . . in respect of an existing dispute").

[127] Reisman II ¶ 49 (emphasis in original); *see also, e.g.*, Reisman I ¶ 85.

[128] Hr'g Tr. 1843:16-1844:2 (Day 5) (Reisman Direct) ("Abuse of process is an independent ground which, in my view, would lead to the refusal to allow a case to proceed for want of jurisdiction. The reasons for this, I would summarize as follows: The Claimant in this case acquired Bonds over 50 years long since in defunct, and seeks to bring those Bonds as a claim for remuneration without a corresponding benefit accorded by the action to the Respondent Peru.").

[129] *See supra* Section II.A; *see also, e.g.*, Republic of Peru, Opening Statement, at 83-84 Hr'g Tr. 635:18-19 (Day 2) (Koenigsberger Cross); Hr'g Tr. 676:15-17 (Day 2) (Lanava Cross); Gramercy, "Check List of Items to Cover in Our Due Diligence" (Doc. R-1095); [redacted]

[130] *See supra* Section II.A; *see also* Hr'g Tr. 470:10-17, 621:20-622:2, 622:13-17, 651:11-14, 654:21-655:7 (Day 2) (Koenigsberger Direct, Redirect); Reisman II ¶¶ 48, 50.

pressure it into a settlement as to the preexisting dispute. With the Treaty as a "safety net" that was "essential" to its strategy, Gramercy orchestrated a lobbying and propaganda campaign designed to change Peruvian law in its favor and harm Peru on the international stage, all to secure a bigger payout for Gramercy and its clients. At the same time, Gramercy repeatedly invoked the Treaty in a thinly-veiled threat of Treaty claims, unavailable to Peruvian bondholders, if Peru did not bend to the Gramercy campaign.[131]

- **Gramercy acquired still more Bond claims to further amplify pressure.** Gramercy amassed additional Bonds through the hidden 2017 Tranche 2 deal to aggregate a larger position in order to "anchor" a settlement – even as Gramercy pursued its attack campaign and Treaty claims alleging Peru had destroyed all value in the Bonds years earlier.[132] Once again, Gramercy intended to leverage Treaty claims or threat of such claims, and appears, according to its paltry document production, to have led the seller to believe that such an international campaign would result in a greater payout than the Bondholder Process then in place under Peruvian law. Professor Reisman confirmed, based on the limited information newly disclosed at the hearing, that the Tranche 2 acquisitions further support his conclusion that Gramercy abused the Treaty.[133] Gramercy again chose not to cross-examine him as to those conclusions.

62. The origins of Gramercy's alleged investment are alone sufficient to dismiss the claims on the basis of abuse. Using the money of its third-party clients, Gramercy bought claims in a domestic Peruvian dispute that was not merely foreseeable, but rather had persisted for decades. At the same time, given this longstanding dispute, it also was foreseeable that Peru would implement further measures with respect to valuation and payment of the Bonds, which Gramercy might then seek to challenge in a Treaty case.[134] Either way, for Gramercy, the Treaty was not protection against the general risk of an unforeseeable future dispute, but rather an instrument of pressure to wield against Peru with respect to the specific, preexisting dispute over Bonds.

63. Thus, Gramercy, the lone foreign fund, sought to – and did – "transform a pre-existing domestic dispute into an international dispute."[135] The perpetual attack campaign against Peru that followed, in the United States and elsewhere, further underscores Gramercy's efforts to internationalize a Peruvian matter, and the fundamentally abusive nature of its alleged investment. Such misconduct is not what the Treaty was created to foster; nor is it a value-creating economic venture which the Treaty was made to protect.

B. Gramercy Violated Treaty Preconditions To Arbitration

64. Gramercy's disregard for Treaty norms and requirements also is reflected in its noncompliance with mandatory Treaty preconditions to arbitration, as previously detailed.[136] This was openly on display at the hearing, where Gramercy mischaracterized

[131] *See supra* Section II.D; *see also, e.g.*, Statement of Rejoinder ¶¶ 37-44; Statement of Defense ¶¶ 189-194.

[132] *See supra* Section II.E; *see also, e.g.*, Hr'g. Tr. 606:2-607:21 (Day 2) (Koenigsberger Cross).

[133] Hr'g Tr. 1844:3-13 (Day 5) (Reisman Direct).

[134] *See, e.g.*, *Philip Morris v. Australia*, ¶ 554 (RA-140) ("[A] dispute is foreseeable when there is a reasonable prospect . . . that a measure which may give rise to a treaty claim will materialise.").

[135] *Phoenix Action, Ltd. v. Czech Republic*, Award, ¶ 142 (RA-100).

[136] *See, e.g.*, Republic of Peru, Opening Statement at 85-96 (H-2); Statement of Rejoinder, Section III.B; Statement of Defense, Section III.C.

objections with respect to the Treaty's temporal and waiver requirements as "both more technical and more inconsequential."[137] The Treaty's temporal and waiver requirements are neither technical nor inconsequential. Indeed, Gramercy's violation of these requirements means that Peru never consented to arbitrate, and the claims must be dismissed.

1. Gramercy Violated The Non-Retroactivity Requirement

65. Article 10.1.3 establishes that the Treaty "does not bind any Party in relation to any act or fact that took place" before it entered into force on 1 February 2009.[138] This prohibition on retroactivity applies with equal force to later acts or facts that are deeply rooted in pre-Treaty acts or facts, as previously detailed.[139] Among other authorities in the record, *Berkowitz v. Costa Rica* underscores that pre-Treaty "acts and facts cannot . . . form the foundation of a finding of liability even in respect of a post-entry into force . . . actionable breach," and that, "[t]o be justiciable, a breach that is alleged to have taken place within the permissible period . . . must, if it has deep roots in pre-entry into force or pre-critical limitation date conduct, be *independently* actionable."[140] Thus, as Professor Reisman concluded, "[j]urisdiction *ratione temporis* is lacking . . . because the acts or facts lying at the heart of Gramercy's claims took place decades before the Treaty entered into force."[141]

66. At the hearing, Gramercy chose not to address *Berkowitz* or, indeed, any authorities regarding the non-retroactivity requirement. Gramercy also chose not to cross-examine Professor Reisman with respect to his conclusion that its claims run afoul of this rigid temporal limitation, including his direct examination testimony that Article 10.1.3 establishes that the Contracting Parties "did not want to empower tribunals to rewrite history, ancient history."[142] Instead, Gramercy continued to selectively pick and choose from an array of acts and facts spanning decades – and to pretend that its claims suddenly materialized with the July 2013 Constitutional Tribunal decision.[143] The hearing proved otherwise, including:

- Gramercy's Peruvian law expert, Professor Castillo, testified that, "with this case . . . we're talking about debts that came due a long time ago and they were not paid opportunely."[144]
- Gramercy's executives confirmed that Gramercy bought into a preexisting dispute that featured repeated attempts in the Peruvian courts and political branches over many years to resolve questions over the Bonds. Gramercy "took over the existing litigations" in a number of cases.[145]

[137] Hr'g Tr. 49:4-5 (Day 1) (Gramercy Opening).

[138] Treaty, Art. 10.1.3 (RA-1).

[139] *See, e.g.*, Republic of Peru, Opening Statement at 87 (H-2); Statement of Rejoinder ¶ 52; Statement of Defense ¶ 180.

[140] *Berkowitz v. Costa Rica*, Interim Award, ¶¶ 222, 269 (RA-150); *see also, e.g.*, *Mondev v. United States*, Final Award ¶ 70 (RA-62).

[141] Reisman I ¶ 88; *see also* Reisman II ¶ 4 ("The Tribunal lacks jurisdiction *ratione temporis* because acts or facts lying at the heart of Gramercy's claims took place decades before the Treaty entered into force. Gramercy was well aware, at the time it purchased the Bonds, of the prolonged and ongoing dispute . . . .").

[142] Hr'g Tr. 1846:9-15 (Day 5) (Reisman Direct).

[143] *See, e.g.*, Gramercy, Opening Statement at 52 (H-1).

