*In the matter of*

**Gramercy Funds Management LLC**
**Gramercy Peru Holdings LLC**
*Claimants*

***v.***

**The Republic of Peru**
*Respondent*

# Post-Hearing Brief on Merits and Quantum of the Republic of Peru

31 AUGUST 2020

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Lima

WHITE & CASE
Washington, D.C.

# Post-Hearing Brief on Merits and Quantum of the Republic of Peru

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# Post-Hearing Brief on Merits and Quantum of the Republic of Peru

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

## I. Overview

2. Claimants Gramercy Funds Management LLC and Gramercy Peru Holdings LLC (together, "Gramercy") have failed to show that Peru has breached the Peru-United States Trade Promotion Agreement (the "Treaty"). Gramercy's case has built on mischaracterizations of the facts, unsupported interpretations of Peruvian law and conspiratorial accusations, all aimed to show that Gramercy's still-unauthenticated Agrarian Reform Bonds had a clear legally-mandated value (which, conveniently for Gramercy, would just happen to accord with its principal claims in this proceeding albeit not with any of its own prior valuations) and that Peru nefariously deprived them of that value (through measures which, conveniently for Gramercy, would just happen to not be time barred by the Treaty). It has been confirmed that these claims are baseless, reflecting more on the greed of the Claimants than the conduct of Peru.

### A. The Core Facts Of The Case

3. As this proceeding concludes, Gramercy has utterly failed to prove its case and the core facts set out by Peru at the outset of the case have been confirmed by document production, admissions at the Hearing, and secret documents hidden by Gramercy.

- The Bonds are decades-old instruments with unique origins and characteristics that became worthless on their face. Peru never invited Gramercy or others to acquire Bonds.
- The 2001 Sentence holding nominal payment unconstitutional did not establish a framework for payment or say how to value the Bonds, as Gramercy's expert admitted.
- Contemporaneous assessments and years of differing court interpretations and failed bills confirm there was no clear (or implicit) legal rule on how to value the Bonds.
- Gramercy speculates in risk and uncertainty. It even warns investors in Gramercy that there are no guarantees, as the CEO of Gramercy admitted at hearing.
- Gramercy's own limited due diligence had varying valuations and confirms there was no clear (or implicit) legal rule on how to value the Bonds.
- Gramercy used third-party client month to pay US$ 33 million for *expectative claims* related to Bonds that it did not authenticate, has never authenticated to this day, and which are held for other beneficiaries.
- Gramercy engaged in a strategy to "monetize" the Bonds that included lobbying Peru to change the legal framework. Meanwhile, its error-filled Financial Statements used diverse valuations that were never close the US$ 1.8 billion is claims in this case.
- Peru's Constitutional Tribunal resolved the uncertainty in 2013, mandating a methodology for determining the value of the Bonds and a payment process.

- The 2013 Resolution was approved validly and it has been upheld repeatedly. Gramercy's unsubstantiated conspiracy theories to the contrary have been debunked.
- Peru duly established a Bondholder Process and is paying bondholders. Gramercy admits it could have received US$ 34 million under the Bondholder Process.
- Gramercy has continued acquiring Bonds, even during this proceeding, even as it has said that Peru's conduct rendered them worthless.

### B. Gramercy's Failure To Prove Its Case

4. Peru respectfully reiterates its request that this proceeding be dismissed. Gramercy has failed to establish that the Tribunal has jurisdiction, that there has been any Treaty breach, or that it is entitled to compensation.

**Gramercy Has Failed To Show Any Violation Of The Treaty**

- Gramercy has not met its burden of proof;
- Gramercy continues to mischaracterize facts, witness and expert testimony;
- Gramercy fails to prove an expropriation;
- Gramercy fails to prove a violation of the minimum standard of treatment;
- Gramercy fails to prove a violation of national treatment; and
- Gramercy fails to prove a violation of most-favored nation treatment, including for an obsolete effective means provision in a third treaty.

**Gramercy Is Not Entitled To Damages**

- Gramercy fails to provide a legally cognizable damages claim;
- Gramercy fails to prove any damages with reasonable certainty;
- Gramercy fails to prove Peru's actions proximately caused any damages;
- Gramercy fails to prove that it has an interest in the Land Bonds; and
- Gramercy fails to prove it is entitled to the amounts of damages it claims.

5. Gramercy's claims are meritless. Even as Gramercy claims US$ 1.8+ billion and argues less would be an expropriation, it has submitted five alternative claims, including three after the Hearing without support. Gramercy's continued subversion of due process by making new damages claims even after the Hearing is a transparent appeal for a Solomonic decision by the Tribunal. But Gramercy is entitled to nothing: any award of damages would be an outrage, and would absurdly a reward to Gramercy's abusive conduct and an offense to the Treaty and investment arbitration.

### C. Gramercy's Ever-Evolving Claims Subvert Due Process

6. Over the course of the proceeding, as Gramercy was forced to reckon with Treaty preconditions it had failed to satisfy, evidence it withheld and then belatedly produced, and the burden of proof it failed to meet across a multitude of issues, Gramercy repeatedly attempted to reformulate its case.

**Changing Allegations of Breach**

- At the outset of this proceeding, Gramercy made the 2013 Resolution the cornerstone and focused on accusations of "forgery," which it referred to referring to it 15 times in its original Notice of Arbitration and Statement of Claim, and argued that it "first acquired constructive or actual knowledge of Peru's [Treaty] breaches on or after July 16, 2013."

- Gramercy later revised its initial pleadings to account for its failure to comply with the Treaty waiver requirements and the attendant prescription consequences, and placed new emphasis on measures after the 2013 Resolution, arguing that it had no "constructive or actual knowledge" of alleged Treaty breaches until after 5 August 2013.
- In its Reply, Gramercy further distanced itself from its initial allegations and shifted focus to the Bondholder Process and its implementation, including new arguments regarding participation rates, and administrative law. Gramercy made no mention of the alleged forgery, and instead raised a new denial of justice claim.
- In its Post-Hearing brief, Gramercy places further emphasis on unfounded allegations of wrongdoing by the MEF – unsupported theories directly refuted by Hearing testimony. The "forgery" allegations at the heart of its initial claims are mentioned only twice.

**Changing Allegations as to Valuation**

- At the outset, Gramercy's principal clam was that Peru had destroyed the value of the Land Bonds through the Constitutional Tribunal's decision to adopt a dollarization valuation methodology, as opposed to a CPI. Gramercy's Notice of Intent, Gramercy made no mention of the parity exchange rate "base period" or "compensatory interest."
- In its Third Amended Notice of Arbitration and Statement of Claim, Gramercy sought to distance itself from its earlier focus on dollarization and referred to "base period" twice and did not refer to compensatory interest.
- In its most recent brief, Gramercy shifts focus to the parity exchange rate base period (5 references) and compensatory interest (15 references) and two of its three newest damages claims accept Peru's methodology minus these two points.

**Changing Damages Claims**

- At the outset, Gramercy's sole claim was for the purported "intrinsic" "current value" of the Land Bonds, which it claimed was US$ 1.8 billion.
- In its Reply, Gramercy added two new claims for: what it allegedly it would have obtained in local court proceedings (US$ 842 million); and what it alleges is the fair market value of its Land Bonds (US$ 550 million).
- In its most recent filing, Gramercy adds three entirely new valuation claims: what it allegedly would have gotten under a dissent to the 2013 Resolution (US$ 841 million); and what it allegedly would get using Gramercy-created "adjustments" to the valuation formula in the Bondholder Process (US$ 845 and US$ 885 million).

7. Gramercy's ever-evolving claims underscore the fundamental weakness of its case which it sought to obscure by withholding key documents and information necessary to substantiate its merits and damages claims, including among others:[1]

- **Bond Holdings.** At the outset, Gramercy did not submit any evidence of its Bond holdings other than an image of a lone Bond. When it finally introduced images of additional Bonds, they revealed issues related to authenticity, as Gramercy unilaterally dropped over 100 Bonds because of self-identified "discrepancies," and Peru's Quantum experts identified numerous further problems. While Gramercy has conceded its importance, Gramercy's Bonds have never been authenticated.

[1] *See, e.g.*, Statement of Rejoinder § IV.A; Statement of Defense § III.A; Post-Hearing Brief on Jurisdiction § II.A; Petition of the Republic of Peru, 2 March 2020.

- **Bond Acquisition Documents.** At the outset, Gramercy did not submit any evidence of its Bond acquisitions. When it finally submitted the Bond purchase Contracts with it Reply, they revealed, among other things, Gramercy's recognition that the Bonds' status and value was uncertain.
- **Bond Valuations.** At the outset, Gramercy withheld evidence of how it valued the Bonds outside of this proceeding. When it finally produced financial documents, they were heavily redacted, obscuring potential relevance, reliability, and context. During the hearing, Gramercy's own witness admitted that they were full of errors.
- **Beneficial Owners.** At the outset, Gramercy did not submit any evidence of the fund structure it created to acquire and hold Bonds. When it finally produced such documents, they revealed, among other things, that Gramercy acquired the Bonds entirely with funds from its clients, the true beneficial owners; third parties beneficially own over 99% of Gramercy's alleged Bonds; and Gramercy executives, including all three witnesses who testified at the Hearing, have an interest in the Bonds and the outcome of this arbitration.
- **2017 Hidden Land Bond Deal**. Gramercy persisted on hiding the existence of its secret 2017 acquisition of Bonds until its executives revealed the fact at the Hearing. The Hearing testimony, and documents that the Tribunal then ordered Gramercy to produce, further weakened Gramercy's case by highlighting fundamental flaws: among other things, that Gramercy understood that Bond value had not been destroyed, its efforts to monetize the Bonds through avenues not provided under Peruvian law, and its hopes for wildly speculative returns and windfall profits.

### D. Gramercy's Systematic Abuse And Deception Subverts the Treaty

8. Gramercy's chosen approach has undermined the integrity of this Treaty proceeding by persistently depriving Peru of its fundamental rights to present a defense, to due process, to be heard, and to equal treatment.[2] Among (many) other examples:

- Gramercy inverted Peru's fundamental right to respond, withholding the key documents and information, including those mentioned above, until after the Notices of Arbitration and Statements of Claim in some cases (and until, or even after, the Hearing in others).
- Gramercy deprived Peru of the opportunity to meaningfully assess and respond on key technical, legal, and damages points, including via cross-examination of Gramercy's witnesses and experts, and through its own experts, by never disclosing certain key documents, including damages calculations and its internal valuation model.
- Gramercy undercut Peru's ability to engage in document production by forcing it to request documents without knowing the nature of the merits and damages claims it was facing, or even the identity and arguments of Gramercy's witnesses and experts.

9. Compounding the foregoing is Gramercy reliance on blatant misrepresentations, half-truths and outright falsehoods. As Peru anticipated, this pattern has continued in Gramercy's Post-Hearing brief. Among (many) other examples:

- Gramercy falsely alleges that Minister Castilla "all but confessed to [the MEF's interference with the Constitutional Tribunal] on the stand." Minister Castilla expressly

[2] *See, e.g.*, Statement of Rejoinder § IV.A; *Fraport A.G. Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment dated 23 Dec. 2010 (RA-111) ¶ 200.

"reject[ed]" Gramercy's allegations and made clear that "at no time there was any type of interference or saying something to the Chief Justice of Constitutional Tribunal."[3]

- Gramercy falsely claims that Minister Castilla "did not contradict" "Justice Eto's accounts" "that the MEF told the Justices that the outstanding agrarian reform debt was as high as US$ 18.5 billion." In fact, he made clear that he had "never seen those figures" and that "I would remember that meeting, and I have no recollection whatsoever, and I've never had those figures in mind. And I don't know Mr. Eto. I've never seen or been with him."[4]
- Gramercy falsely claims that Minister Castilla and Vice Minister Sotelo "admitted" that, prior to the 2013 Resolution, "there was no obstacle" to Peru paying the Bonds, including through the issuance of a decree. In fact, she confirmed that "there was no legal formula to establish how the Bonds … would be brought up to current value," and Castilla stated that "it was impossible for a legal framework to be established that could translate that 2001 Decision into an express valuation method. There was a legal vacuum."[5]
- Gramercy falsely states, without any citation, that Dr. Wühler "admitted on the stand that he had not looked at whether [the Bondholder Process] was either 'fair' or 'effective' in practice." In fact, Dr. Wühler expressly stated that "[t]he Bondholder Process is a fair and effective process for the resolution of the bonds, but also for the individual Bondholders to seek the payment of the actualized value of the bonds."[6]
- Gramercy falsely claims that Dr. Hundskopf "conceded that as a general rule Peruvian courts applied CPI for the Land Bonds." In fact, he reconfirmed that "[t]he current value principle is not a synonym of CPI. It does not mean that one must exclusively use the CPI" and that "there have been rulings, legal provisions that make reference to this, in one case dollarization, and the other cases in connection with the [CPI]. So, there was a dispute. There was a little bit of a lack of settlement in this."[7]

10. Finally, Gramercy pursued its efforts to monetize the Bonds through a campaign of deception and systematic abuse of the Treaty notwithstanding its claims in this proceeding.

- **Lobbying.** Gramercy spent over US$ 3.8 million on politicizing the dispute, disseminating misinformation and interfering in Peru's attorney-client relationship.
- **Negative Reports.** Gramercy has commissioned and disseminated biased reports and media attacking Peru and the Treaty, to harm Peru's international reputation and relationship with the United States.
- **Attacks on Sovereign Finance.** Gramercy procured negative reports from less-regarded ratings agencies and corresponded with institutions to prejudice Peru's sovereign finance.
- **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.
- **Propaganda.** Gramercy distributed false propaganda against Peru which has been cited by numerous alleged stakeholders, including pension funds and others.

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[3] *Compare* Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 4; *and* Hr'g. Tr. 1177:17-1178:8, 1208:1-3.