[144] Hr'g Tr. 1429:12-14 (Day 4) (Castillo Cross).

[145] *See supra* Section II.A.

- Gramercy highlighted in argument the allegedly "seminal" 2001 Constitutional Tribunal decision, which arose from bondholder litigation begun in 1996 and formed a foundation for various measures to follow.[146] Gramercy's witness and expert examinations repeatedly addressed whether and how Peru implemented the 2001 decision in subsequent measures.[147]

- Gramercy recognized that the 2013 Constitutional Tribunal decision was inextricably intertwined with the 2001 decision. In fact, the 2013 decision arose from a request to enforce the 2001 decision,[148] and Gramercy's "state of mind" was that the 2013 decision would be "limited to a simple enforcement."[149]

67. Hearing testimony and argument thus confirmed that pre-Treaty acts and facts are central to Gramercy's case. Further, even the later alleged measures emphasized by Gramercy – namely, the 2013 Constitutional Tribunal decision and the implementing Supreme Decrees that followed – are all deeply rooted in those same pre-Treaty acts and facts. Accordingly, Gramercy's claims violate Article 10.1.3. Indeed, were it not the case that the later-in-time measures are also time-barred, and that Gramercy could pick and choose those post-Treaty measures that better served its case, the Treaty's temporal limitations on non-retroactivity would be rendered meaningless.[150]

2. Gramercy Violated The Prescription Requirement

68. Article 10.18.1 of the Treaty establishes that claims must be submitted to arbitration within three years of when a claimant first acquired, or should have first acquired, knowledge of an alleged breach, and knowledge of loss or damage. As previously detailed, the Contracting Parties agree that this is a "'*clear and rigid' requirement* that is not subject to any 'suspension,' 'prolongation,' or 'other qualification,'" and that they "did not consent to arbitrate an investment dispute" if claims fall outside of the mandatory period.[151] The Contracting Parties further agree that the prescription period is triggered by the first appreciation of alleged loss or damage;[152] it does not require "full or precise knowledge," or that a claimant "be in a position to fully particularize its legal claims."[153]

69. Even assuming that Gramercy's claims concern measures starting in July 2013, as it alleges – and not years earlier, before the Treaty entered into force – the claims violate the prescription period. The record shows that Gramercy first appreciated alleged Treaty breaches and losses no later than 16 July 2013, in the immediate aftermath of the

[146] *See, e.g.*, Hr'g Tr. 120:1, 151:1-4, 171:6-9 (Day 1) (Gramercy Opening).

[147] *See, e.g.*, Hr'g Tr. 926:3-8 (Day 3) (Sotelo Cross); Hr'g Tr. 1196:7-22 (Day 4) (Castilla Cross); Hr'g Tr. 2053:17-2054:8, 2055:1-11 (Hundskopf Cross); Hr'g Tr. 1397:21-1399:11 (Day 4) (Castillo Direct).

[148] Hr'g Tr. 630:21-22 (Day 2) (Koenigsberger Redirect); *see also, e.g.*, Third Amended Statement of Claim ¶ 74 ("After two failed attempts by Congress to pass bills that would have implemented the 2001 CT Decision, in October 2011, the Engineers' Bar Association asked the Constitutional Tribunal to enforce the 2001 CT Decision.").

[149] Hr'g Tr. 630:21-22 (Day 2) (Koenigsberger Redirect).

[150] *See, e.g.*, *Berkowitz*, Interim Award, ¶ 208 (RA-150) (confirming "[s]uch an approach would also encourage attempts at the endless parsing up of a claim," and "effectively denude the limitation clause of its essential purpose").

[151] US Submission ¶¶5-6 (emphasis added); *see also* Republic of Peru, Opening Statement at 90; Statement of Rejoinder ¶¶ 47-49.

[152] *See* US Submission ¶ 8 ("[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.") (emphasis added).

[153] *Corona Materials v. Dominican Republic*, Award on Preliminary Objections ¶¶ 194, 217 (RA-144); *Berkowitz v. Costa Rica*, Interim Award ¶ 213 (RA-150).

Constitutional Tribunal's decision of that date. Gramercy did not submit its claims to arbitration until over three years later in August 2016, as confirmed below in relation to Gramercy's faulty waiver, which determines when the Treaty claims were submitted.

70. At the hearing, Mr. Koenigsberger attempted unsuccessfully to distance Gramercy from the critical 16 July 2013 date. "We had no idea what to make of the July 2013 ruling," he testified. "There was more unknowns than knowns."[154] Claiming that "[a]ll sorts of factors" had yet to be clarified, Mr. Koenigsberger suggested that Gramercy did not have "any sense of what the value difference was" between what Gramercy had anticipated and what the ruling provided.[155] In this respect, Gramercy tries to prove too much – namely, that it did not have precise knowledge of loss. That, however, is not the relevant legal standard – and Gramercy chose not to cross-examine Professor Reisman with respect to his conclusion that its claims run afoul of the prescription period.

71. Hearing testimony, along with the contemporaneous documentary record, confirms that Gramercy did have the first appreciation of alleged loss on 16 July 2013, and thus triggered the prescription period – and, indeed, began contemplating claims shortly after:

- Mr. Koenigsberger acknowledged at the hearing that "what we expected going into [the Constitutional Tribunal decision] was enforcement of current value with CPI plus interest." Instead, "[w]hat came out of it was dollarization."[156]
- A series of Gramercy emails on the day of the ruling criticized it as a "surprise," "nonsense," and "different from what we expected." Gramercy "*expected it to represent a significant haircut*," though it would need to "run the numbers" to see if it would be a "*50% haircut* more or less."[157]
- The next day, Gramercy said that the ruling "gave the government 'huge wiggle room' to make a smaller payment than [it] had expected" – meaning, as clarified in later emails, "wiggle room for the government *to try to impose a confiscatory settlement*."[158] That same day, an expert for a Gramercy-affiliated organization said that "creditors might try to sue Peru in a foreign or international court."[159]
- By 22 July, just days after the ruling, the same Gramercy employee who prepared the initial analysis had also drafted a "[d]ocument *prepared in connection with settlement negotiations and in anticipation of litigation*."[160] Gramercy has withheld that document on the basis of alleged privilege.

72. This contemporaneous record is consistent with Gramercy's well-documented position, at the outset of this proceeding, that "[t]he Government's intentions *became apparent on July 16, 2013*," and that, by June 2016, "*time ha[d] run out*" for

[154] Hr'g Tr. 576:5-6 (Day 2) (Koenigsberger Cross).

[155] Hr'g Tr. 630:19-631:8 (Day 2) (Koenigsberger Redirect).

[156] Hr'g Tr. 630:11-13 (Day 2) (Koenigsberger Redirect).

[157] *See, e.g.*, Email from R. Koenigsberger to J. Cerritelli, 16 July 2013 (Doc. CE-544); Email from J. Cerritelli to R. Koenigsberger, 16 July 2013 (Doc. CE-544) (emphasis added).

[158] Reuters, *Peru's land-reform debt payout could be minimal, bondholders say*, 17 July 2013 (R-398); Email from J. Cerritelli to R. Joannou, 9 Oct. 2013 (Doc. CE-546) (emphasis added).

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

[160] Gramercy Privilege Log, 16 June 2020, at 2 (emphasis added). Gramercy recently resubmitted its privilege log in connection with its Tranche 2 document production.

Gramercy to file its claims.[161] Its later attempts to shift the critical date to the time of the 2014 Supreme Decrees are both transparent and unfounded. In fact, Gramercy's privilege log also shows that its international counsel in this arbitration was "providing legal advice regarding Land Bonds valuation methods" no later than November 2013; and, as previously shown, Gramercy invoked the Treaty in a letter to Peru in December 2013.[162]

73. Thus, contrary to Mr. Koenigsberger's testimony years after the fact, the contemporaneous documents reveal that Gramercy first appreciated the alleged breach and loss on 16 July 2013, and had anticipated litigation well before the 2014 measures it now emphasizes. To endorse Gramercy's efforts to shift focus to these later cherry-picked measures "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."[163] The Contracting Parties (and relevant authorities) agree that this is impermissible.

3. Gramercy Violated The Waiver Requirement

74. Article 10.18.2 establishes that, to submit claims under the Treaty, Gramercy must meet both formal and material requirements as to the waiver of local proceedings. The Contracting Parties agree that an effective waiver is "a precondition to the Parties' consent to arbitrate claims, and accordingly a tribunal's jurisdiction."[164] Indeed, the very first case brought under the Treaty, *Renco v. Peru*, was dismissed due to the claimant's failure to provide a compliant written waiver, as previously detailed.[165] Because GPH did not satisfy the Treaty's waiver requirements until August 2016, it claims were not submitted until then.

75. GPH's written waiver provided with Gramercy's first Notice of Arbitration, in June 2016, suffered the same fundamental flaw as in *Renco*: it purported to reserve rights as to claims in other fora if its Treaty claims were dismissed on jurisdictional or admissibility grounds. At the hearing, Gramercy conceded that, "just days after the *Renco* Decision, on July 18, GPH submitted a second waiver without any reservations, so there could be no issue about *Renco*."[166] Indeed, per the holding in *Renco* – and a line of cases under treaties with similar waiver provisions – GPH's initial violation of the written requirement alone was grounds for dismissal. Accordingly, GPH did not satisfy the formal component of the waiver requirement until it submitted its second written waiver, without a reservation of rights, on 18 July – *after* the 16 July 2016 prescription cut-off date.

76. Even then, however, GPH *still* had not submitted its claims to arbitration because it had not satisfied the material waiver requirement. As noted, Mr. Koenigsberger testified that Gramercy "took over" claims in Peruvian courts with respect to a "subset" of the Bonds, thus underscoring that Gramercy's acquisition were already burdened by a preexisting domestic dispute.[167] Gramercy's position with respect to these local proceedings has shifted drastically over the course of the arbitration – initially representing that "Gramercy is a party

[161] *See, e.g.*, Republic of Peru, Opening Statement, at 94 (H-2); Statement of Rejoinder ¶ 58; Statement of Defense ¶¶ 183-186.

[162] Gramercy Privilege Log, 16 June 2020, at 1; Gramercy Letter to President of the Council of Ministers, 31 Dec. 2013 (Doc. CE-185).

[163] US Submission ¶ 6; *see also* Republic of Peru, Opening Statement, at 95; *Berkowitz v. Costa Rica*, Interim Award ¶ 208 (RA-150).

[164] US Submission ¶ 10.

[165] *See, e.g.*, Statement of Rejoinder ¶¶ 69-75; Statement of Defense ¶¶ 170-177.

[166] Hr'g Tr. 51:2-4 (Day 1) (Gramercy Opening).

[167] *See supra* Section II.A.

to hundreds of legal proceedings," and later that GPH had "initiated applications in seven."[168] In any event, even on Gramercy's account, it did not submit applications to withdraw from these local proceedings until 5 August 2016. Accordingly, it could not have satisfied both written and formal requirements any earlier than then – again, *after* the 16 July cut-off date.

77. Gramercy argued at the hearing that the local proceedings did not concern the same measures at issue in arbitration, and that a waiver was not actually needed; Gramercy did so "to minimize the points of dispute."[169] That Gramercy would renounce rights to local proceedings concerning valuation and payment of the Bonds – rights it now emphasizes as part of its Treaty case – merely to "minimize the points of dispute" is not credible. Indeed, Gramercy could not have proceeded with its local Bond claims without raising a serious risk of double recovery and conflicting outcomes in relation to its claims in this proceeding. This is precisely the scenario that the waiver requirement, which "should be interpreted broadly," serves to eliminate.[170]

78. Gramercy also suggested that its waiver violation "is really a moot point" because it pertains only to GPH, and thus "has no impact whatsoever on the scope of the claims that [the Tribunal] will ultimately need to decide."[171] To the contrary, GPH's failure to meet both the formal and material waiver requirements any earlier than August 2016 is fatal to its claims, given the rigid 16 July prescription cut-off. Because GPH's claims are time-barred, temporal jurisdiction could exist, at most, only as to GFM – assuming, for the sake of argument, that GFM were to clear the non-retroactivity requirement (it cannot). The Tribunal thus would have a narrower scope of issues to decide as to GFM, an entity that played no role whatsoever in the Bond acquisitions; that was substituted into the Gramercy structure years after the fact; and that holds nothing more than a 0.08% indirect interest in Bond claims.

C. Gramercy Did Not Make An Investment Under The Treaty

79. Even setting aside that Gramercy has abused the Treaty and failed to comply with mandatory preconditions to arbitration, the fact remains that Gramercy did not make an investment covered by the Treaty. Gramercy's unfounded efforts to convert the domestic Agrarian Reform instruments into an international Treaty investment rely on a purely literal, out-of-context reading, as well as a misplaced emphasis on U.S. laws and negotiating policies – all in contravention of mandatory rules of interpretation and the Contracting Parties' agreed interpretation of the Treaty, as previously detailed and confirmed at the hearing.[172]

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[168] *Compare* Notice of Arbitration and Statement of Claim, 2 June 2016 ¶ 136 *with* Second Amended Notice of Arbitration and Statement of Claim, 5 Aug. 2016 ¶ 136; *see also* Statement of Rejoinder ¶¶ 76-84; Statement of Defense ¶¶ 175-176.

[169] Hr'g Tr. 51:17 (Day 1) (Gramercy Opening).

[170] US Submission ¶ 15; *see also, e.g.*, *Commerce Group v. El Salvador* (RA-113) ¶¶ 111-112; Statement of Rejoinder ¶ 82.

[171] Hr'g Tr. 50:11-13 (Day 1) (Gramercy Opening).

[172] *See, e.g.*, Republic of Peru, Opening Statement at 98-112; Statement of Rejoinder, Section III.D; Statement of Defense, Section III.E.

1. The Treaty Text Establishes That Gramercy Did Not Make An Investment Under The Treaty

a. The Treaty Mandates An Assessment Of Investment Characteristics

80. Gramercy's unfounded efforts to establish jurisdiction rest largely on the fact that Agrarian Reform Bonds are called "bonds" and the Treaty definition of investment refers to "bonds." Over the course of the hearing, Gramercy repeatedly sought to illicit testimony to the effect that "the Bonds are bonds."[173] However, as Professor Reisman explained, "*the question is not whether these Bonds are like some other bonds*," but rather, "are they an investment for which there's a methodology in the Treaty, which looks at a variety of different factors" and "requires a constant reference to the characteristics [of investment]."[174] Indeed, Professor Reisman testified that he "was struck by this particular Treaty in its reiterated use of the word 'characteristics,' [in] the definition of 'investments.'"[175]

81. That definition, set forth in Article 10.28, specifies that an asset must have "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."[176] A footnote to the definition reinforces that "debt" and "bonds" specifically are subject to, not excluded from, this required assessment.[177] Thus, while Ambassador Allgeier had opined that bonds and other types of assets listed in the definition were "intended" or "presumed" to qualify as investments,[178] cross-examination revealed that this is contrary to the Treaty text – as well as the understanding of the United States and the agreed interpretation of the Contracting Parties.[179] Indeed, Professor Reisman emphasized:

> I found particularly compelling the United States' Submission as one of the State Parties to the Treaty indicating that *the enumeration of the type of an asset in Article 10.28, however, is not dispositive* as to whether a particular asset owned or controlled by an investors meets the definition of 'investment.' *It must still always possess the characteristics of an investment*, including such characteristics as the

[173] *See, e.g.*, Hr'g. Tr. 1480:1-4 (Day 4) (Olivares-Caminal Direct); Hr'g. Tr. 2301:18-2302:2 (Day 6) (Guidotti Cross); Hr'g. Tr. 1860:10-1861:15 (Day 5) (Reisman Cross).