[4] *Compare* Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 50, 54; *and* Hr'g. Tr. 1230:15-1232:12.

[5] *Compare* Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 6, 40; *and* Hrg. Tr. 906:16-907:8, 1196:7-20.

[6] *Compare* Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 92; *and* Hr'g. Tr. 2197:14-2198:2.

[7] *Compare* Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 17; *and* Hr'g. Tr. 2019:15-17, 2031:8-15.

11. Gramercy's conduct is an abuse of the Treaty and a travesty. Its persisting in its campaign despite the repeated admonitions and orders of the Tribunal evidence a profound lack of respect for the Tribunal, these proceedings and the Treaty itself. Not only does such conduct underscore Gramercy's tremendous lack of confidence in its claims, it presents a gross threat to the legitimacy of this proceeding and investor-State arbitration as a dispute resolution mechanism. Such conduct cannot be sanctioned.

# II. Facts Confirmed And Uncovered

## A. The Hearing Confirmed The Unique Origins And Characteristics Of The Agrarian Reform Bonds

12. The record before this Tribunal makes it clear that the Bonds have characteristics that are not comparable to contemporary sovereign bonds, thus underscoring as a matter of jurisdiction that the Bonds are not Treaty investments (as addressed previously) and also that Gramercy's claims on the merits are unfounded (as addressed herein).

- **Governing Law and Jurisdiction.** In 1969, the Agrarian Reform Law established the legal framework for Peru's agrarian reform and authorized the issuance of the Land Bonds. The Bonds are governed by Peruvian Law and subject to the exclusive jurisdiction of Peruvian courts, as Dr. Guidotti confirmed.[8]
- **Purpose.** The Agrarian Reform Law authorized the compensation of landholders with Bonds. Dr. Hundskopf explained at the hearing, "the primordial obligation was indemnification for the takings," which was liquidated with the delivery of Bonds.[9]
- **Format.** The Bonds are "simply paper" and not "electronic instrument[s]."[10] Dr. Guidotti confirmed they "were nominative, were issued in nominal terms with fixed coupons; no protection for inflation whatsoever. So, they were not indexed." Mr. Edwards also conceded on cross-examination that they were not inflation protected.[11]
- **Placement.** The original holders of the Land Bonds "didn't buy" the Bonds.[12]
- **Denomination**. The Land Bonds "were issued in soles de oro, the old Peruvian currency," as Dr. Guidotti confirmed.[13]

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[8] *See* Law Decree No. 17716, 14 June 1969 (Doc. RA-155), Art. 173. *See also* Statement of Defense ¶¶ 24 *et seq.;* Hr'g. Tr. 2282:21-2283:6 (Day 6) (Guidotti Direct); *see also* Hr'g Tr. 898:18-22 (Day 3) (Sotelo Direct) (the Land Bonds are "not governed by the laws of New York" but are "domestic debt [of Peru], and the legal regime that underlies it has to do with internal debt.").

[9] *See* Law Decree No. 17716, 14 June 1969 (Doc. RA-155), Art. 173. *See also* Hr'g Tr. 2278:15-20 (Guidotti Direct); Guidotti Presentation (H-13) at 4-5; Hr'g Tr. 898:15-17 (Sotelo); Hr'g. Tr. 1890:21-1981:4 (Reisman Re-direct); *compare* Hr'g. Tr. 2279:8-13 (Guidotti) (contrasting the Bonds to "Global Bonds [that] are issued to investors that are institutional investors, that can be retail investors, and they are typically issued through the use of underwriters, large financial institutions that intervene in the primary market and then also in developing the secondary market."); Hundskopf Presentation (H-10) at 2.

[10] Hr'g Tr. 898:12-15 (Day 3) (Sotelo Direct); Hr'g. Tr. 1890:21-1981:4 (Day 6) (Reisman Re-direct).

[11] *See* Hr'g Tr. 898:12-15 (Day 3) (Sotelo Direct); Hr'g. Tr. 1890:21-1981:4 (Day 6) (Reisman Re-direct); Hr'g. Tr. 2282:17-19 (Day 6) (Guidotti Direct); *compare* Hr'g. Tr. 2281:2-14 (Day 6) (Guidotti Direct) *and* Hr'g. Tr. 1641:4-7 (Day 4) (Edwards Cross).

[12] Hr'g. Tr. 2278:19-20 (Day 6) (Guidotti Direct); *compare* Hr'g. Tr. 2279:14 (Day 6) (Guidotti) (Global Bonds "are marketed through roadshows, for instance."); *see also* Hr'g Tr. 1890:19-1891:16 (Day 5) (Reisman Redirect).

[13] Hr'g. Tr. 2282:20-2283:4 (Day 6) (Guidotti Direct) ("[i]nstead, the Global Bonds are issued in foreign currency. So, they have a protection against devaluation and, implicitly, inflation.").

- **Nominal Value.** The Bonds were issued at nominal values with interest rates of 4%, 5% or 6%, and with coupons that could be redeemed annually. As Dr. Hundskopf explained, the Bonds were periodic monetary obligations. The Agrarian Reform Law did not peg the value of the Bonds to the value of the expropriated land or make any provision for successive revaluations of the land or Bonds. As Dr. Castillo acknowledged at the Hearing, the Bonds and land are "something separate"; a basic truth as to which he "[has] no doubts."[14]

13. During the Hearing, Gramercy's expert, Mr. Olivares Caminal, sought to minimize the difference between the Land Bonds and contemporary bonds. According to him, "the Land Bonds are simply bonds,"[15] because they include the word "Bond,"[16] and because, a secondary market allegedly existed in 1983 when certain Bonds were traded on the Lima Stock Exchange.[17] In fact, Dr. Guidotti confirmed, the Bonds "didn't have the characteristics that allowed the development of a secondary market."[18] Further, Dr. Guidotti confirmed, "[t]here is no secondary market" for the Land Bonds, which were "never listed on the Stock Exchanges," "registered with central depository institutions," or "auctioned in the New York market."[19] As Dr. Guidotti explained, based on the volume and value of the trading, the supposed secondary market in 1983 was "simply nonexistent."[20] On cross-examination, Mr. Olivares-Caminal admitted that trading of the Land Bonds in 1983 on the Lima Stock Exchange was "insignificant"[21] and conceded that there was no other secondary market until Gramercy's purchase of Bonds,[22] which did not create a secondary market.

14. During the Hearing, notwithstanding the plain terms of the Agrarian Reform Law and Bonds, Gramercy's legal expert, Dr. Castillo, argued that Peru's obligation to pay the Bonds instead "was always a debt of value, as is any debt that is the result of an expropriation."[23] This flawed argument relies on a mischaracterization of the law in force at the time of the Agrarian Reform and turning a blind eye to contemporaneous evidence:

- **Mischaracterization of Laws in Force.** When asked to explain why an expropriation is a debt of value, Dr. Castillo replied: "[i]t is a debt of value because of the Constitution of [19]79 and [19]93 that provides for the payment of the updated value of the Property."[24] These constitutional provisions postdate the Agrarian

[14] Hr'g. Tr. 1417:16-11 (Day 4) (Castillo Cross) ("[Q.] The land is something separate. A. I have no doubts about that, sir."); *see also* Castillo Report ¶ 90 ("As far as I understand, neither of the Parties to this arbitration argues that the correct approach would be to bypass the Bonds and value the land directly. Therefore, even if a debt of value undoubtedly exists from the origin of the Bonds, then in order to update the value of the obligation, what is relevant is the monetary amounts imprinted on the Bonds.").

[15] Hr'g. Tr. 1480:22-1481:2 (Day 4) (Olivares-Caminal Direct).

[16] Hr'g. Tr. 1483:6-13 (Day 4) (Day 4) (Olivares-Caminal Direct).

[17] Hr'g. Tr. 1521:11-1526:17 (Day 4) (Olivares-Caminal Cross).

[18] Hr'g Tr. 2280:3-9 (Day 6) (Guidotti Direct); Guidotti Direct). In contrast, Dr. Guidotti explained that "Global Bonds are issued to investors that are institutional investors, that can be retail investors, and they are typically issued through the use of underwriters, large financial institutions that intervene in the primary market and then also in developing the secondary market." Hr'g Tr. 898:14-21 (Day 3) (Sotelo Direct); Hr'g Tr. 2280:3-9 (Day 6) (Guidotti Direct); Guidotti Expert Presentation (H Guidotti Expert Presentation (H-13) at 4-5.

[18] Hr'g. Tr. 2280:5-9 (Day 6) (Guidotti Direct).

[19] Hr'g Tr. 898:14-21 (Sotelo Direct); Hr'g Tr. 2280:3-9 (Guidotti Direct); Guidotti Presentation (H-13) at 4-5.

[20] Hr'g. Tr. 2280:10-2281:1 (Day 6) (Guidotti Direct).

[21] Hr'g. Tr. 1525:11-13 (Day 4) (Olivares-Caminal Cross).

[22] Hr'g. Tr. 1526:7-17 (Day 4) (Olivares-Caminal Cross).

[23] Hr'g. Tr. 1398:20-21 (Day 4) (Castillo Direct).

[24] Hr'g. Tr. 1431:13-18 (Day 4) (Castillo Cross); *See also,* Castillo Report ¶¶ 69-73 (explaining that current value requirement derives from the constitutional nature of expropriations).

Reform Law of 1969, and as Dr. Castillo admitted, were adopted as a reaction to Peru's experience during the Agrarian Reform.[25] As Dr. Castillo admitted under cross-examination, the relevant provision of Peru's Constitution in effect at the time of the Agrarian Reform Law, unlike its later iterations, *did not* require that the State pay compensation for expropriation in advance, but rather, expressly authorized the payment of compensation over time, either through installments, tranches or bonds.[26]

- **Mischaracterization of Agrarian Debt.** As the record shows, the Agrarian Reform Law provided for payment in fixed amounts over time, as Dr. Castillo himself acknowledged.[27] Debts requiring payment of fixed sums of money without requiring some other valuation are textbook examples of debts to pay money; as Dr. Castillo himself has explained in his writings, "if the convention by which a sum of money is promised does not contain any specification such that the bond refers to only that determined monetary sum, the debt is purely monetary."[28] Unlike certain contemporary instruments, nothing in the Agrarian Reform Law or the Bonds provided that the value of the obligation would be kept constant. On the contrary, the Law provided for fixed interest rates that were not pegged to inflation.

- **Inconsistent with Historical Treatment.** If the Bonds had constituted debts of value, as Dr. Castillo argues, bondholders would have been able to seek to update them during the Agrarian Reform to counteract the effects of inflation Peru was undergoing. Dr. Castillo admitted he was unaware of any cases of this happening.[29] Nor has he or Gramercy attempted to identify any mechanism under the Agrarian Reform Law that would have permitted and enabled such updating to take place. Indeed, none existed. It would not be until 2001 that Peru decided to apply the *principio valorista* (referred to in this proceeding as the current value principle) instead of paying nominal value.[30] Peru's decision was prospective and did not call into question the appropriateness of prior nominal payments, which is consistent with Peruvian law permitting debtors to agree to apply the *principio valorista* to obligations that originally were purely monetary, as Dr. Castillo acknowledged.[31]

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[25] Hr'g. Tr. 1432:22-1433:11 (Day 4) (Castillo Cross) ("Q. And in your Report, you cite three provisions, constitutional provisions, that state that the price has to be paid before expropriation? That is one of the requirements under Article 70? A. Yes, *because of the negative experience with the Agrarian Reform, the members of the Reform of '73 eliminated the payment in Bonds* and also established the scope of expropriation compensation. The scope of the compensation had to do with the damages suffered by the expropriated Party. It was a rule that was elaborated *based on the Peruvian experience*.") (emphasis added).

[26] *See* Hr'g. Tr. 1434:4-21 (Day 4) (Castillo Cross) ("Q. And in particular, that constitutional amendment stated that whenever it had to do with expropriation for land reform purposes, the State did not have to pay a compensation before; rather, they could pay towards the future with Bonds or some other form? A. Yes. Q. That was the Constitution, and that is what happened. The payment was in Bonds and the payment was after a specific period, not at the time of expropriation. A. Yes. Here you need to differentiate. Bonds were given, but it doesn't mean that the expropriation was paid… [The Bonds] were the instruments that were going to allow the expropriated Party to cash little by little."); Political Constitution of Peru 1933, as amended by Law N° 15242 of 1964, Art. 29 (CE-03).

[27] Hr'g. Tr. 1416:22-1417:11 (Day 4) (Castillo Cross) ("they were securities that represented a compensation that was going to be paid gradually"); *see also* Hr'g. Tr. 1421:16-22 (Day 4) (Castillo Cross).

[28] F. Osterling Parodi & M. Castillo Freyre, El Nominalismo y el Valorismo en el Perú, Part I, pg. 44 (RA-357). Similarly, Luis Fernando Uribe Restrepo, on whose work Dr. Castillo relies, explains that some debts are nominal by nature, among them bonds. *See* F. Uribe Restrepo, Las Obligaciones Pecuniarias Frente a la Inflación, pg. 47 (CE-361) ("*ciertas obligaciones deben permanecer siempre al margen del valorismo y regirse por la solución nominalista*," específicamente, "*títulos valores*").

[29] Hr'g. Tr. 1422:1-1423:3, 1424:4-11 (Day 4) (Castillo Cross).