[174] Hr'g Tr. 1860:22-1861:15 (Day 5) (Reisman Cross) (emphasis added); *see also, e.g., Cem Cengiz Uzan v. Republic of Turkey*, Award on Respondent's Bifurcated Preliminary Objection, ¶ 137 (RA-338) (a tribunal "cannot base itself on a purely grammatical interpretation" or "simple dictionary reading of the terms"); Reisman II ¶ 6.

[175] Hr'g Tr. 1839:12-14 (Day 5) (Reisman Direct).

[176] Treaty, Art. 10.28 (RA-1); *see also, e.g.*, Republic of Peru, Opening Statement at 100-101 (H-2); Statement of Rejoinder ¶ 130; Statement of Defense ¶ 205

[177] Treaty, Art. 10.28 n.12 (RA-1) ("Some forms of debt, such as bonds, debentures, and long-term notes, are *more likely to have the characteristics of an investment*, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are *less likely to have such characteristics*.") (emphasis added).

[178] Allgeier I ¶ 36 (CER-7).

[179] Hr'g Tr. 1350:12-1351:10 (Day 4) (Allgeier Cross) ("MR. ULRICH: Mr. President, it's the conclusion of Ambassador Allgeier that there's a presumption. PRESIDENT FERNÁNDEZ ARMESTO: That's what [he] wrote. MR. ULRICH: Correct. That is what he wrote. That's not what the United States says and that's not what Peru says. In the referenced paragraph, it says nothing about a presumption that something listed will be an investment. PRESIDENT: That is true. BY MR. ULRICH: Q. Correct, Mr. Allgeier? The U.S. doesn't state here that there's an alleged presumption that something listed will be an investment. A. In this document, the Department of State did not say that. Q. Okay. They say here, as Peru has submitted, that even a type of asset listed must still have the characteristics of an investment; right? A. That's what it says."); *see also* U.S. Submission ¶ 18.

> commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[180]

82. Mr. Herrera, the lead Treaty negotiator for Peru, likewise confirmed that "the fact that a specific type [of asset] is included in that list does not imply that specific case is considered an investment. There is a need to analyze whether the characteristics of an investment are met and all of the relevant facts need to be weighed in."[181] Indeed, this was a point repeatedly raised by the U.S. negotiators and accepted by Peru.[182]

83. Professor Reisman highlighted this element of the U.S. Submission, reflecting the Contracting Parties' shared interpretation, in response to a question regarding the so-called "negative list" approach to negotiations, under which all assets purportedly are covered by a treaty unless expressly excluded. As Professor Reisman has explained, Gramercy's emphasis on the "negative list" ignores Article 10.28's express mandate for an assessment of investment characteristics.[183] In any event, Ambassador Allgeier conceded that the "negative list" is not a part of the Treaty, nor a legal requirement, and also that the United States made no mention of it when articulating its interpretation of Article 10.28.[184]

84. The particular characteristics of investment identified for consideration in Article 10.28 "are ordinarily referred to as the '*Salini* factors,'" as Professor Reisman testified.[185] While Gramercy sought to highlight his critical views on *Salini* in other contexts, Professor Reisman readily acknowledged those views and reinforced that the *Salini* factors are mandatory here precisely because they are incorporated in the Treaty text:

> I've been critical of *Salini* . . . . The reason why I think that *Salini* is appropriate and its jurisprudence is relevant for illuminating the Treaty in question is that the definition of "investment" explicitly cites the three criteria of *Salini* and, hence, where else to construe them but an examination of the jurisprudence. . . . [A]n interpreter has no choice, whatever it is his or her view of *Salini* in general, to apply these criteria, because the exercise must, in fact, give full effect to the wishes of the States Parties.[186]

85. The three criteria specifically mentioned in Article 10.28 are undisputed. As the President of the Tribunal noted, "[i]t is evident that these factors come – or are related to

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[180] Hr'g Tr. 1840:20-1841:8 (Day 5) (Reisman Direct) (emphasis added); *see also* U.S. Submission ¶ 18.

[181] Hr'g Tr. 1081:14-19 (Day 3) (Herrera Direct).

[182] *Id.* 1114:5-13 (Herrera Cross) ("The U.S. negotiators repeated time and again – or they went time and again to analyzing that in each case one should analyze whether a given activity had the characteristics of an investment. One had to analyze all of the relevant facts. . . . [O]ne had to undertake a case-by-case analysis.").

[183] *See, e.g.*, Reisman II (RER-6) ¶ 16; Hr'g Tr. 1840:13-17 (Day 5) (Reisman Direct).

[184] Hr'g Tr. 1352:7-1353:2 ("Q. 'Negative list,' that's not a term that's used in Article 10.28 of the Treaty; right? A. That is a negotiating approach, and so you don't put your negotiating approach in the Treaty, but it is not mentioned in the agreement, no. Q. Okay. So we agree it is not a legal requirement. It's an approach that the U.S. follows. A. And many other countries. Q. And here in the U.S. submission before you, where they are articulating a position on Article 10.28, they don't say anything about 'negative list,' do they? A. Who they, I'm sorry. Q. The United States Government in this submission before you. A. I don't believe they are commenting on the approach, but they do not mention the 'negative list' in this summary of the Agreement.").

[185] Hr'g Tr. 1839:21-22 (Day 5) (Reisman Direct).

[186] Hr'g Tr. 1874:1-12, 1884:3-7 (Day 5) (Reisman Cross); *see also id.* 1889:10-16 (Reisman Redirect) ("Q. [O]pposing counsel . . . pointed you to some language where you had been previously critical of the *Salini* case. In any of those cases, did the treaty at issue contain language incorporating the *Salini* factors into the definition of 'investment'? A. No.").

Salini."[187] In addition, Professor Reisman testified that the Treaty also requires consideration of the fourth *Salini* factor (*i.e.*, contribution to the Host State's economic development), based on the text of the Preamble and as an underlying purpose of investment treaties generally.[188]

86. The Preamble expressly provides, *inter alia*, that the Contracting Parties "resolved" to "[p]romote broad-based economic development" through the Treaty.[189] While Gramercy challenged Professor Reisman on which preambular provisions he found most relevant, the Preamble language itself remains undisputed.[190] In any event, Professor Reisman confirmed that he "selected the one that was relevant to a jurisdictional inquiry in response to the clear indication by the Parties in the text that this is what they wanted."[191]

87. Accordingly, the critical inquiry concerns whether Gramercy's alleged Bond claim acquisitions have the "characteristics of investment," as set forth in the Treaty and informed by *Salini* and related jurisprudence: namely, contribution of money or other asset; duration; risk; and contribution to the economic development of the State. None of those characteristics are present here, as detailed below. While Gramercy also has sought to rely on the Treaty's Annex 10-F on Public Debt, that Annex provides *limitations* on claims involving public debt, and does *not* expand the definition of "investment" – as the Contracting Parties agree.[192] Further, Mr. Herrera confirmed at the hearing that Annex 10-F was included in the Treaty to satisfy Peru's concerns with respect to the issuance and restructuring of contemporary global bonds – and to underscore, *inter alia*, that the mere nonpayment of such debt, without more, could not give rise to a Treaty claim.[193] The Annex thus lends no support to Gramercy's unfounded attempt to bring the Bonds within the scope of Article 10.28.

b. Gramercy's Acquisition Of Bond Claims Does Not Meet The Characteristics Of An Investment

88. It was common ground between the Parties' experts and witnesses that, to assess whether a particular asset possesses the "characteristics of investment," one must necessarily consider all relevant facts in proper context.[194] Nonetheless, Gramercy's experts, purporting to opine on issues relevant to jurisdiction, repeatedly testified that Gramercy had never shared with them even basic details of the alleged Bond acquisitions. For example, when Ambassador Allgeir was asked if he had reviewed the Bond purchase contracts, he testified, "[j]ust to save you time, *I am totally unfamiliar with the Bonds themselves and the*

[187] Hr'g Tr. 1879:3-9 (Day 5) (Reisman Cross) ("A. My application of *Salini* factors to this interpretative exercise is simply because the Treaty itself indicates the three factors, as I said earlier. PRESIDENT FERNÁNDEZ ARMESTO: Yeah. It is evident that these factors come – or are related to *Salini*.").

[188] Hr'g Tr. 1841:9-16 (Day 5) (Reisman Direct) ("I would include in these criteria the question as to whether or not the transaction in question, which is trying to qualify as an investment as a term of art, contributes to the development of the Host State, a point that is raised in the preamble part of the Treaty, subject to interpretation, and something that is one of the latent purposes of this entire genre of treaties.").

[189] Treaty, Preamble (RA-1).

[190] *See* Hr'g Tr. 1885:9-1887:13 (Day 5) (Reisman Cross).

[191] Hr'g Tr. 1886:16-19 (Day 5) (Reisman Cross).

[192] *See, e.g.*, U.S. Submission ¶ 19 (confirming that Annex 10-F addresses "certain limitations on claims" and "does not limit or expand the definition of 'investment' under Article 10.28).

[193] *See, e.g.*, Hr'g Tr. 1124:8-14, 1129:15-1130:1 (Day 3) (Herrera Cross); *id.* 1134:1-3 (Herrera Redirect) ("So, first, no claim could be brought for the nonpayment of a debt, just like that. Evidence had to be given that the Agreements had been violated.").

[194] *See, e.g.*, Hr'g Tr. 1081:14-19 (Day 3) (Herrera Direct); Hr'g Tr. 1504:4-10 (Day 4) (Olivares-Caminal Cross).

transactions that took place."[195] Professor Olivares-Caminal confirmed that he also had not reviewed the purchase contracts, and was unaware of the fact that the funds used to acquire the Bonds had been provided by third parties.[196] The fact that Gramercy's experts prepared their reports in a vacuum, without access to such basic information and evidence, further undermines their already flawed conclusions.

89. Indeed, the full picture of relevant facts and evidence underscores that Gramercy's acquisition of Bond claims does *not* possess the characteristics of investment.

- **No Contribution of Money or Other Asset.** GPH committed no capital or other asset as part of the Bond acquisitions, and instead relied entirely on funds from third-party clients who acquired beneficial ownership interests through payment to Gramercy. GFM was not even formed until after the Bond acquisitions were complete, and inherited management of GPH years later when Gramercy substituted it into the corporate structure.[197]

- **No Duration of Alleged Investment.** Because neither GPH nor GFM made a contribution, there is no duration of investment to measure. Further, even before the first alleged Bond acquisition, Gramercy had raised all funds from its clients, and set in motion its plan to sell interests to third parties through "investment products" within the Gramercy structure. Gramercy sought to "monetize" claims to payment that were immediately (indeed, past) due, and not to hold bonds over time to receive periodic payments of interest and repayment of principal.[198]

- **No Risk.** GPH made no contribution and never stood to gain or lose anything from the third party-funded acquisitions. Any profits or losses are to be passed from GPH to PARB and, ultimately, on to the many beneficial owners. GFM also made no contribution, holds only a *de minimis* indirect beneficial interest in the Bonds, and is insulated from liability in connection with its management of GPH and the Bonds. In fact, GFM stands only to gain, and not lose, as a result of the fees it has charged to clients (based on a percentage of its own speculative Bond valuations) and performance-based fees it hopes to charge in the future.[199]

- **No Contribution to Peru's Economic Development.** Gramercy made one-off payments to bondholders using third-party funds, repackaged Bond interests for sale to third parties outside of Peru, and generated fees outside of Peru. Far from contributing to Peru, or to any economic venture creating value in Peru, Gramercy actively engaged in measures to undermine the economy in an attempt to pressure Peru to settle. In any event, Gramercy's own expert, Professor

[195] Hr'g Tr. 1360:18-1361:14 (Day 4) (Allgeier Cross) (emphasis added).

[196] Hr'g Tr. 1508:5-1509:1 (Day 4) (Olivares-Caminal Cross).

[197] *See supra* Section II.C; *see also* Republic of Peru, Opening Statement, at 105; Statement of Rejoinder ¶¶ 103-104.

[198] *See supra* Section II.C; *see also* Peru, Opening Statement, at 106; Statement of Rejoinder ¶¶ 103-104. That Gramercy's efforts to monetize the Bond claims have taken longer than it has advertised to clients does not meet the duration element. *See, e.g.*, *KT Asia Investment Group v. Kazakhstan*, Award ¶ 213 (RA-317) ("A planned short term project does not suddenly meet the duration element in the definition of investment because onward sale does not materialize within the intended time frame due to external forces unrelated to the project author's intent or expectations."); [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY].

[199] *See supra* Section II.C; *see also* Peru, Opening Statement, at 107-108 (H-2); Statement of Rejoinder ¶¶ 103-104.

> Olivares-Caminal, agreed that the US$ 33 million total price paid to various individual bondholders over the years was a "negligible figure."[200]

90. Thus, taking account of all relevant circumstances – and not merely considering Bond certificates in a vacuum – Gramercy's acquisitions do not have the "characteristics of investment" required to bring them within the scope of the Treaty. In any event, the fact remains that the Bonds themselves are not "bonds" or "public debt" within the ordinary meaning of those terms, and are fundamentally different from the contemporary sovereign debt that the Treaty was intended to cover.[201] These fundamental distinctions were emphasized by Professor Guidotti, Ms. Sotelo, and Mr. Herrera, and also acknowledged by Gramercy's debt expert, Professor Olivares-Caminal.[202] And, as Professor Reisman underscored, the Bonds are not comparable to the contemporary sovereign debt instruments that have been the subject of other treaty arbitrations, including *Abaclat v. Argentina*:

> The criteria for determining whether or not a transaction in this case, the expropriation of land and the provision of Bonds for repayment at a nominal interest were not, in my view, bonds in the same sense as the bonds that are ordinarily used, for example, in *Abaclat*. These Bonds did not have a willing buyer. These Bonds were simply paper that was given to people for their land. . . . So, it would be, I think, to me, wrong to take those standards and apply them to a transaction that I would not have thought was bonds and which was in no sense an investment within the meaning of the [Treaty].[203]

91. Indeed, as Peru has shown, jurisprudence on contemporary sovereign debt reinforces that the Agrarian Reform Bonds are not investments under the Treaty.[204]

2. The Treaty's Object And Purpose Confirms That Gramercy Did Not Make An Investment Under The Treaty

92. Gramercy has all but ignored the Treaty's object and purpose, as reflected in the Preamble, which confirms that Gramercy did not make an investment under the Treaty. In fact, Gramercy's expert, Ambassador Allgeier, repeatedly opined that the Preamble is not a "legal filter" for the understanding of the Treaty.[205] It is a well-established principle of international law, however, that the Preamble is considered both context and evidence of the Treaty's object and purpose – two mandatory elements which must be considered, together with the text, when interpreting the Treaty.[206] When this was brought to his attention on

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[200] Hr'g Tr. 1530:18-1531:3 (Day 4) (Olivares-Caminal Cross) ("Q. So, Gramercy's payments, over 30 million, constitutes .03 percent of Peru's GDP at the time, yeah? A. Correct. Q. All right. So, that's a negligible figure, isn't it, relative to the GDP? Not really a contribution, wouldn't you say? A. Again, I can agree with that . . . ."); *see also supra* Section II.C; Peru, Opening Statement, at 109 (H-2); Statement of Rejoinder ¶¶ 103-14.

[201] *See supra* Section II.A; Peru, Opening Statement at 112 (H-2); *see also infra* Section IV.C.3 (addressing the Treaty's negotiation history).

[202] *See, e.g.*, Hr'g. Tr. 2277:8-2281:14 (Day 6) (Guidotti Direct); Hr'g Tr. 898:12-899:2 (Day 3) (Sotelo Direct); 1127:18-1129:14 (Day 3) (Herrera Cross); 1515:10-1517:17 (Day 4) (Olivares-Caminal Cross).