[30] *See e.g.,* Statement of Defense ¶¶ 38 *et seq;* Statement of Rejoinder ¶¶ 180 *et seq.*

[31] Hr'g. Tr. 1391: (Day 4) (Castillo Direct)

## B. The Hearing Confirmed The Pre-existing Domestic Dispute Over The Bonds

### 1. The Bonds Lost All Value And Legal Certainty

15. It is undisputed that years of currency changes and hyperinflation destroyed the nominal value of the Bonds.[32] As this unfolded, some bondholders chose to redeem their Bond coupons annually, in accordance with Peruvian law; others did not. Before the Bonds reached maturity, their face value was impacted by inflation and currency changes.[33] As Vice Minister Sotelo testified, the MEF calculated that the total outstanding debt on the Land Bonds was a single cent of a Sol.[34]

16. In 1992, when Peru liquidated the Agrarian Bank, the entity in charge of paying the Bonds, no alternative payment mechanism was established.[35] When the Bonds reached maturity, bondholders had claims to immediately due payments.[36] As Gramercy's exprt, Dr. Castillo, confirmed, "[t]he general rule [under Peruvian Law] on obligations to pay sums of money" is that "[t]he payment of a debt contracted in national currency cannot be demanded in a different currency, nor in any sum other than the original nominal amount agreed upon."[37] In other words, as Gramercy's damages expert, Mr, Ewards put it, "the Land Bonds had become virtually worthless."[38]

### 2. The 2001 Constitutional Tribunal Sentence Did Not Establish A Clear Legal Rule

17. The record makes it clear that the uncertainty as to the virtually worthless Bonds persisted for years. Among various efforts over time to resolve the issue of the Bonds, Law No. 26597 was issued in 1996 and provided that the Bonds be paid according to their nominal value plus interest at stated coupon rates. On 15 March 2001, Peru's Constitutional Tribunal issued a sentence ("2001 Sentence") holding, among other things, that Law No. 26597 was unconstitutional insofar as it mandated payment of the Bonds according to their nominal value.[39] The Sentence left open more questions than it answered.[40]

18. The Hearing confirmed that there is no basis to Gramercy's argument that the 2001 Sentence established a "clear legal rule," and "had a clear and objective meaning, which includes that the Land Bonds would have to be updated with CPI, that inflation adjustments must update the value of the Bonds from the date of issuance, and that compensatory interest must be applied to the Land Bonds."[41] This self-serving interpretation is not borne out by the Sentence, its context, or its contemporaneous understanding, as witnesses and experts confirmed.

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[32] *See, e.g.*, Statement of Rejoinder § I; Statement of Defense § I; Hr'g. Tr. 1640:19-1641:13 (Edwards Cross).

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

[34] Hr'g. Tr. 919:3-6, 920:12-13, 924:21-925:3, 950:9 (Day 3) (Sotelo Cross).

[35] Decree Law N° 25478, 6 May 1992, Art 1 (RA-158).

[36] Hr'g. Tr. 1449:19-1450:3 (Day 4) (Castillo Direct).

[37] Hr'g. Tr. 1389:20-1390:1 (Day 4) (Castillo Direct); *See also*, Civil Code, Art. 1234 (RA-200).

[38] Amended Expert Report of Sebastian Edwards, 13 July 2018 ¶ 27; see also Hr'g. Tr. 1641:14-17 (Edwards Cross).

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

[40] *See e.g.,* Statement of Defense ¶¶ 38 *et seq;* Statement of Rejoinder ¶¶ 180 *et seq.*

[41] Gramercy Opening, Slide 82; *see also,* Gramercy's Post-Hearing Brief ¶¶ 11-31; Hr'g. Tr. 1411:8-15 (Day 4) (Castillo) (the 2001 Sentence was "very clear" and "did not require any kind of clarification.").

19. The operative part of the Sentence is 7 paragraphs in its entirety, and less than two pages. It neither establishes a method for determining the value of the Bonds nor a procedure for their payment.[42] The Sentence contains no reference to any updating methodology, to the date of issuance, or to compensatory interest. That the 2001 Sentence did not establish a method for determining the value of the Bonds or a procedure for their payment is not surprising given that the question before the court was the constitutionality of a specific statutory provision: Article 2 of Law No. 26597. In fact, the College of Engineers, the petitioners in the case, wanted judges to be free to update the value of the Bonds according to "the criteria established in Article 1235 [of the Civil Code] or any other correction index."[43]

20. Unable to locate an express legal rule in the 2001 Sentence mandating a method for determining the value of the Bonds nor a procedure for their payment, Gramercy argues that the 2001 Sentence contained implicit requirements that (i) principal must be updated using CPI; (ii) CPI must be applied from the date of issuance, even if Peru had already paid some of a bond's coupons; and (iii) interest must be applied at a real rate of 7.22%.[44] This is wrong, as Peru has previously established, and the hearing confirmed.[45]

21. Contrary to Gramercy's assertion,[46] the 2001 Sentence did not make CPI the only conceptually correct method of updating the Bonds. The 2001 Sentence did not refer to CPI, as Gramercy's own legal expert confirmed.[47] In addition:

- **Peruvian Law did not require CPI.** As Dr. Hundskopf explained, "[t]he current value principle is not a synonym of CPI. It does not mean that one must exclusively use the CPI."[48] Gramercy does not dispute that the Civil Code has two articles that relate to the *principio valorista*, and neither mandates the use of CPI; Art. 1235 provides for updating value based on various different indicators; Art. 1236 refers to the date of calculating debts of value.[49] At the Hearing, Dr. Castillo acknowledged that Articles 1235 and 1236 both relate to the *principio valorista*,[50] that courts applied dollarization to determine current value (including in cases under Article 1236),[51] and that CPI was not applied as "by default."[52]
- **No single methodology was implicitly required.** Cross-examination of Dr. Castillo also confirmed that CPI is not the only appropriate valuation methodology. While Dr. Castillo previously had maintained that there is a "single criterion or parameter" for determining current value and that "obligations of value have […] a single

[42] Hundskopf Presentation (H-10) at 4-5.

[43] Constitutional challenge of the College of Engineers of Peru, 16 December 1996, in Constitutional Tribunal Record No. 00022-1996-PI/TC, pg. 48 at ¶ 1.42 (Doc. R-462) (The College of Engineers of Peru complained that the legislature sought to prevent a fair revaluation by preventing judges from applying "*los criterios a que se refiere el artículo 1235 o cualquier otro índice de corrección").*

[44] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 15.

[45] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 15.

[46] Gramercy's Post-Hearing Brief ¶ 16; Castillo ¶ 21 ("CPI was implicitly required by the current value principle.").

[47] Hr'g. Tr. 1437:14-16 (Day 4) (Castillo Cross).

[48] Hr'g. Tr. 2019:11-2020:5 (Day 6) (Hundskopf Direct).

[49] *See* Peru Civil Code of 1984, 25 July 1984, Arts. 1235, 1236 (RA-382). As Dr. Hundskopf confirmed, neither article requires CPI; similarly, Dr. Castillo conceded that Peruvian courts applying Article 1236 had elected to use a dollarization methodology. Hr'g. Tr. 1439:15-1440:3 (Day 4) (Castillo Cross).

[50] Hr'g. Tr. 1393:17-20 (Day 4) (Castillo Cross) ("there are two exceptions to the nominalist tool … constituted by Article 1236. Article 1236 regulates what is known by obligations of value or debts of value by nature.").

[51] Hr'g. Tr. 1441:14-15 (Day 4) (Castillo Cross).

[52] Hr'g. Tr. 1440:4-7; 1441:19 (Day 4) (Castillo Cross).

value,"[53] during the Hearing he admitted that there are various CPI methodologies, including regional CPIs,[54] as well as the so-called Adjusted CPI.[55] Dr. Castillo also admitted that to determine which methodology is appropriate "one would have to look at each specific case" and "[o]ne has to apply the particular one that corresponds to that Bond."[56]

- **Alternative methodologies were economically appropriate.** CPI is not required as a matter of economics. Peru's Quantum experts confirmed at the Hearing that "we think there are advantages to doing it in dollars"[57] and that "the dollarization method was "economically justified."[58] Moreover, Gramercy's own expert, Mr. Edwards, does not deny that dollarization can be a conceptually correct valuation methodology in this case and has presented a "backup" calculation using the dollarization methodology.[59] Gramercy is wrong to state that Peru has not disputed that CPI is appropriate because it is the standard method for restoring purchasing power that 99 out of 100 economists would use.[60] In fact, Peru's expert stated, "we could get a roomful of economists and I believe everybody would do it differently, frankly."[61]

22. Also contrary to Gramercy's assertion,[62] the 2001 Sentence did not imply that the date of issuance was the only conceptually correct date from which to update the value of the Bonds. The 2001 Sentence does not refer to issuance date. In addition:

- **Peruvian Law did not require updating from the issuance date.** As Dr. Hundskopf observed, there is no requirement in Peruvian law to apply interest going back to the date of issuance.[63] Gramercy is unable to point to any provision of the Civil Code or other rule in Peruvian law that requires updating from the issuance date. On the contrary, evidence in the record shows that various dates have been used in cases before Peruvian courts, including both the date of placement and the date of last clipped coupon.[64] Under cross-examination, Dr. Castillo was unable to maintain that everyone agreed on the relevant date, calling it a "controversial political issue" and agreeing that there was not uniformity on this issue in Peruvian courts.[65]
- **The time of the taking was irrelevant.** Gramercy is wrong to assert that the issuance date is relevant to restore value for the Land Bonds from the "time of the

[53] Castillo Report ¶¶ 21(iv), 80.

[54] Hr'g. Tr. 1460:2-1461:5 (Day 4) (Castillo Cross).

[55] Hr'g. Tr. 1463:6-1464:3 (Day 4) (Castillo Cross).

[56] Hr'g Tr. 1462:7-21 (Day 4) (Castillo Cross).

[57] Hr'g. Tr. 2410:11-12 (Day 7) (Quantum Cross).

[58] Hr'g. Tr. 2485:7-8 (Day 7) (Quantum Cross).

[59] Hr'g. Tr. 1709:14-17 (Day 7) (Edwards Cross); Amended Edwards II ¶ 7 ("Both the CPI Method and a correctly implemented Dollarization Method are consistent with the Current Value Principle").

[60] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 17.

[61] Hr'g. Tr. 2410:16-17 (Day 7) (Quantum Direct).

[62] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 20-23

[63] *See, e.g.*, Hundskopf II § C; Hr'g. Tr. 2020:6-15 (Day 6) (Hundskopf Direct) ("The 2001 Judgment, well, nor does it state the date as of which one should calculate the updated value of the Agrarian Bonds, leaving it open … -the possibility of choosing different dates… [O]bviously, there were different dates. The date of issue of the Bonds, the date of payment of the last Bond, the date of payment of the totality of the Bonds.").

[64] Opening Statement of Peru, Slide 28.

[65] Hr'g. Tr. 1436:18-19 (Day 4) (Castillo Cross); see also Hr'g. Tr. 1437:2-6 (Day 4) (Castillo Cross) ("Q. Do you know that some courts have not agreed with that, in that they have estimated the updating after the date of the last payment? A. Yes. I have read some resolutions that show that and others that are contrary to that.").

taking."[66] Here, again, Gramercy seeks to conflate the Bonds with the actual land for which they were provided, even though Dr. Castillo conceded on cross-examination that the value of the Land Bonds is not linked to the value of the expropriated lands.[67] In any case, as Dr. Castillo admitted, the date of issuance of the Bonds was not the same as the date of the taking[68]–and in some cases the differences could be years.[69]

- **Economics did not require updating from the issuance date.** Peru's Quantum experts confirmed that using the issuance date is not necessary, and could be problematic. Among other things, it requires concluding that the 2001 Sentence was retroactively changing the original terms of the Bonds, as it "would be computing a new face value for every clipped Coupon and every unclipped coupon for the principal. Even though we recognize that if it was clipped, it was paid at the amount paid on the actual Coupon."[70] To adjust from the date of their issuance would mean that the nominal terms of each Bonds were void from their very inception,[71] even though it is undisputed that bondholders presented coupons and were paid for them during this time.

23. Finally, Gramercy similarly errs in arguing that the 2001 Sentence created any certainty with respect to the interest rate applicable to the Land Bonds.[72] The 2001 Sentence does not refer to interest. In addition:

- **Peruvian Law does not require a 7.22% interest rate**. Under Peruvian law, there is (and was) no one way to compute interest, and it is not even clear whether the current value principle requires interest to cover opportunity costs.[73] While Gramercy cites Dr. Castillo in support for this rate,[74] Dr. Castillo confirmed during cross-examination: "I do not delve into the matter of interest."[75]
- **Gramercy's preferred rate is unsupported.** Gramercy has not identified evidence that anyone understood the 2001 Sentence to implicitly require the application of a 7.22% interest rate prior to Mr. Edwards. On the contrary, during the Hearing, Mr. Edwards confirmed that he did not cite any evidence of Gramercy's expectations for the interest rate it seeks, and confirmed that Peru "could have done anything" and "can apply any rate they want."[76] Mr. Edwards confirmed that he did not rely on Peruvian law (or Dr. Castillo) in coming up with the 7.22% rate.[77] He also conceded that his approach was inconsistent with Gramercy's own internal valuation models.[78]
- **Gramercy's preferred rate is economically problematic.** As Peru's Quantum experts confirmed: "[t]he Cost of Debt, [Edwards] says, is 7.22 percent. This is a lending rate that someone would get if you lent to people who construct all of the

[66] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 22.

[67] Hr'g. Tr. 1417:6-8 (Day 4) (Castillo Cross).

[68] Hr'g. Tr. 1435:17-19 (Day 4) (Castillo Cross).

[69] *See, e.g.*, Contract for the Assignment of Rights, 14 February 2007 (Doc. CE-339.043) (with expropriation date of 3 June 1975 and bond placement date of 19 April 1977).

[70] Hr'g. Tr. 2366:9-16 (Day 7) (Quantum Direct). *Id.* 2366:19-2367:5, 2370:5-12 (Day 7).

[71] Hr'g. Tr. 2372:3-20 (Day 7) (Quantum Direct).

[72] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 28-31; Quantum Direct Presentation, Slide 28.

[73] *See, e.g.*, Hundskopf II ¶¶ 64-67.

[74] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 28-31.

[75] Hr'g. Tr. 1408:20-22 (Day 4) (Castillo Cross).

[76] Hr'g. Tr. 1719:22, 1732:19-20 (Day 5) (Edwards Cross).