[203] Hr'g Tr. 1890:19-1891:16 (Day 5) (Reisman Redirect).

[204] *See, e.g.*, Republic of Peru, Opening Statement at 98-112 (H-2); Statement of Rejoinder, Section III.D; Statement of Defense, Section III.E.

[205] *See, e.g.*, Hr'g Tr.1325:1-8 (Day 4) (Allgeier Direct); Allgeier II (CER-11) ¶ 14; Allgeier I (CER-7) ¶ 66.

[206] *See, e.g.*, Vienna Convention, Art. 31(2) (providing that a treaty's preamble comprises part of the context); *Joseph Charles Lemire v. Ukraine II*, Decision on Jurisdiction and Liability, ¶¶ 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); Statement of Rejoinder ¶¶ 135-139.

cross-examination, Ambassador Allgeier again disclaimed any knowledge of international law, including the role that the Preamble plays in proper Treaty interpretation.[207]

93. Peru has demonstrated – and Gramercy has not rebutted – that Gramercy's Bond acquisitions undermine the stated objectives of the Treaty,[208] including:

- **Cooperation and Integration.** Gramercy injected itself into a preexisting domestic dispute, and interfered with U.S.-Peru relations through its propaganda and lobbying campaign.
- **Broad-Based Economic Development.** Gramercy made one-off payments to individual bondholders, repackaged Bonds for sale to third parties outside Peru, generated fees outside Peru, and sought to harm Peruvian sovereign finance.
- **Employment Opportunities; Improved Labor Conditions and Living Standards.** Gramercy acquired distressed Bonds subject to a longstanding domestic dispute, with the speculative aim of enriching itself and its non-Peruvian investors.
- **Parity Between Domestic and Foreign Investors.** Gramercy abused the Treaty in an effort to gain far more favorable treatment for itself than for Peruvians.

94. Gramercy's undermining of these stated Treaty objectives further reinforces that its alleged acquisition of Bond claims does not have the "characteristics of an investment" within the meaning of the Treaty, and thus does not qualify as an investment subject to Treaty protections.

3. The Treaty Negotiations Further Confirm That Gramercy Did Not Make An Investment Under The Treaty

95. In light of the Treaty's text, viewed in context and in light of the object and purpose, Gramercy did not make any "investment." No recourse to supplementary means of interpretation is necessary; nor could such supplemental means override the proper Treaty interpretation.[209] Nonetheless, Gramercy has continued to emphasize certain circumstances of the Treaty's conclusion – in particular, U.S. laws, policies, and pre-Treaty investor disputes which purportedly influenced the U.S. approach to negotiations. Gramercy's focus on unilateral U.S. requirements is irrelevant, and the pre-Treaty disputes lend no support to its claim that the Contracting Parties accounted for the Bonds during negotiations.[210]

96. To the contrary, the negotiating history underscores that the Bonds were never considered to be "investments." This was further confirmed by the hearing testimony of Mr. Herrera, who led Peru's negotiation team for the investment chapter of the Treaty,[211] as well as Gramercy's own expert, Ambassador Allgeier, who oversaw negotiations from the

[207] Hr'g Tr. 1369:2-10 (Day 4) (Allgeier Cross) ("Q. So, are you aware that, under principles of treaty interpretation, the preamble is considered context to be considered? A. I don't know that for a fact. Q. Okay. And you're not aware that, under principles of treaty interpretation, the preamble is also viewed as evidence of object and purpose? A. Now, I don't know international law, so I don't know that for a fact.").

[208] *See, e.g.*, Republic of Peru, Opening Statement at 111 (H-2); Statement of Rejoinder ¶¶ 136-137; Statement of Defense ¶¶ 166-167; *see also* Treaty, Preamble (RA-1).

[209] *See, e.g.*, Vienna Convention, Art. 32; Reisman II ¶ 7-10.

[210] *See, e.g.*, Statement of Rejoinder ¶¶ 153-159.

[211] Hr'g Tr. 1079:18-1080:3 (Day 3) (Herrera Direct).

U.S. side. Mr. Herrera, who participated directly in the Treaty negotiations, reaffirmed during Gramercy's cross-examination that neither Peru nor the United States had intended to subject the Bonds to Treaty protections; indeed, the Bonds were never even mentioned.[212] Ambassador Allgeier had not participated directly in the negotiations, but nonetheless also confirmed that the negotiating minutes make no mention of the Bonds.[213]

97. In the face of this undisputed evidence that the Bonds were never addressed, Ambassador Allgeier addressed a handful of pre-Treaty disputes involving U.S. investors whose lands had been expropriated as part of the Agrarian Reform. These disputes, he said, show that "the Land Reform was very connected with the negotiating process," and, "was a proverbial Damocles sword over the enterprise."[214] However, the very documents on which Ambassador Allgeier relied – leaked U.S. diplomatic cables which he did not appreciate had been downloaded from WikiLeaks[215] – plainly show that the referenced disputes, including the LeTourneau case, had nothing to do with the Bonds.[216] Further, the U.S. Embassy had actually recommended removing some cases from the list of disputes it was tracking "due to continued lack of involvement by the Claimants."[217]

98. Indeed, when asked by Gramercy about LeTourneau on cross-examination, Mr. Herrera confirmed that the case "had nothing to do with the Land Reform Bonds because that was related to a road that was impacted" and ultimately settled through a US$10 million payment, not Bonds.[218] Mr. Herrera also repeatedly confirmed that "we *never* discussed *any* of the outstanding cases" at the Treaty negotiating table, and thus the cases "did not guide the discussion on any of the basic elements of the Agreement."[219]

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[212] Hr'g Tr. 1110:11-1112:21 (Day 3) (Herrera Cross) ("A. [T]his is a concrete fact that the matter was never discussed at the negotiating table."); *see also id.* 1081:22-1082:4 (Herrera Direct) ("Q. What was the role of the Land Reform within the context of the negotiations for the investment chapter of this Treaty? A. The Land Bonds, as the topic was not discussed at the negotiation table.").

[213] *See, e.g.*, Hr'g Tr. 1378:15-17 (Day 4) (Allgeier Cross) ("Q. And you didn't personally participate; right? You weren't in the room. A. I was the supervisor, that's correct."); *id.* 1378:21-1379:4 ("Q. And the minutes of the 13 rounds of the Treaty negotiations, to assist those of us who weren't in the room, they make no mention of the Land Bonds; right? A. I don't recall. I think that's right. I think that's right. They don't mention it.").

[214] Hr'g Tr. 1329:11-15 (Day 4) (Allgeier Direct).

[215] Hr'g Tr. 1372:8-1373:1 (Day 4) (Allgeier Cross).

[216] *See, e.g.*, Hr'g Tr. 1375:13-1377:18 (Day 4) (Allgeier Cross) ("Q. So, [LeTourneau] was a commercial dispute; right? Adjudicated in Peruvian Court over a road. That's what this cable says. A. No, it doesn't say where it was adjudicated. Q. Well, it says there was a 1970 Peruvian Supreme Court decision on it; right? A. Okay. . . . Q. So, LeTourneau . . . wasn't about the legal status of the Bonds or valuation of the Bonds or payment of the Bonds. A. No. . . . Q. Okay. And LeTourneau, that case, it wasn't about any Peruvian court decision or a draft decree or law about the Bonds? A. I have no idea. I have not gone in detail to follow the tortuous route of the LeTourneau case. Q. Okay. And the other two cases that you've cited involving U.S. investors and Peru, they likewise involved a dispute over expropriation of land and weren't [a] dispute over the Bonds; right? A. I don't know. My area was not to go into detail on these disputes. . . . Q. But from what we've seen, none of these pre-Treaty cases addressed in your Report specifically concern the Bonds. We agree on that; right? A. I don't know. As I said, I have not gone into the detail of each and every case."); *see also* Hr'g Tr. 1383:18-1384:8 (Allgeier Recross).

[217] Hr'g Tr. 1384:15-1385:6 (Day 4) (Allgeier Recross); *see also* Peru 2006 Report on Investment Disputes and Expropriation Claims, 1 June 2006, at 1-2 (Doc. CE-456).