[77] Hr'g. Tr. 1717:10-1718:19, 1732:19-20 (Day 5) (Edwards Cross).

[78] Hr'g. Tr. 1727:14-1728:15 (Day 5) (Edwards Cross).

assets in the economy. [I]t's a very theoretical rate. There is no instrument anyone could possibly invest in to replicate this. You can't be a partial lender to every asset in the economy…. Unlike a Treasury Bill rate, which is an instrument - yes, maybe you need to fly to the U.S., but you can still invest in it. This is uninvestable."[79]

24. Unsurprisingly, the criteria for determining the current value of the Bonds that Gramercy now says were tacitly mandated by the 2001 Sentence are the very same criteria that Gramercy proposes in this Treaty proceeding. In fact, however, even Gramercy has not always used these supposedly implicit criteria, as discussed below. Gramercy's own changing positions over time merely confirm the uncertainty that existed until 2013.

### 3. Uncertainty Persisted For Years After The 2001 Sentence

25. The record makes it clear that the uncertainty following the issuance of the 2001 Sentence lasted for over a decade.[80] The evidence from this period reconfirms that there was no clear legal rule as to the correct method for the calculation of the value and payment of the Agrarian Reform Bonds.

- **Contemporaries did not perceive a clear legal rule**. The existing state of uncertainty was confirmed by the joint commission report of 2004, which found that "the current legal norms do not limit or restrict the factors or indexes that can be utilized to update the agrarian debt," and "three distinct possibilities have been used as factors for updating," which included a dollarization methodology.[81]
- **There was no clear rule in the courts.** Following the 2001 Sentence, various inconsistent methods were used to calculate the current value of the Bonds in court proceedings. In the Luna Case, for example, the court ordered the application of Lima / Trujillo CPI dating back to the date of placement and interest at the stated coupon rate, compounded annually.[82] In the Ica Case, the court used a Central Bank automatic adjustment indexes and did not specify a date or type of interest to apply.[83] In the Laredo Case, the court applied Lima CPI from the date of the last clipped coupon with simple interest at the stated coupon rate.[84]
- **The Legislature tried, and failed, to establish a legal framework.** Between 2001 and 2013, at least 11 different bills with varying approaches to bringing certainty to the status and value of the Land Bonds were proposed, but none became law.[85] These various bills contemplated using Lima CPI, dollarization, and Adjusted CPI.[86] Dr. Castillo conceded that "over the decades, there have been any number of attempts on the part of civil society, associations and in this case, the Congress of the Republic, to establish some legal way in addition to the courts of justice to conclude this history in a satisfactory manner for society in general."[87]

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[79] Hr'g. Tr. 2383:3-21 (Day 6) (Quantum Direct).

[80] *See e.g.,* Statement of Defense ¶¶ 38 *et seq;* Statement of Rejoinder ¶¶ 180 *et seq.*

[81] Report of Commission 148, 6 Feb. 2004 (H-15).

[82] Fourteenth Civil Court of Lima, Expert Report, File No. 31548-2001, 4 May 2006 at 3, 4, 7 (CE-117).

[83] Supreme Court Sentence CAS No. 1002-2005, 12 July 2006 at 2 (CE-14);

[84] Fifth Civil Court of Trujillo, Expert Report, File No. 303-72, 6 November 2006, at 4, 12 (CE-119).

[85] Peru Opening Statement, Slides 29, 51.

[86] *Id.*

[87] Hr'g. Tr. 1452:20-1453:3 (Day 4) (Castillo Cross).

- **The Executive confirmed the lack of a legal framework.** Likewise, until 2013, the MEF's position was that there was no legal framework for paying the Bonds.[88] According to a July 2006 report, the "approval by Congress … of a legal framework is pending, which would establish the general treatment of the obligations derived from the agrarian reform process… such rights and interests, as well as those of the State, with respect to the obligations derived from the Agrarian Reform process, can only be determined when one counts with the aforementioned legal framework and will be exercised in accordance with said framework and other applicable norms."[89]

26. The lack of certainty was also confirmed during the Hearing. According to Vice Minister Betty Sotelo, the 2001 Sentence "didn't indicate the way in which the valuation would take place or how the current value principle would be applied" and thus, "there was no legal formula to establish how the Bonds of the Agrarian Reform would be brought up to current value."[90] Likewise, Minister Luis Miguel Castilla explained: "[i]f you look at the legislation at the time, there is no law that has a current value principle or a legal framework that establishes how value is to be established. That does not exist. Therefore, it was impossible for a legal framework to be established that could translate that 2001 Decision into an express valuation method. There was a legal vacuum, like I said, a legal lacuna.[91]

27. Gramercy incorrectly argues that the MEF could have established a process to pay the Bonds under the 2001 Sentence, had it chosen to do so.[92] Contrary to Gramercy's mischaracterization, Minister Castilla did not "admit[] that the President or the MEF could have done so by decree."[93] In fact, he expressly explained the opposite:

> As a matter of Peruvian law, there is a division of powers. The legislative branch of Government is the one that establishes the laws. The Executive does not have legislative powers... Emergency Decrees need to meet certain requirements that are set by the Constitutional Tribunal. One of the requirements is that they need to be time-barred, and they should not predict the situation because, otherwise, if the situation is predictable, then Congress could legislate…. [A]n emergency Decree has very specific criteria that it has to meet. I wouldn't say that an Emergency Decree could be a permanent solution legally in connection with that matter.[94]

28. Vice Minister Sotelo and Dr. Hundskopf similarly confirmed that the MEF was unable to implement the 2001 Sentence without a law authorizing it,[95] absent which a supreme decree would not have been appropriate.[96]

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[88] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 32-43; Hr'g. Tr. 495:14-18 (Koenigsberer Cross).

[89] Letter No. 077-2006-EF/75.01/DE from DNEP to Defensoría del Pueblo, 17 July 2006 (R-259).

[90] Hr'g. Tr. 906:16-907:8 (Day 3) (Sotelo Cross).

[91] Hr'g. Tr. 1196:7-20 (Day 4) (Castilla Cross); *see also* Hr'g. Tr. 1173:14-1175:6 (Day 4) (Castilla Direct) ("I recall a letter that was sent by representatives of Gramercy Fund making a number of requests, and the main response, which reflects the Ministry's attitude, is that there was not a legal framework for responding to their requests. During that period when I was Vice Minister for Treasury, there were a couple of efforts to try to come up with such a legal framework…. There was no legal framework.").

[92] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 40.

[93] *Id.*

[94] Hr'g. Tr. 1190:11-1191:13 (Day 4) (Castilla Cross). Minister Castilla distinguished the 2014 supreme decrees that implemented the 2013 Constitutional Tribunal Resolution and confirmed that attempts were made within the MEF to coordinate with the legislative branch to facilitate the creation of the legal framework necessary to realize payments on the Land Bonds. *See, e.g.*, Hr'g. Tr. 1189:13-18 (Day 4) (Castilla Cross).

[95] Hr'g. Tr. 928:8-19 (Day 3) (Sotelo Cross) ("A. In 2001, the Court said the current value principle has to be applied. Okay; it has to be applied. But how was it going to be applied? The how only came about in 2013…. PRESIDENT FERNÁNDEZ ARMESTO: Could this have been resolved with a law? Not with a Supreme Decree,

## C. The Hearing Confirmed Gramercy's Speculation Amidst Ongoing Uncertainty

29. The record shows that Gramercy allegedly acquired thousands of Bonds that have never been authenticated, fully aware of their uncertain legal status and driven by a speculative strategy to capitalize on that uncertainty.

### 1. Gramercy's Business Model Focused On Distressed, Uncertain Assets

30. As confirmed at the Hearing, speculation in uncertainty and risk is the core of Gramercy's business model: Gramercy uses its clients' money to acquire "distressed" assets that have the potential for high rates of return – but also the potential for total loss, as to which Gramercy disclaims all responsibility).[97] During the Hearing, Gramercy's founder and lead witness, Mr. Koenigsberger confirmed Gramercy's business model of investing in "distressed emerging market assets,"[98] which he admitted includes the Land Bonds.[99]

31. Presented with Gramercy disclosures as to the risks involved in this type of investing, Mr. Koenigsberger confirmed on cross-examination that Gramercy is "*not in the business of giving certainty or assurances*," and "there's no assurances that investment objectives will be met."[100] On the contrary, Gramercy expressly cautions investors that "the investment's performance may be volatile and *investors may lose all or a substantial portion of their investment*."[101] For Gramercy, the very lack of certainty makes an asset attractive: it can use third-party funds to speculate on potentially high returns, while making its clients bear the risk of total loss – and generating considerable management fees regardless of the outcome. Testimony at the Hearing reconfirmed that this was also what Gramercy sought with respect to the Agrarian Reform Bonds.

### 2. Gramercy's Due Diligence Confirmed The Uncertain Status Of The Bonds

32. The record shows that Gramercy knew that there was significant uncertainty as to the legal status and value of the Bonds, which were subject to a pre-existing dispute.[102] Indeed, that is the entire reason Gramercy decided to acquire Bonds. Gramercy's 2006 due diligence memorandum refers to diverse methods of potentially calculating the value of the Bonds as well as to ongoing litigation and legislative efforts in this regard.[103]

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but with a law? I understand that between 2001 and 2013, a law was missing. THE WITNESS: Yes. Yes, sir. A law was necessary.")

[96] Hr'g. Tr. 2035:10-2036:1 (Day 6) (Hundskopf Tribunal Questions) ("A Supreme Decree is a lower-ranking provision, so what we needed was an enforcement judgment by the Constitutional Tribunal because this had to do with constitutional development of this judgment at that level, at the constitutional level, meaning at the Constitutional Tribunal level. I don't think we could have done this via a Supreme Decree.")

[97] *See, e.g.,* Statement of Rejoinder § IV.B.2.b.ii; Statement of Defense § II.C.2.1.

[98] Hr'g. Tr. 394:2-10 (Day 2) (Koenigsberger Cross).

[99] Hr'g. Tr. 405:6-8 (Day 2) (Koenigsberger Cross).

[100] Hr'g. Tr. 416:12-15 (Day 2) (Koenigsberger Cross) (emphasis added).

[101] Hr'g. Tr. 424:10-20 (Day 2) (Koenigsberger Cross) (emphasis added). *See also* Hr'g. Tr. 425:1-8 (Day 2) (Koenigsberger Cross).

[102] *See, e.g.,* Statement of Rejoinder § IV.B.2.a.i.

[103] *See,* 2006 Memorandum (CE-114).

33. During the Hearing, Mr. Koenigsberger confirmed that he was unaware of any other such due diligence memorandum,[104] and Gramercy has failed to show any evidence indicating that Gramercy had a different understanding of the status of the Bonds than what is revealed in the 2006 Memorandum. Gramercy's knowledge of the lack of certainty involving the Bonds is similarly evident in other contemporaneous internal Gramercy documents.[105]

34. Mr. Koenigsberger's cross examination also confirmed that Gramercy knew about the uncertainty with respect to the Bonds. Asked whether the reference to multiple different valuation methodologies in Gramercy's due diligence memorandum suggested a lack of certainty, Mr. Koenigsberger conceded that "*there was a lack of certainty*."[106] He also confirmed that he "considered Peru to be in default,"[107] that "[t]he face value of the Land Bonds as denominated in Soles de Oro was worthless even in 2005,"[108] that there were "multiple possibilities of how to monetize the Bonds at that time,"[109] and that Gramercy aimed to find "some sort of solution."[110]

### 3. Gramercy's Hidden Contracts Confirmed The Uncertain Status Of The Bonds

35. The Bond purchase contracts that Gramercy withheld from this proceeding for years likewise reflect the Land Bonds' existing state of uncertainty.[111] Among other things, the purchase contracts provide that Gramercy acquired a "claim against the Peruvian State," including "any ancillary litigious and/or inchoate rights as may pertain to said Bonds,"[112] thus highlighting the longstanding and ongoing domestic dispute as to the Bonds. Moreover, the contracts contain an express acknowledgement by Gramercy that it was taking on the "risk" of "possible effective compensation,"[113] that Gramercy was acquiring an

[104] Mr. Koenigsberger confirmed that the 2006 Memorandum was the sole due diligence memorandum that Gramercy has submitted and that he was not aware on any other due diligence memoranda. *See* Hr'g. Tr. 471:9-18; Hr'g. Tr. 478:8-10 (Day 2) (Koenigsberger Cross). Mr. Koenigsberger further admitted that Gramercy "[t]o this day, we tell our research analysts don't spend so much time on the [due diligence] memorandum." Hr'g. Tr. 478:2-3 (Day 2) (Koenigsberger Cross).

[105] For example, internal Gramercy emails reveal that before Gramercy acquired any bonds, it was aware that its collaborator, ADAEPRA, was pursuing "a judicial strategy demanding payment of the agrarian debt." Email from Jose Cerritelli to David Herzberg, 24 January 2006 (Doc. CE-729). These internal emails also state that "draft legislation is moving forward and still could be improved and negotiated further;" that "Adaepra has proposed using the consumer price index;" and that there is an "alternative inflation index." In addition, they contain comments highlighting the uncertainty that were not included in the 2006 Memorandum, including, for example, that "[w]e are in new territory now and we are building a new case history of the valuation of these debts in the courts." *See* Email from J. Cerritelli to D. Herzberg, January 24, 2006 (Doc. CE-729); Email from J. Cerritelli to D. Herzberg, January 24, 2006 (Doc. CE-749). These documents also confirm Gramercy's strategy to pressure to Peru to change its law. For example, an undated document titled "Check list of Items to Cover in our Due Diligence" states that "we should talk to the incoming government to propose to them solutions that result in holders realizing the highest returns." Check list of Items to Cover in our Due Diligence, undated, (Doc. R-1095).

[106] Hr'g. Tr. 480:13-20 (Day 2) (Koenigsberger Cross).