[218] Hr'g Tr. 1093:2-8 (Day 3) (Herrera Cross); *see also id.* 1093:16-1094:1 (Day 3) (Herrera Cross).

[219] Hr'g Tr. 1139:5-15 (Day 3) (Herrera Redirect) (emphasis added); *see also, e.g., id.* 1095:16-1096:14 (Herrera Cross) ("Q. So, if I understood you correctly, the topic [of the other disputes] was discussed, and you, on behalf of the negotiators or Peru or Government of Peru, said that you could not solve it? A. No, I don't think that we have understood each other. What I told you is that it was not proper to discuss that topic at the negotiating table for the Agreement."); *id.* 1098:17-18 ("As I say, we never discussed any of the cases that were pending.").

99. The U.S. diplomatic cables do highlight the longstanding history of the Agrarian Reform and associated disputes that predated the Treaty.[220] But they are not evidence of what took place in the Treaty negotiations themselves. Nor are the negotiation parameters or internal deliberations of one Contracting Party evidence of the scope of the Treaty agreed between the Contracting Parties, as Ambassador Allgeier acknowledged and Professor Reisman confirmed.[221] Accordingly, the WikiLeaks evidence and Ambassador Allgeier's related testimony offer no support for Gramercy's flawed reading of the Treaty's definition of "investment." They certainly lend no support to Gramercy's speculative theory that the Contracting Parties were mindful of the Bonds and specifically chose not to exclude them from Treaty protection. Indeed, as Mr. Herrera confirmed, neither the pre-Treaty disputes nor the Bonds themselves were ever discussed in the Treaty negotiations.[222]

4. In Any Event, The Alleged Bonds Remain Unauthenticated

100. Even setting aside all of the highly relevant circumstances as to how Gramercy acquired and structured Bond claims, the fact remains that significant questions remain about the alleged Bond certificates themselves. Gramercy bears the burden of proving, among other elements, the validity of the instruments upon which it bases its claims. Nonetheless, it is undisputed that Gramercy's alleged Bonds remain unauthenticated. Gramercy's ongoing failure, even at this late stage, to meet its burden of proving an essential element of its case stands in marked contrast to the approach of claimants in other investment treaty arbitrations. In *Abaclat v. Argentina*, for example, the bonds at issue were not old physical bonds, and authenticity was not even in question. Nonetheless, the claimants created a searchable electronic database with supporting claim documentation from tens of thousands of individual claimants; made the database available to the respondent; and welcomed an independent expert verification and party comment procedure that was overseen by the tribunal and completed before the merits hearing.[223]

101. Peru raised one plainly problematic so-called Bond at the hearing as but one example of the significant, ongoing problems associated with Gramercy's attempt to pursue Treaty claims based on 9,600 pieces of decades-old paper that have never been subject to proper verification or authentication.[224] That Gramercy apparently expects the Tribunal to enter a multi-billion dollar award based solely on Gramercy's unilateral – and evidently flawed – review of the alleged Bonds underscores once again Gramercy's disregard for the Treaty, fundamental due process, and the integrity of this proceeding.

D. Gramercy Is Not An Investor Under The Treaty

1. Gramercy Made No Investment Involving Its Own Contribution, At Its Own Risk

102. As Peru has established, 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

[220] *See, e.g.*, Hr'g Tr. 1370:22-1371:3 ("Q. And the disputes involving the Agrarian Reform, in particular, those dated back decades – right? – well before the Treaty negotiation? A. That's correct.").

[221] *See, e.g.*, Hr'g Tr. 1339:1-1340:15 (Day 4) (Allgeier Cross); Hr'g Tr. 1870:12-1871:1 (Day 5) (Reisman Cross).

[222] *See, e.g.*, Hr'g Tr. 1081:20:1082:4 (Day 3) (Herrera Direct); 1098:13-18, 1112:5-1113:19 (Herrera Cross).

[223] *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 15, 20 Nov. 2012 ¶¶ 6, 8, 19-37 (RA-351).

[224] *See supra* Section II.B; *see also* Bond No. 023679, Bond Package No. 76 (Doc. CE-224A, Appendix B, Bates No. GMCY-0004634); Hr'g Tr. 692:2-695:14 (Day 2) (Lanava Cross).

enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party."[225] Thus, because the Bonds are not an investment, neither Claimant can be an investor. In addition, the Treaty requirement that an investor actively "make" an investment underscores, as a number of tribunals have held, that an investor "*must itself have made a contribution*," at its own risk, and cannot "benefit from a contribution made by someone else, here [the] ultimate beneficial owner."[226] Gramercy's superficial showing – relying on the mere fact that GPH holds title to Bonds and GFM later inherited control of GPH – is not sufficient.

103. As detailed above, Gramercy's own documents and executives confirm that neither Claimant entity "made" any investment involving a contribution of its own, at its own risk. GPH acquired the Bonds with money raised entirely from third-party beneficiaries; GFM was later substituted into the Gramercy structure to manage GPH, not to acquire or hold Bonds; and any proceeds with respect to the Bonds ultimately will pass to the third-party beneficial owners who funded the Bond purchases, among others. Accordingly, even if the Bonds were to constitute an investment under the Treaty – they do not – Gramercy has failed to meet its jurisdictional burden of proving that it meets the requirements to be an investor.

2. GPH Is Not Entitled To The Benefits Of The Treaty

104. Article 10.12.2 of the Treaty provides that a Contracting Party "may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor *if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party*, and *persons of a non-Party . . . own or control the enterprise*."[227] The hearing testimony of Gramercy's Chief Compliance Officer, Mr. Lanava, established that the conditions for the denial-of-benefits clause are met here as to GPH, which accordingly is not entitled to the benefits of the Treaty.

105. Mr. Lanava confirmed that GPH has no substantial business activities in the United States or, indeed, anywhere. Rather, GPH was created solely to buy and hold Bonds in Peru.[228] Indeed, as the record establishes, GPH is a mere vehicle which Gramercy set up to acquire and hold Bonds and, ultimately, pass any associated profits or losses up through the ownership structure to Gramercy's third-party clients.[229] The only other purported "business" of GPH which Mr. Lanava described was that "it has contracts with Peruvian lawyers and it has contracts with the local custodian that owns the Bonds, so it does have other business."[230] Those alleged activities, however, also concern the Bonds – and, in any event, all take place

[225] Treaty, Art. 10.28 (RA-1); *see also, e.g.*, Statement of Rejoinder ¶¶ 85-88; Statement of Defense ¶ 212; Reisman I ¶ 63; Reisman II ¶¶ 26, 40.

[226] *KT Asia Investment Group v. Kazakhstan*, Award ¶¶ 192, 219 (RA-317) (emphasis added) (further concluding that claimant "has made no contribution and, having made no contribution, incurred no risk of losing such (inexistent contribution)"); *see also, e.g.*, Republic of Peru, Opening Statement, at 114 (H-2); Statement of Rejoinder ¶¶ 91-92; *Alapli Elektrik v. Turkey*, Award ¶¶ 350, 384, 386 (RA-318); *Clorox Spain v. Venezuela*, Award ¶ 834 (RA-319).

[227] Treaty, Art. 10.2.2 (RA-1) (emphasis added); Republic of Peru, Opening Statement at 120 (H-2).

[228] Hr'g Tr. 704:9-14, 720:12-721:16 (Day 2) (Lanava Cross) ("Q. Created for the sole purpose of owning these Bonds; right? A. Correct. . . . Q. GPH holds title to the Bonds, yes? A. That is correct. Q. And that was the sole purpose of GPH all along; right? A. That's right. GPH was established to acquire Land Bonds. Q. Okay. GPH doesn't conduct any other business; right? A. In what sense? Q. Well, it was created to buy Bonds and hold them. That's what it does; right? A. It does hold the Bonds. . . . ARBITRATOR DRYMER: Does GPH have assets or operations unrelated to the Agrarian Bonds? A. No. It holds the Land Bonds, it owns the title to the Land Bonds.").