[107] Hr'g. Tr. 473:18-19 (Day 2) (Koenigsberger Cross); *see also* Hr'g. Tr. 461:21-462:7.

[108] Hr'g. Tr. 464:18-20 Day 2) (Koenigsberger Cross) (not objecting to Amended Koenigsberger ¶ 21 ("The face value of the Land Bonds as denominated in Soles de Oro was worthless even in 2005….").

[109] Hr'g. Tr. 472:8-13 (Day 2) (Koenigsberger Cross).

[110] Hr'g. Tr. 470:7-17 (Day 2) (Koenigsberger Cross) ("[I]f I go back to that time, we had underwritten this on two potential paths to monetization. We talked about monetization path. One, the preferred route, which is engaging in a dialogue, whether that be with the Legislative or the Executive branches of Government to try and implement some sort of solution around the Land Bonds. So, that was part of the initial strategy was, as in many, which is understand what the problem is and try and aggregate us a group of creditors to be able to implement a solution.").

[111] *See, e.g.*, Statement of Rejoinder ¶ 352.

[112] *See, e.g.*, Post-Hearing Brief on Jurisdiction of the Republic of Peru § II.A.

[113] *See, e.g.*, Contract for the Assignment of Rights, Doc. CE-339.001, 20 October 2006, Art. 3.2(vi).

"expectative right" as to the "possibility of actual collection,"[114] and therefore that Gramercy's purchase price – substantially discounted from a valuation by a Peruvian bondholder organization – was "adequate."[115]

36. At the hearing, Dr. Hundskopf confirmed that Gramercy's chosen contract language, and the provision on "expectative rights" in particular, reflect that the "possibility of collecting compensation stemming from this property constitutes an expectative right whose maturization is on account of and at the risk of the assignee." This possibility is "a gamble" and "something that could be remotely possible, even"; "it was not guaranteed."[116] Gramercy's expert, Dr. Bullard, likewise acknowledged that an expectative right refers "to the possibility to collect, to the expectation."[117]

37. In its Post-Hearing brief, Gramercy argues that the "expectative right" language in its purchase contracts "serves to allocate collection risk between assignor and assignee, effectively disclaiming any obligation of the selling bondholder to make whole Gramercy, as purchaser, if Gramercy was not able to collect payment from Peru."[118] This is not a defense, but a concession. The fact that Gramercy acquired an expectative right – and that, as Gramercy now confirms, the transaction involved allocation of risk – reflects the lack of certainty existing at the time that it was going to be able to collect payment at all.

38. Finally the purchase contracts reveal that Gramercy agreed to pay bondholders US$ 33 million for the Bonds, *i.e.*, far below what Gramercy now says the same Bonds are worth.[119] At the Hearing, Gramercy's Chief Compliance Officer, Mr. Lanava, and its Chief Financial Officer, Mr. Joannou, both confirmed this purchase price,[120] and Mr. Joannou further confirmed that this was "a substantial discount to a Peruvian Bondholder group's calculation of their value."[121] Indeed, the Contracts include valuations by ADAEPRA, a Peruvian bondholder organization, which used a simple interest methodology resulting in valuations that were higher than what Gramercy agreed to pay.[122] That Gramercy was able to acquire the Bonds for this amount is further clear evidence of uncertainty: it is simply not credible that bondholders would have agreed to receive this amount if there truly had been a clear or implicit legal rule giving them a right to significantly more.

### 4. Gramercy's Post-Acquisition Lobbying Confirmed The Uncertain Status Of The Bonds

39. Gramercy's extensive efforts to being certainty to the legal status and value of the Land Bonds confirms its knowledge of the existing uncertainty. Indeed, the record shows that, even before it acquired any Bonds, Gramercy designed a strategy to monetize the

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[114] *See, e.g.*, Contract for the Assignment of Rights 20 October 2006, Art. 3.2 (Doc. CE-339.001); *see also* Statement of Rejoinder § IV.B.2.

[115] *See, e.g.*, Contract for the Assignment of Rights, Doc. CE-339.001, 20 October 2006, Art. 3.2(vi).

[116] Hr'g. Tr. 2014:14-2015:2 (Day 6) (Hundskopf Direct); Hundskopf Direct Presentation, Slide 3. *See also* Hr'g. Tr. 2049:17-2050:4 (Day 6) (Hundskopf Cross) (explaining that Gramercy's acquisition of an expectative right reflected the risk it ran, as the acquirer, that lacked certainty as to what it was doing to recover, which could be "five times more or five times less."). This, Dr. Hundskopf explained, means that an expectative right reflects that collection was only a "probability" and, accordingly not like "securities in general."

[117] Hr'g. Tr. 1899:3-4 (Day 5) (Bullard Direct).

[118] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 35.

[119] *See, e.g.*, Statement of Rejoinder § IV.B.1.b.

[120] Hr'g. Tr. 718:22-719:51 (Day 2) (Lanava Cross); Hr'g. Tr. 794:21;795:1 (Day 2) (Joannou Cross).

[121] Hr'g. Tr. 807:3-16 (Day 2) (Joannou Cross).

[122] Statement of Rejoinder § IV.B.2.a.ii.

Bonds that included lobbying to influence changes in Peruvian law.[123] The record further shows that, following its acquisition of the Bonds, Gramercy followed through on its plan to push for changes in legislation,[124] and also that Gramercy sought to influence the Peruvian judiciary, including through meetings between Gramercy representatives and the Constitutional Tribunal.[125] Such efforts to change the law in Gramercy's favor, confirmed by Gramercy's own documents and the testimony of its own witnesses, underscore that the Bond framework was anything but "certain" until the July 2013 Resolution – let alone as early as 2001, as Gramercy now claims.

40. Among other examples, which Gramercy does not deny, in June 2009, Gramercy wrote a letter to the Agrarian Commission of Peru's Congress that was included in a report by the Commission, which highlighted the purported importance of a new bond issuance.[126] Shortly thereafter, Gramercy told its investors that "[redacted]"[127] Gramercy also wrote to the President of Peru in May 2009 to propose a restructuring whereby Peru would swap Gramercy's Bonds with new sovereign bonds.[128] The letter acknowledges that there was not yet a "definitive solution" and acknowledged the "complexity of the issue."

41. Hearing testimony further confirmed that Gramercy recognized the uncertain status and value of the Bonds and sought to remedy it. Mr. Joannou conceded that Gramercy paid (and continues to pay) lobbyists.[129] In fact, the record shows that both Gramercy and its former lawyer, Mario Seoane commented on a draft bill that would have brought certainty to the status of the Land Bonds around 2009 had it become law (which it did not); indeed, Mr. Seoane "highlighted the importance of its approval to give the bondholders the possibility of reclaiming its payment."[130]

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[123] *See, e.g.*, Statement of Rejoinder § IV.B.2.b; Post-Hearing Brief on Jurisdiction § II.D; Due Diligence Memo (CE-114).

[124] *See, e.g.*, Statement of Rejoinder §§ IV.B.2.b.i, IV.B.2.c.i.

[125] *See, e.g.*, Email from Jose Cerritelli to Robert Koenigsberger, 9 October 2013 (Doc. CE-737) (discussing the July 2013 Constitutional Resolution and stating that "we are discussing the above issues with the president of the tribunal, Oscar Urviola."). During 2013, for example, the Constitutional Tribunal's visitor log records at least 10 separate visits from Gramercy attorneys Mario Seoane and Isacc Huamanlazo on 16 January, 22 March, 27 March, 22 April, 23 April, 29 April, 26 June, 18 September, 2 October, and 15 November, respectively. *See* Constitutional Tribunal, Visitor Registry, 2013 (R-467).

[126] Agrarian Commission Report, 31 May 2011 (Doc. R-397).

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

[128] Gramercy Letter to President of Peru, 7 May 2009 (Doc. R-261).

[129] Hr.g. Tr. 804:17-20 (Day 2) (Joannou Cross). Indeed, Gramercy's pressure campaign has not ended: recently publicized lobbying forms indicate that, in the second quarter of 2020, Gramercy paid three different lobbying firms a total of US$ 310,000 to lobby multiple branches and agencies of the U.S. Government. This follows the $460,000 Gramercy spent on lobbying in the first quarter of 2020. *See* Peru Letter to Tribunal, 21 May 2020 (R-82). Overall, since 2015, Gramercy has now invested more than US$ 4 million in lobbying on the Land Bonds. *See, e.g.*, Statement of Rejoinder ¶¶ 304-312; Statement of Defense ¶ 132; Post-Hearing Brief on Jurisdiction ¶ 32; Letter from Peru to the Tribunal, 3 August 2020 (R-87).

[130] Opinion of the Agrarian Commission of Congress on Draft Bills N°s 456/2006-CR, 3727/2008-CR and 3293/2008-CR, June 16, 2011, at 10 (CE-160).

42. Similarly, Mr. Koenigsberer testified that Gramercy intended to "catalyze a consensual resolution" to the Land Bonds.[131] In particular, he confirmed that Gramercy considered that it had "two potential paths to monetization."[132] He described the "preferred route," as "engaging in a dialogue" "with the Legislative or the Executive branches" "to try and implement some sort of solution around the Land Bonds."[133] According to Mr. Koenigsberger, Gramercy was "part of Bondholder committees" and "we consulted with and supplied expertise to Bondholders that were involved with" the Agrarian Commission of Congress."[134] As previously detailed, Gramercy's documents confirm that these lobbying efforts across the political branches were part of what Gramercy itself described as a campaign to "pressure" Peru[135] – *i.e.*, to compel Peru to pay more for the Bonds than Peruvian law provided – once again undermining Gramercy's claims to certainty in the law as of 2001.

43. Mr. Koenigsberger further confirmed that "Mario Seoane before, who was our counsel and counsel to other Bondholders" was referenced in a Gramercy document as the person "discussing" issues related to the Land Bonds "with the President of the [Constitutional] Tribunal, Oscar Urviola."[136] While Gramercy peddles conspiracy theories involving alleged "interference" with the Constitutional Tribunal, it, of course, has no explanation for its own contacts with the Tribunal. Gramercy's efforts further confirm the existing state of uncertainty of the Bonds at the time. If, as Gramercy now claims, the framework as to Bond valuation and payment was certain, there would have been nothing left for Gramercy to "resolve."[137]

### 5. Gramercy's Unreliable Valuations Confirmed The Uncertain Status Of The Bonds

44. During the Hearing, Gramercy's witnesses and expert once again confirmed that, under the Bondholder Process, Gramercy would have been able to receive US$ 34 million for the Land Bonds for which it paid US$ 33 million.[138] While Gramercy does not consider this sufficient, the established facts and Hearing testimony confirmed that Gramercy's own valuations over time were highly subjective, initially reflecting the uncertain status and value of the Land Bonds; and subsequently, after the Constitutional Tribunal resolved that uncertainty, Gramercy's ongoing disregard for established Peruvian law.

45. The record shows that Gramercy, since the time of its acquisition, has given its Bond Holdings diverse valuations not grounded in Peruvian Law. [redacted]

[131] Hr'g. Tr. 621:21 (Day 2) (Koeningsberger Cross).

[132] Hr'g. Tr. 470:8-9 (Day 2) (Koeningsberger Cross).

[133] Hr'g. Tr. 470:9-13 (Day 2) (Koenigsberger Cross).

[134] Hr'g. Tr. 470:17, 541:19-543:14 (Day 2) (Koenigsberger Cross).

[135] *See, e.g.*, Post-Hearing Brief on Jurisdiction § II.D; [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY].

[136] Hr'g. Tr. 580:21-581:9, 582:5-9 (Koenigsberger Cross); *see also* Hr'g. Tr. 581:15-21 (Koenigsberger Cross).

[137] Hr'g Tr. 621:21(Day 2) (Koenigsberger Redirect).

[138] Hr'g. Tr. 1628:11-13 (Day 5) (Edwards Direct). 1650:22-1651:6 (Edwards Cross); Edwards Presentation, Slide 38; Hr'g. Tr. 593:6-16 (Day 2) (Koenigsberger Cross).

[redacted]."[139]

46. At the Hearing, Messrs. Joannou and Koenisgsberger confirmed that [redacted][140] Mr. Koenigsberger confirmed that [redacted].[141]

47. As Mr. Joannou confirmed, Gramercy has not shared this model with Peru, the Tribunal, or even with its auditors.[142] Gramercy also withheld this model from its own damage expert, Mr. Edwards.[143] Despite Gramercy's efforts to hide the facts, what little is known about the model reinforces that there was no clear or implicit legal rule as to the method for valuing the Bonds – not in 2001, not at the time of the acquisitions from 2006 to 2008, and not even years later. For example, Mr. Joannou admitted that [redacted].[145] Moreover, [redacted][146] Peru has no way of verifying what other differences there may be between the model and Gramercy's claims in this proceeding.

48. On the basis of its model, [redacted]"[148] When asked to elaborate, Mr. Koenigsberger cited a 2011 legislative bill which he admitted never became law, as well as court decisions as to other Bonds.[149] Notably, Mr. Koenigsberger also confirmed that Gramercy had a motive for increasing Bond valuations when he conceded that the management fees paid by Gramercy's clients are tied to its own valuation of the Bonds.[150]

49. While Gramercy's various, evolving, self-interested attempts at Bond valuations over the years underscore the prevailing lack of certainty, the Hearing also confirmed that Gramercy's financial statements ultimately are unreliable. Mr. Joannou admitted on cross-examination that [redacted]

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[139] *See, e.g.*, Statement of Rejoinder § IV.B.2.b.iii.

[140] Hr'g. Tr. 805:7-15 (Day 2) (Joannou Cross); Hr'g. Tr. 560:14-16 (Day 2) (Koenigsberger Cross).

[141] Hr'g. Tr. 560:14-16; 561:16-17 (Day 2) (Koenigsberger Cross).

[142] Hr'g. Tr. 839:10-17 (Day 2) (Joannou Cross).

[143] Hr'g. Tr. 1654:21-1655:4 (Day 5) (Edwards Cross).

[144] Hr'g. Tr. 811:16-18 (Day 2) (Joannou Cross).

[145] Hr'g. Tr. 838:13-839:9 (Day 2) (Joannour Cross).

[146] See Hr'g. Tr. 782:20-783:10 (Joannou Cross).

[147] Quantum II, Appendix 6; H-5.

[148] Hr'g. Tr. 563:14-17 (Day 2) (Koenigsberer Cross).

[149] Hr'g. Tr. 563:4-566:6 (Day 2) (Koenigsberer Cross).

[150] Hr'g Tr. 398:20-400:9 (Day 2) (Koenigsberger Cross); *see also id.* 566:9-16; Koenigsberger Rebuttal ¶ 31; GFM Brochure, 29 Mar. 2018, at 6 (R-540); Hr'g. Tr. 773:7-9 (Lanava Cross); Post-Hearing Brief on Jurisdiction ¶ 37.

[redacted][151]

In its Post-Hearing brief, Gramercy seeks to dismiss any implications of this, stating that Mr. Joannou "candidly acknowledged [the errors] on cross-examination."[152] While that is hardly a cure, it does not even address that they were not the only significant problems undermining the credibility of Gramercy's financial statements to come out on cross-examination. Indeed, Mr. Joannou further explained that, under applicable accounting standards, "you have a Level 3 security, where there are significant unobservable inputs. In that scenario, you need to have some judgment because you need to build a model to come up with the Fair Market Value. And that's what the Peru Land Bonds were. . . ."[153]

## D. The Hearing Confirmed The Resolution

### 1. The Constitutional Tribunal Established A Framework For Valuation And Payment

50. In July 2013, the Constitutional Tribunal issued a Resolution (the "July 2013 Resolution") resolving years of uncertainty as to the legal status and value of the Land Bonds, as Peru has established and the hearing confirmed.[154] The July 2013 is fatal to Gramercy's claims:

- **Confirmation of prior uncertainty.** The July 2013 Resolution expressly rejects the argument still maintained by Gramercy, that the 2001 established a clear legal rule as to the valuation of the Bonds. In fact, it provides that the 2001 Sentence "determined that the Constitutional demanded 'a valuation and updated payment' of the debt; even though it did not specify which was the criteria for determining said valuation" and did not "fix which should be, specifically, said 'valuation and updated payment criteria.'"[155] Notably, this was the opinion of a clear majority of the justices, and was reiterated in Justice Mesia's dissent (which Gramercy has never criticized).[156]
- **Creation of legal framework**. The Resolution mandated that the Executive Branch implement an administrative process through which legitimate bondholders would be paid with the following procedures: verification of the authenticity of the bonds and the identity of holders, calculation of the current value of Bonds, and determination of the form of payment, which potentially could be in cash, land, or bonds.[157]

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[151] Hr;g. Tr. 844:16-850:3 (Day 2) (Joannou Cross).

[152] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 145.

[153] Hr'g. Tr. 786:2-22 (Day 2) (Joannou Direct), 808:13-16 (Joannou Cross); Hr'g. Tr. 2427:2-2428:16 (Day 7) (Quantum Direct) (explaining the implications of Level 3 designation as follows: [redacted]

[154] *See, e.g.*, Peru's Statement of Rejoinder § IV.B.1.c.

[155] July 2013 Resolution, ¶ 17 (RA-288); *see also,* Hr'g. Tr. 2026:4-14 (Day 6) (Hundskopf Direct) ("The Constitutional Tribunal determined that the 2001 Resolution does not specify what the criterion is for determining said valuation, and that, with the purpose of making possible implementation of the Judgment of 15 March 2001 and of actually making effective the obligation of the Peruvian State to pay the Agrarian Reform Debt, this Tribunal proceeded to establish the criterion of valuation and updated payment of the debt, as well as the procedure that the Executive should follow in order to make said payment effective.").

[156] July 2013 Resolution, Mesia Dissent ¶ 20 (RA-288) (stating that neither "the Legislature nor the Executive has established the criteria for the mode of how [the Bonds] should be paid, or with what type of interest or by which deadline, as well as the date on which the calculation or updating of the debt should take place.").

[157] Hr'g. Tr. 1176:18:1177:1 (Day 4) (Castilla Direct); Hr'g. Tr. 907:12-15 (Day 3) (Sotelo Cross); Hr'g. Tr. 2031:19-2032:11 (Day 6) (Hundskopf Direct); Hr'g. Tr. 2080:4-9 (Day 6) (García-Godos Direct).

- **Determination of valuation methodology**. The Resolution also considered various methods for determining the current value of the Bonds, and, after specifically rejecting a methodology based on CPI, held that the "dollarization" method should be applied since the date of the last clipped coupon and applying the U.S. Treasury interest rate. In so ruling, the Constitutional Tribunal considered the appropriateness of the U.S. Dollar as safe-haven currency in times of hyperinflation, and the legal precedent of Emergency Decree No. 088-2000, as well as the potential budgetary impact of other methods that might make payment impracticable.[158] Dr. Hundskopf also confirmed that "unlike the 2001 Ruling, this made it possible for the MEF to establish a payment procedure administratively"[159] Similarly, Vice Minister Sotelo testified that the 2001 "[d]ecision by the Tribunal was not complete. It didn't say how the updating was to be done. That is why the Ministry was not able to establish the administrative procedure. It did so in 2013."[160]

### 2. Gramercy's Theories As To The Resolution Rely On Mischaracterizations Of Testimony And Remain Unsupported

51. Gramercy does not agree with the July 2013 Resolution's criteria for determining the value of the Bonds. To accept it, would affect Gramercy's own valuations of its purported holdings, and, thus, Gramercy's bottom line.[161] Instead, Gramercy has resorted to peddling conspiracy theories about the origins of the July 2013 Resolution, which it calls "shocking" and the result of "improper interference by the MEF in the [Constitutional Tribunal's] decision making."[162] These are grave allegations, and Peru has taken them seriously: as the record shows, they have been subject to scrutiny as part of repeated investigations by diverse branches of the Peruvian government, including Peru's Congress, which has rejected the charges of corruption on which Gramercy erroneously continues to rely.[163]

52. Gramercy has not presented a shred of evidence to support its wild theories. None of Gramercy's witnesses can speak to any of the accusations. And at the Hearing, Dr. Castillo affirmed that he had not given any opinion in connection with any such accusations.[164] The only person who even purported to address these issues was Dr. Revoredo, who withdrew herself from the proceeding, and who Gramercy refused to make available for cross-examination.[165]

53. Peru, on the contrary, voluntarily presented as a witness Minister Castilla, the very person Gramercy wrongly accuses of "improper[ly] interfer[ing]" in the Constitutional Tribunal's deliberations and "causing" it to render the July 2013 Resolution.[166] Absent any

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[158] *See, e.g.*, Peru's Statement of Rejoinder § IV.B.1.c.

[159] Hr'g. Tr. 2031:19-2032:11 (Day 6) (Hundskopf Direct).

[160] Hr'g. Tr. 923:4-13 (Day 3) (Sotelo Cross); s*ee also* Hr'g. Tr. 926:4-9 (Day 3) (Sotelo Cross) ("the Constitutional Court in the 2001 Decision declared that the Land Bonds were going to be updated using the current value principle. It clarified the methodology in 2013 and other variables as well."); Hr'g. Tr. 928:8-11 (Day 3) (Sotelo Cross) ("In 2001, the Court said the current value principle has to be applied. Okay; it has to be applied. But how was it going to be applied? The how only came about in 2013.").

[161] *See infra* Section IV.

[162] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 44-57.

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

[164] Hr'g. Tr. 1411:1-1412:1 (Day 4) (Castillo Cross).

[165] Hr'g. Tr. 1409:190-1410:15 (Day 4) (Castillo Cross).

[166] Gramercy's Post-Hearing Brief ¶¶ 45-50; Hr'g. Tr. 109:1-117:17 (Day 1) (Gramercy's Opening).

evidence of its own, Gramercy engages in mischaracterizations of Minister Castilla's testimony and seeks to argue that he "all but confessed to [the MEF's interference with the Constitutional Tribunal] on the stand."[167] Lest there be any doubts, Minister Castilla not only did not confess, he expressly rejected Gramercy's accusations. When asked about Gramercy's allegations "that you sought to intimidate or pressure the Constitutional Tribunal" in connection with the July 2013 Resolution, Minister Castilla responded:

> I reject such statements - those statements or assertions, first as regards the autonomy and majesty of the Constitutional Tribunal, which merits my greatest respect, and second to state and say that, well, no, I have always acted in a responsible manner, with proper treatment, and in a transparent manner. So, I fully reject those allegations on the part of the Gramercy Fund.[168]

54. On cross-examination Minister Castilla also made clear that "at no time there was any type of interference or saying something to the Chief Justice of Constitutional Tribunal."[169] Minister Castilla similarly rejected Gramercy's baseless assertion that routine government meetings were somehow nefarious, and denied that there was a "historical meeting" at which the MEF pressured the Constitutional Tribunal. As Castilla stated:

> Believe me, Mr. President, that if such a meeting had taken place, I certainly would remember…. I'm being very cautious in not making clear-cut assertions because a lot of time has gone by and this is the first time I'm seeing this. But I can assure you, that had there been a meeting of this sort, I would 1 have a very clear recollection of it. So, for me, this is news…. I would remember that meeting, and I have no recollection whatsoever, and I've never had those figures in mind. And I don't know Mr. Eto. I've never seen or been with him.[170]

55. Nor could Gramercy elicit any support for its wild speculations from Vice Minister Sotelo, who likewise confirmed on cross-examination that she did not have any such meeting with members of the Constitutional Tribunal.[171]

56. Absent any actual evidence, Gramercy seeks to rely on cherry-picked, out-of-context statements by Magistrates Urviola and Eto, neither of whom agreed to appear as witnesses for Gramercy, and whose statements Gramercy blatantly mischaracterizes.[172] Notably, Gramercy omits to mention that its allegations that the Constitutional Tribunal was pressured by the MEF were contradicted by the magistrates' own testimony to the Subcomission on Constitutional Accusations:

- Magistrate Eto testified that "the resolution was always going to be the same," "never in my life has the Executive established any type of pressure, we have never

[167] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 45.

[168] Hr'g. Tr. 1177:17-1178:8 (Day 4) (Castilla Cross).

[169] Hr'g. Tr. 1208:1-3 (Day 4) (Castilla Cross). *See also* Hr'g. Tr. 1230:15-1232:12 (Day 4) (Castilla Cross) (contrary to Gramercy's assertion that Minister Castilla "did not contradict … that the MEF told the Justices that the outstanding agrarian reform debt was as high as US$ 18.5 billion," during the Hearing he expressly stated "I've never seen a figure of 18.5 billion … I've never seen this.").

[170] Hr'g. Tr. 1230:15-1232:12 (Day 4) (Castilla Cross). *See also* Hr'g. Tr. 1210:3-12 (Day 4) (Castilla Cross) ([t]here was never a meeting explicitly to discuss this topic, but President Chief Justice Urviola may have referred to this or any other matter, and my position was always that of responsibility that judicial legal judgments had to be aware that we had limited resources for the population and also to address any Decisions by the Court. That has been my conduct - that is to say, equilibrium, balance, and consideration, and that is what I mentioned to Mr. Urviola.").

[171] Hr'g. Tr. 959:18-960:4 (Day 3) (Sotelo Cross).

[172] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 49.

had it," "we have never had any type of document signaled by the Ministry of Economy and Finance, as we should know."[173]

- Magistrate Urviola testified: "I reject absolutely, that we had received from the Ministry of Economy and Finance a draft, this is absolutely false."[174]
- Magistrate Alvarez testified that "we would not have accepted a draft coming from an institution, normally this would have been a scandal."[175]

57. Gramercy likewise omits to mention that other documents of the Constitutional Tribunal confirm the validity of the July 2013 Resolution, including the "acta" of July 16, 2013 recording the votes of each magistrate;[176] the "acta" of August 13, 2013, signed by all magistrates and confirming that all magistrates agreed that the July 2013 Resolution "was a closed case";[177] as well as the resolutions issued by the Constitutional Tribunal in August and November 2013, which reaffirmed the July 2013 Resolution.[178]

58. Finally, Gramercy fails to acknowledge that the MEF (among others in the Peruvian Government) did not agree with the July 2013 Resolution and presented a legal challenge seeking replacement of the Constitutional Tribunal's decision, as Minister Castilla testified.[179] This is hardly what one would expect if, as Gramercy alleges, the MEF had interfered with the Constitutional Tribunal in order to dictate the MEF's preferred outcome. In any event, the Resolution has been upheld repeatedly, including in August and November 2013, as the undisputed record shows.[180]

59. Gramercy's total lack of evidence is further highlighted by its attempts to invent new arguments in the post-Hearing phase. For example, Gramercy now argues that the July 2013 Resolution itself is a "smoking gun" because it is consistent with aspects of Professor Bruno Seminario's 2011 report.[181] Tellingly, Gramercy did not mention the alleged "smoking gun" before the Hearing, and even now has failed present any evidence that it was relied on by the Constitutional Tribunal.