[229] *See supra* Section II.C.

[230] Hr'g Tr. 721:18-21 (Day 2) (Lanava Cross).

in Peru, and thus cannot satisfy the Treaty's requirement for "substantial business activities in the territory of any Party, *other than the denying Party* [*i.e.*, Peru]."[231]

106. Mr. Lanava further suggested that GPH is "actively working to monetize the Bonds" through a "symbiotic relationship" with GFM.[232] He then conceded, however, that under GPH's Operating Agreement, GFM has the sole and exclusive power to conduct all of GPH's business and to manage all of GPH's affairs – expressly including the prosecution of "lawsuits and arbitration"[233] – and that GPH's role remains limited to holding the Bonds.[234] Accordingly, the documentary and testimonial evidence confirms that GPH has no business – let alone "substantial business" – beyond its holding of Bonds in the territory of Peru, the "denying Party" under Article 10.12.2. Moreover, even to the extent that "monetizing" the Bonds were a business activity attributable to GPH, Gramercy's alleged "monetizing" efforts are now focused in this arbitration. It cannot be the case that the mere act of pursuing claims under the Treaty itself constitutes a "substantial business activity" conferring Treaty benefits.

107. Mr. Lanava's testimony also confirmed that GPH is, and always has been, wholly-owned by non-U.S. entities. When GPH was first formed and began acquiring Bonds, it was wholly owned by the Cayman Island entity GEMF.[235] Through later evolutions in the Gramercy structure, GPH came to be wholly owned by a different Cayman Island entity, PARB.[236] PARB, in turn, has been owned by various non-U.S. entities over time, and since the initiation of this arbitration has been owned by [redacted] entities: [redacted], a Cayman Island [redacted] entity; [redacted], another Cayman Island [redacted] entity; and the UK entity [redacted] (at times through its U.S. investment vehicle, [redacted].[237]

108. Accordingly, because Mr. Lanava's testimony confirmed that GPH "has no substantial business activities in the territory of any Party, other than the denying Party," and also that GPH has at all times been owned by "persons of a non-Party," all of the conditions of Article 10.12.2 are met and GPH is not entitled to the benefits of the Treaty.

3. Gramercy Has No Standing As To The Vast Majority Of Bond Interests Beneficially Owned By Third Parties

109. Even assuming that either Claimant could be considered an "investor," and that the denial-of-benefits clause did not apply, it remains the case that Gramercy does not have standing to submit claims as to interests that are beneficially owned by third parties. Further to the established written record, hearing testimony confirmed that third parties, including non-U.S. nationals, beneficially own ***more than 99%*** of the Bonds allegedly held by GPH. That is a striking figure, with fatal consequences for Gramercy's claims.

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[231] Treaty, Art. 10.12.2 (emphasis added).

[232] Hr'g Tr. 721:3-12 (Day 2) (Lanava Cross)

[233] GPH Amended Operating Agreement, Art. 3 (Doc. CE-145).

[234] Hr'g Tr. 742:18-743:9 (Day 2) (Lanava Cross); *see also* GPH Amended Operating Agreement (Doc. CE-145).

[235] *See, e.g.*, Hr'g Tr. 710:12-711:3 (Day 2) (Lanava Cross); *see also* [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY].

[236] *See, e.g.*, Hr'g Tr. 731:4-13 (Day 2) (Lanava Cross); *see also* [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY].

[237] *See, e.g.*, Republic of Peru, Opening Statement, at 117, 119 (H-2); [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY].

110. As previously demonstrated, the Treaty permits Gramercy to claim only for its own alleged losses, and not losses suffered by third parties.[238] This is consistent with the well-established international law principle that a claimant does not have standing to bring claims with respect to the interests of third-party beneficial owners. Thus, for example, the *Occidental Petroleum v. Ecuador* annulment committee held that 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,'" reflecting "a more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit."[239]

111. As detailed above,[240] the hearing testimony of Gramercy executives Mr. Koenigsberger and Mr. Lanava underscored that Gramercy is effectively a nominal owner, with a *de minimis* beneficial interest in Bonds held for the benefit of third parties.

- GPH acquired title to the Bonds by purchasing them with funds raised from its third-party clients, the true beneficial owners. GFM contributed nothing to the acquisitions – it did not even exist at that time – and holds no title.
- Profits or losses in respect of the Bonds, if any, are to be distributed to third parties – [redacted] The respective beneficial ownership interests in the Bonds are as follows:[241]
  - [redacted] (in which the [redacted] funds are invested) holds an [redacted]% beneficial interest in the Bonds.
  - [redacted] (a wholly-owned investment vehicle of [redacted]) holds a [redacted]% beneficial interest in the Bonds.
  - [redacted] (with various investors) holds a [redacted]% beneficial interest in the Bonds.
- Claimant GFM has a [redacted]% holding in [redacted] through which it holds a mere [redacted]**%** indirect beneficial interest in the Bonds.[242]

112. Accordingly, as Gramercy's own executives expressly affirmed at the hearing, third parties are the ultimate beneficiaries of the alleged Bond investment.

- Mr. Koenigsberger: "Predominantly, the investment is for the underlying investors and funds that have economic interest in the Bonds."[243]
- Mr. Lanava: Gramercy's clients are "[t]he ultimate beneficiaries, correct. They will have the economic interest in the underlying Land Bonds."[244]

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[238] The Treaty permits claims on behalf of third parties in only one specified scenario – not present here – and no other. *See* Treaty, Art. 10.16.1(b); Statement of Rejoinder ¶¶ 107-109.

[239] *Occidental Petroleum v. Ecuador*, Decision on Annulment, ¶¶ 260-262 (RA-308); *see also Siag v. Egypt*, Award ¶¶ 581-584 (RA-332); *Impregilo v. Pakistan*, ¶¶ 151, 153 (RA-334); *Blue Bank v. Venezuela*, Award ¶ 172 (RA-333); *Saghi v. Iran*, Iran-US Claims Tribunal, ¶ 18 (RA-335); Statement of Rejoinder ¶¶ 110-114.

[240] *See supra* Section II.C.

[241] *See, e.g.*, Hr'g. Tr. 754:15-755:10 (Day 2) (Lanava Cross); [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY]; Republic of Peru, Opening Statement at 117 (H-2).

[242] *See, e.g.*, Hr'g. Tr. 756:6-20 (Day 2) (Lanava Cross).

[243] Hr'g Tr. 626:12-16 (Day 2) (Koenigsberger Redirect) (emphasis added).

113. This is not a scenario, as Gramercy has proposed, where any company would be disqualified from Treaty protection simply because it has shareholders with an indirect economic interest in downstream assets.[245] Gramercy's hypothetical ignores the fact that a company typically engages in economic activity and has profits and losses of its own, some of which may ultimately flow to others. Here, Gramercy has engaged in no economic activity and retained effectively no interest in the performance of the Bonds. Instead, Gramercy bought a claim, using third-party funding, and then sold almost the entirety of the beneficial ownership interest in that claim to third parties, who will profit or lose depending on the outcome of this case. Thus, under the Treaty and well-established principles of international law, Gramercy – with mere nominal and *de minimis* beneficial ownership – does not have standing as to more than 99% of the Bonds allegedly presented in this arbitration.

V. Request For Relief

114. For all of the reasons set forth above, in prior written submissions, and at the hearing, Peru respectfully requests that the Tribunal:

- Dismiss Gramercy's claims in their entirety for lack of jurisdiction and/or lack of admissibility;
- Award Peru such further and other relief as the Tribunal may deem appropriate, including with respect to the Gramercy conduct detailed throughout this proceeding; and
- Award Peru all costs incurred in connection with this proceeding.

Respectfully submitted,

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1 July 2020

[244] Hr'g Tr. 769:2-9 (Day 2) (Lanava Cross) (emphasis added).

[245] *See, e.g.*, Hr'g Tr. 48:19-49:1 (Day 1) (Gramercy Opening).