### 3. The MEF Lawfully Developed And Implemented The Bondholder Process

60. As Peru has established, the MEF lawfully implemented the Constitutional Tribunal's mandate that the Executive Branch implement the procedure for the registration, valuation, and payment of the Land Bonds by developing the Bondholder Process.[182] In accordance with the Tribunal's mandate, the MEF has done so through four Supreme Decrees (the "Decrees"), each issued in accordance with Peruvian law, and each supported by a voluminous file of documentation (voluntarily provided by Peru to Gramercy), including technical reports regarding the Resolution's implementation, legal reports assessing and confirming compliance with Peruvian law, statements of reasons detailing the object and

[173] Peru Congress, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 33, 37 (R-1100).
[174] Peru Congress, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, at 14 (R-1100).
[175] Peru Congress, Subcommission on Constitutional Complaints, Transcript, 9 January 2019, 24 14 (R-1100).
[176] Constitutional Tribunal, Record of Full Session of Tuesday 16 July 2013, 16 July 2013 (Doc. R-1101).
[177] Constitutional Tribunal, Record of Full Session, 16 July 2013, at 33 (R-1072, ROP33122).
[178] Constitutional Tribunal Resolutions, 8 August 2013, 4 November 2013 (RA-229, RA-230).
[179] Hr'g. Tr. 1177:7-11 (Day 4) (Castilla Direct); Resolution of Constitutional Tribunal, 8 August 2013 (RA-229).
[180] *See, e.g.*, Peru's Statement of Rejoinder § IV.B.1.c.
[181] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 51.
[182] *See, e.g.*, Statement of Rejoinder § IV.B.1.d.

purpose of each decree, and aide memoires.[183] Peru has also established that the Bondholder Process is advancing, that Bondholders are being paid, and that the Bondholder Process comports with international norms for claims procedures.[184]

61. Hearing testimony confirms that the MEF lawfully developed and implemented the Bondholder Process pursuant to the Constitutional Tribunal's mandate:

- **MEF acted in good faith and compliance with Peruvian law**. Vice Minister Sotelo confirmed in testimony that: "[w]hat the Ministry did at all times and what it does, in particular, in connection with these proceedings is to act in good faith. It's always acted in good faith."[185] This was also confirmed by Minister Castilla: "we always acted in good faith, trying to diligently carry out that ruling."[186] Dr. Garcia-Godos confirmed that "the Supreme Decrees do meet the requirements of reasonableness, of legality; they are valid, they are in force."[187]
- **MEF developed Bondholder Process pursuant to July 2013 Resolution**. Vice Minister Sotelo confirmed that, "[a]fter the Resolution of the Constitutional Tribunal, in the process of enforcing its judgment, the Peruvian State issued the legal rules, the Supreme Decrees, to regulate the administrative procedure with respect to the valuation, registration, and payment of the Agrarian Reform Bonds."[188] She further affirmed: "the Bondholder Process "has been organized pursuant to the order of the Court."[189] Similarly, Minister Castilla confirmed that "[w]e were observing. We were complying with the Judgment."[190]
- **Each Decree was supported by ample legal and technical analysis**. Minister Castilla confirmed, "the technical areas review all of the input they have, and we use the technical, legal reports, and the Supreme Decrees did have those reports, and they were the basis to be able to carry out or implement a Supreme Decree."[191] Likewise, Vice Minister Sotelo confirmed that the "extensive documentation regarding the legal and technical support" for each Decree includes "documents supporting the Supreme Decree issuance based on the procedures usually implemented by MEF when dealing with the Council of Ministers."[192]
- **MEF confirmed valuation formulas**. Minister Castilla confirmed that "given the complexity of this task, it was allowed that one could include future provisions if needed or appropriate, so that door was left open."[193] Vice Minister Sotelo confirmed that "there was no way for one to anticipate changes in the valuation formula, but if along the way you notice that there are things to be improved, things to be corrected, well, it is always possible to go one step ahead and to make the changes that one

[183] Supreme Decree No. 017-2014-EF Record (R-317); Supreme Decree No. 019-2014-EF Record (R-318); Supreme Decree No. 034-2017-EF Record (R-357); Supreme Decree No. 242-2017-EF Record (R-359).

[184] *See, e.g.*, Peru's Statement of Rejoinder ¶ 377; Wühler II ¶¶ 7-14, 45-47.

[185] Hr'g. Tr. 900:4-10 (Day 3) (Sotelo Direct), 970:12-15 (Sotelo Cross).

[186] Hr'g. Tr. 1178:20-1179:4 (Day 4) (Castilla Direct), 1255:19-22, 1259:7-9 (Castilla Cross).

[187] Hr'g. Tr. 2097:13-15 (Day 6) (García-Godos Direct).

[188] Hr'g. Tr. 900:4-10 (Day 3) (Sotelo Direct), 970:12-15 (Sotelo Cross).

[189] Hr'g. Tr. 900:18-19 (Day 3) (Sotelo Direct).

[190] Hr'g. Tr. 1255:18-1256:3 (Day 4) (Castilla Cross); Hr'g. Tr. 1178:18-1179:1 (Day 4) (Castilla Direct), 1255:19-22, 1259:7-9 (Castilla Cross).

[191] Hr;g. Tr. 1262:3-7 (Day 4) (Castilla Cross).

[192] Hr;g. Tr. 1000:16-22 (Day 3) (Sotelo Cross).

[193] Hr'g. Tr. 1179:5-8 (Day 4) (Castilla Direct).

considers are going to improve the whole administrative process system.[194] She also explained that the MEF confirmed the formulas "because of the different interpretations that one might have of the variables contained in the Supreme Decrees 17 and 19 that an additional consultation was put to Mr. Seminario."[195]

- **MEF reconfirmed valuation formula with international expert and provided further specificity**. Vice Minister Sotelo confirmed that, in addition to confirming with Mr. Seminario, "for further certainty, [the MEF] asked the opinion of an international expert, Mr. Carlos Lapuerta."[196] She also confirmed that Supreme Decree No. 242-2017-EF "was issued to specify some of the aspects in the formula and to avoid interpretations as to sources of information and where several of those variables came from."[197]

- **The Bondholder Process is Advancing and Bondholders are being paid**. Vice Minister Sotelo testified that the implementation of the Bondholder Process "is continuing"; and, specifically, that "according to the last cut at early January, approximately 191 Bonds were paid for about 4.5 million soles."[198] Indeed, Peru already authenticated well over 11,000 Bonds, more than the total number of old Bonds that Gramercy claims to hold.[199] The amount to which a participating bondholder is entitled is determined by strict application of the formula of Supreme Decree No. 242-2017-EF.[200] The assessment made at the payment stage is on the viability of the participating bondholder's requested mode of payment (and not the amount).[201] Dr. Wühler confirmed his conclusion that the Bondholder Process is "progressing" and that it "provide[s] for an efficient resolution of the individual bonds submitted to it."[202] He also reconfirmed that the Bondholder Process "is a fair and effective process for the resolution of the bonds, but also for the individual Bondholders to seek the payment of the actualized value of the bonds."[203]

- **The Bondholder Process is a claims and compensation process**. Dr. Wühler confirmed that "the process established by Perú to deal with the agrarian bonds and with the claims by Bondholders is a claims and compensation process."[204] Professor Guidotti similar confirmed that with respect to the Bondholder Process "there is no analogy to the debt restructuring."[205] Even Gramercy's expert, Olivares-Caminal, who had sought to draw unfounded analogies to debt restructurings, confirmed that "I don't think it's a debt restructuring process."[206]

- **The Bondholder Process comports with international norms**. Dr. Wühler also confirmed that "the efficacy and efficiency of the Bondholder Process are sound and

[194] Hr'g. Tr. 976:6-12 (Day 3) (Sotelo Cross).

[195] Hr'g. Tr. 961:18-962:2 (Day 3) (Sotelo Cross).

[196] Hr'g. Tr. 973:19-21 (Day 3) (Sotelo Cross).

[197] Hr'g. Tr. 997:14-17 (Day 3) (Sotelo Cross).

[198] Hr'g. Tr. 900:15-17 (Day 3) (Sotelo Direct).

[199] Administrative Process Summary Slide, 31 August 2019 (R-1064).

[200] *See, e.g.*, Statement of Rejoinder IV.B.1.e; Statement of Defense II.E.

[201] Supreme Decree No. 242-2017-EF, Art. 17 (RA-23). The full process is detailed in Article 17 of Supreme Decree No. 242-2017-EF.

[202] Hr'g. Tr. 2197:19-2198:2 (Day 6) (Wühler Direct).

[203] Hr'g. Tr. 2242:15-2243:9, 2197:15-18 (Day 6) (Wühler Direct).

[204] Hr'.g. Tr. 2170:10-12 (Day 6) (Wuhler Direct).

[205] Hr'.g. Tr. 2289:18 (Day 6) (Guidotti Direct).

[206] Hr'.g. Tr. 1488:18-19 (Day 4) (Olivares-Caminal Direct).

consistent with international practice," and that the Bondholder Process is "effective compared to other processes comparing to the different stages that they have."[207]

62. Forced to abandon its original claims in these proceedings based on the July 2013 Resolution, as noted above, Gramercy has sought to shift the centerpiece of its claims to the development of these Decrees and their compliance with hyper technical formalities, and to the implementation and status of the Bondholder Process – a Process which, in any event, Gramercy chose to boycott.

63. For example, Gramercy tries to attack the Decrees through supposedly independent expert Dr. Bullard, who was revealed to have various conflicts of interest (some of which he did not disclose) and to be self-interested in the proceeding, including because he simultaneously acts as counsel to various claimants pursuing claims against Peru based on similar facts and arguments as those in this proceeding.[208] Moreover, it was revealed that Dr. Bullard had previously analyzed the same criteria as an expert for Peru on a different matter and reached the opposite conclusion *i.e.*, that the type of measure he now challenges was, in fact, lawful as a matter of Peruvian law [209] Further undermining his testimony, on cross-examination, it became clear that Dr. Bullard had not actually reviewed all relevant records of the very Decree records he was criticizing for purportedly lacking sufficient records.[210]

64. Gramercy alleges that Peru failed to abide by hyper formalisms, including to (i) pre-publish the Decrees; (ii) provide a statement of reasons; and (iii) perform a regulatory quality analysis.[211] While even such alleged noncompliance with local law cannot rise to the level of a Treaty breach, as addressed further below, the hearing confirmed that Peru, in fact, did observe applicable Peruvian law.

- **Pre-publication**. Pre-publication of the Decrees was not required, because, as Dr. Garcia-Godos explained at the Hearing, the applicable law, Law No. 29158, requires pre-publication of regulations only "when the law so requires."[212] Gramercy's claim that pre-publication was required relies on a supreme decree (not a law), which, as Dr. Garcia-Godos confirmed at the hearing, is "not binding in this respect."[213] Even assuming pre-publication were required by the text of an applicable law (which it is not), Dr. Garcia-Godos confirmed that it would not be required in this case because of the particular nature of the Decrees in that they were issued to implement the binding mandate of the Constitutional Tribunal, as reflected in the published Resolutions.[214]

[207] Hr'g. Tr. 2202-16-19, 2269:7-9 (Day 6) (Wühler Redirect); *see also* Hr'g. Tr. 2198:8-11 (Day 6) (Wühler Direct).

[208] Hr'g. Tr. 1929:10-1935:9 (Day 5) (Bullard Cross).

[209] Hr'g. Tr. 1941:9-20 (Day 5) (Bullard Cross).

[210] Hr'g. Tr. 1979:4-1984:21 (Day 5) (Bullard Cross).

[211] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 78-86.

[212] Hr'g. Tr. 2099:9-2100:5 (Day 6) (García-Godos Cross); *see also* Ley Orgánica del Poder Ejecutivo, Art. 13, 20 December 2007 (RA-396).

[213] Hr'g. Tr. 2104:7-14 (Day 6) (García-Godos Cross).

[214] Hr'g. Tr. 2088:1-19 (Day 6) (García-Godos Direct) ("[A]pplication of the mandate of the CT makes prepublication unnecessary…. Publication is based on the principles of transparency and foreseeability. Normally the Opinion of the people, well, that's important in the case of prepublication, when there are certain doubts about the scope of certain provisions, whether changes or new points are going to be introduced, there's a generic group of persons who might be impacted, and, therefore, an opinion would be needed to prepare the Parties, particularly when there may be major impact on the normal course of transactions. This comes from a judicial process as between the Parties, where there was a specific pronouncement. There was a plaintiff or several plaintiffs and a Respondent, which in this case was the State, so what was going to be pre-published and what for?"); *see also* Hr'g Tr. 2158:10-15 (García-Godos Redirect).

During the Hearing, Gramercy also raised questions about whether the Constitutional Tribunal's mandate left open sufficient questions so as to require pre-publication of the Decrees. Dr. Garcia-Godos made clear that this was not the case because "[t]his is not a typical Supreme Decree. This is an atypical Supreme Decree that comes from a specific mandate from the highest court of the land. The possibilities to act in a discretionary manner are very limited."[215]

- **Statement of Reasons**. It is undisputed that each of the decrees was accompanied by a statement of reasons.[216] Indeed, as Peru has established, each of the decrees issued in this case was developed through a careful and deliberative process and was supported by technical and legal opinions, as well as an explanatory statement (*exposición de motivos*) and corresponding aide memoire.[217] Yet, Gramercy complains about sufficiency, alleging the need for some sort of further "cost-benefit" or "quantitative" analysis.[218] However, each was accompanied by a cost-benefit analysis.[219] Moreover, the statements of reason issued for the Decrees were sufficient given their particular nature, as under Peruvian law and in practice, the scope of a statement of reasons depends on the subject matter in question, as confirmed by Dr. Garcia-Godos,[220] Minister Castilla,[221] and Vice Minister Sotelo[222] during the Hearing.
- **Regulatory Quality Analysis**. The MEF was not required to perform a regulatory quality analysis in the case of the Decrees as they are not "norms of a general character" and, thus, are expressly exempted under Article 2.1 of Legislative Decree No. 1310.[223] Indeed, this was confirmed by the MEF General Counsel's office, which concluded that the Decrees were exempt because they only involve certain persons considered to be legitimate bondholders of the Lands Bonds.[224] During the Hearing, Dr. Garcia-Godos confirmed that "in my view [the MEF's conclusion] is valid."[225]

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[215] Hr'g. Tr. 2115:10-14 (Day 6) (García-Godos Cross).

[216] Doc. R-684; Doc. R-698; Doc. R-989; Doc. R-678

[217] *See, e.g.*, Peru's Statement of Rejoinder § IV.B.1.d.

[218] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 84.

[219] Doc. R-684; Doc. R-698; Doc. R-989; Doc. R-678.

[220] *See* Hr'g. Tr. 2089:9-16 (Day 6) (García-Godos Direct) ("[I]n this case, there may be statements of purpose that are very concise, but no one can deny that there have been reports as among the various areas of the Ministry of Economy that reveal that there's been a review of the regulatory formula that was finally going to come out. And, finally, these provisions rest on the judgment of the Constitutional Tribunal.).

[221] Hr'g. Tr. 1289:9-12 (Day 4) (Castilla Cross) ("One cannot make a general statement that all cost-benefit analyses will be the same. It will depend on the subject matter covered by the Supreme Decree."). Minister Castilla also addressed the implications of the fact that in this case the MEF was implementing a mandate of the Constitutional Tribunal: "[E]verything will depend on the purpose of the Supreme Decree and what is the context of the Supreme Decree. The 2014 one was to carry out a mandate from the Constitutional Tribunal. Therefore, it was what it was. There was no way to avoid or get around that, much less was it the intent - one had to completely carry out, fully carry out what was being ordered by the Constitutional Tribunal. That is very different from a proposal that originates in the Executive Branch and that must be accompanied by a cost-benefit analysis. So, I believe that the provision must be seen in its proper dimension."). *See* Hr'g. Tr. 1291:13-1292:4 (Day 4) (Castilla Cross).

[222] Hr'g. Tr. 980:16-981:5 (Sotelo) ("It would be difficult to [indicate a specific cost to the State of the Land Bonds], and it would not have been productive to do it at the time, because we needed to do the Supreme Decrees and abide by them. We didn't know how many coupons would be in circulation. We didn't know the date of the nonpayment to recognize the obligation.… So there were many assumptions that one had to take into account to conduct this exercise. So, to abide by the procedure mandated by the Constitutional Court, well, we didn't really have to know exactly how much these obligations were going to cost.).

[223] *See, e.g.*, Peru's Statement of Rejoinder § IV.B.1.d; Legislative Decree No. 1310, 5 April 2019 (RA-410).

[224] MEF, Oficina General de Asesoría Jurídica, Memorando N° 264-2018-EF/42.01, 28 June 2018 (Doc. R-1148).

[225] Gramercy mischaracterizes Dr. García-Godos's conclusion with respect to this point, claiming that he "refused to say whether or not, in his professional opinion, the MEF's position was right." Gramercy's Post-Hearing Brief on

> Dr. Garcia-Godos elaborated on his conclusion that the Decrees are exempt because they were not of a general character by referring to the purpose of the norm itself, which is "to verify that administrative procedures meet certain basic standards, but based on the terms of legality and necessity, proportionality, and efficacy."[226] In this case, as Dr. Garcia-Godos explained that the regulatory quality analysis was not applicable for two reasons. First, "[t]hese are administrative proceedings that are atypical because they come from a resolution of a legal dispute that decided that there was a debt by the State in favor of a given group or group that could be determined; and second "the Executive Branch, of course, cannot call into question the validity of administrative procedures or aspects of administrative procedures that are in a statute. All the more so, if it's the Constitutional Tribunal."[227]
>
> To the extent that certain aspects of the Bondholder Process were not specifically established by the Constitutional Tribunal, Dr. Garcia-Godos confirmed that those aspects would be outside the scope intended to be subject to the regulatory quality analysis: "that is not the kind of depth that is sought by the analysis of regulatory equality… The evaluation forms … don't get into these aspects."[228]

65. In addition, Gramercy continues to try to attack the decrees because of what it claims is a lack of "analysis of their impact" on Peru's budget.[229] This is a red herring. Peru has established that there is no complete record of the total outstanding number of Land Bonds, as all such records disappeared with the liquidation of the Agrarian Bank.[230] In this context, during the Hearing, both Vice Minister Sotelo and Minister Castilla addressed the unique circumstances surrounding the Land Bonds affecting the MEF's ability to consider the potential budgetary impact.[231] Notwithstanding these uncertainties, Minister Castilla transparently affirmed at the Hearing that he was "not going to deny that we didn't have any estimates,"[232] and, of course, Peru produced many documents in its possession relevant to this.[233] Nonetheless, during the Hearing Gramercy sought to take certain of these documents voluntarily produced by Peru out of context by alleging that, rather than estimates, they could represent "the number" that Peru is using internally.[234] In response, Vice Minister Sotelo rejected this at the Hearing: "they are talking about assumptions. One has to know where have they estimated what is the assumption"; and reiterated her conclusion that "the only

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Merits and Remedies ¶ 86. In fact, Dr. García-Godos's full testimony on this point is as follows: "Q. Okay. My question to you, Mr. Godos is, is it your impartial and independent Opinion that this memorandum is correct as a matter of Peruvian law? A. It is up for discussion. In my view it is valid. I have argued that. I think that it lacked further detail in the analysis of the general effect being tied to it, not stemming from a constitutional mandate that resolved a legal dispute."). *See* Hr'g. Tr. 2152:14-21 (García-Godos).

[226] Hr'g. Tr. 2094:11-15 (Day 6) (García-Godos Direct).

[227] Hr'g. Tr. 2146:1-2147:17 (Day 6) (García-Godos Tribunal Questions).

[228] Hr'g. Tr. 2150:11-18 (Day 6) (García-Godos Cross).

[229] *See, e.g.*, Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 5.

[230] Hr'g. Tr. 919:3-6, 920:12-13, 924:21-925:3, 950:9 (Day 3) (Sotelo Cross); Sotelo I ¶ 19; Decree Law N° 25478, 6 May 1992, Art 1 (Doc. RA-158).

[231] Hr'g. Tr. 951:6-13 (Day 3) (Sotelo Cross); Hr'g. Tr. 1276:4-6 (Day 3) (Castilla Cross).

[232] Hr'g. Tr. 1220:20-22 (Day 4) (Castilla Cross).

[233] *See, e.g.*, Report of Commission 148, 6 Feb. 2004 , 06 February 2004, at 7, 10• (R-257); Actualización de los Bonos de la Deuda Agraria, Bruno Seminario, 1 May 2011, at 11 (R-297); 2011 Agrarian Commission Report, 31 May 2011, at 16 (R-397); Bill 11459 / 2004-CR, 24 August 2004, at 19 (R-418); Bill 11971 / 2004-CR, November 2004: at 12-18 (R-419); 2005 Agrarian Commission Report, 10 May 2005at 29-35 (R-420); Letter No. 058-2006-PR from the President of Peru and the President of the Council of Ministers to the President of Congress of Peru, 19 April 2006, at 2 (R-423); Bill No. 3293 / 2008-CR, 21 May 2009, at 9 (R-502); (R-1072, ROP034645- ROP034646).

[234] Hr'g. Tr. 1027:16 (Day 3).

thing that is tangible and real is what is reflected in the accounting, and the accounting reflects 1 cent of a sole."[235]

66. Gramercy's attacks on the Bondholder Process are similarly unavailing.[236] For example, Gramercy incorrectly claims that Peru "did not challenge" the evidence of its witnesses who participated in the Bondholder Process.[237] Gramercy fails to mention that these supposedly independent witnesses were represented in the Bondholder Process by Gramercy attorneys, as Peru previously established.[238] While Gramercy focuses on the compensation these witnesses were to receive in the Bondholder Process, it fails to account for the fact that they presented and were already paid for a significant number of their bond coupons in accordance with their bonds' original terms—14 in the case of Ms. L and 6 in the case of Mr. S.[239] In any event, Gramercy's misguided efforts to evoke sympathy for cherry-picked individual Peruvian bondholders in no way supports Gramercy's unfounded efforts to obtain windfall profits for itself in this Treaty proceeding – an avenue unavailable to the very Peruvians who Gramercy has manipulated for its own purposes.

67. Gramercy also complains about the pace at which individual bondholders have advanced to payment in the Bondholder Process. As one example, it claims that at the current rate, it would take "100 years" for all Bonds to be processed[240] (even though Gramercy refused to allow updated statistics at the Hearing).[241] Similarly, at the Hearing, Gramercy claimed that it took, on average, 4.1 years "for bondholders just to know how much the MEF is offering."[242] Dr. Wühler, the only expert in claims procedures in this proceeding, whose testimony in this regard stands unrebutted, expressly disagreed, explaining that Gramercy is using "both a wrong calculation" and "the wrong parameters."[243] Among other things, Dr. Wühler explained that the correct metric is not based on individual advancement, but "the progress in the process as a whole."[244] Dr. Wühler also confirmed that it is "absolutely normal and natural" that "[a]s you progress in such a system, it is quite normal that you start slow, that you get faster, that the numbers of cases that you complete get higher."[245] Rather than confront Dr. Wühler' actual testimony, Gramercy repeatedly mischaracterizes and misrepresents it. Among other examples, Gramercy falsely claims that Dr. Wühler "admitted on the stand that he had not looked at whether [the Bondholder Process] was either 'fair' or 'effective' in practice."[246] In fact, he expressly stated that "[t]he Bondholder Process is a fair and effective process for the resolution of the bonds, but also for the individual Bondholders to seek the payment of the actualized value of the bonds."[247]

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[235] Hr'g. Tr. 1028:11-14 (Day 3) (Sotelo Cross).

[236] *See, e.g.*, Gramercy's Post-Hearing Brief on Merits and Remedies § II.C.3.

[237] *See, e.g.*, Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 88.

[238] Peru's Statement of Rejoinder ¶¶ 222-225.

[239] Bondholder Process Case No. 74 (R-1066); Bondholder Process Case No. 22 (R-1067).

[240] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 89, 90.

[241] Hr'g. Tr. 1561:9-1562:18 (Day 5).

[242] Hr'g. Tr. 2216:15-18 (Day 6) (Wühler Cross).

[243] Hr;g. Tr. 2219:1-2 (Day 6) (Wühler Cross).

[244] Hr'g. Tr. 2187:3-10 (Day 6) (Wühler Direct).

[245] Hr'g. Tr. 2189:17-21 (Day 6) (Wühler Direct); Hr'g. Tr. 2221:2-2222:3 (Wühler Cross) ("There has been a lot of activity…. the vast majority [of Bonds] have been authenticated. That was a very involved process.…One also has to keep in mind every claims process that you enter into, you don't start on Day Number 1 to process claims. So, in this case, my understanding is that it has taken quite some time to get the institutional arrangements concluded.").

[246] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 92.

[247] Hr'g. Tr. 2197:14-2198:2 (Day 6) (Wühler Cross).

## E. The Hearing Revealed Gramercy's Secret Bond Acquisitions During The Arbitration

68. As previously detailed, Gramercy founder Mr. Koenigsberger revealed for the first time on cross-examination that Gramercy had concluded a secret deal in 2017 to acquire still more Bonds – at the same time that Gramercy was pursuing this arbitration and the parallel attack campaign against Peru, both of which have featured allegations that Peru "destroyed" the value of the Bonds with measures years earlier.[248] Gramercy's Tranche 2 acquisitions have significant implications for its flawed Treaty case, both with respect to jurisdiction (as addressed)[249] and the merits. Even the limited information available from Gramercy's paltry post-hearing production of four Tranche 2 documents confirms:

- **Gramercy bought more Bonds well after the alleged Treaty breaches.** That Gramercy acquired additional Bonds in 2017 guts the central premise of its merits case: that the July 2013 Constitutional Tribunal Resolution and the 2014 Supreme Decrees destroyed the value of the Bonds. In fact, Mr. Koenigsberger testified that Gramercy determined that the Tranche 2 Bonds were a "good investment decision."[250]
- **Gramercy again relied on inadequate due diligence**. If Gramercy's document production is to be believed, Gramercy decided to spend US$15 million in client money to acquire interests in hundreds of Bonds based on a single, two-page investment committee memo which includes obvious errors. For example, the memo, written nearly four years after the July 2013 Resolution expressly rejected application of CPI to the Bonds, states that the Bonds had to be paid "at so-called 'current value' calculated by using the Peruvian Consumer Price Index."[251] This mirrors Gramercy's 2006 due diligence comprised of one lone, error-filled memo.
- **Gramercy again used unreliable valuations to project windfall profits.** A one-page Gramercy email showing various internal valuation scenarios prior to purchase claims that the Tranche 2 Bonds, with a US$15 million up-front purchase price, could be valued at over US$ 1.9 billion.[252] Underscoring Gramercy's highly subjective and unreliable valuations, Mr. Joannou testified that in 2018 – *after* all of the measures Gramercy alleges constitute Treaty violations – Gramercy actually increased its valuation of the Tranche 2 Bonds in its financial statements.[253]
- **Gramercy undermined the Bondholder Process.** Mr. Koenigsberger testified that Gramercy acquired Tranche 2 to further "aggregat[e] a position to be able to anchor a settlement"[254] – *even after* Peru had established the Bondholder Process as the final resolution for the Bonds. The purchase contract refers to monetization through a "settlement agreement with the Republic of Peru" or "litigating a claim or claims," and Gramercy represented that the Bonds purportedly are a Treaty investment subject to international arbitration.[255] In other words, Gramercy persuaded the Peruvian

[248] *See* Petition of the Republic of Peru, 2 March 2020; Post-Hearing Brief on Jurisdiction § II.E.

[249] Post-Hearing Brief on Jurisdiction § II.E.

[250] *See, e.g.*, Hr'g Tr. 499:19-22; Hr'g Tr. 511:14-512:1 (Day 2).

[251] Investment Committee Memo, 25 April 2017 (H-17).

[252] Gramercy Internal Email, 1 March 2017 (H-16).

[253] Hr'g. Tr. 872:8-10 (Day 2) (Joannou Cross).

[254] 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").

[255] Purchase and Sale Agreement, 27 Apr. 2017, Section 1.3 & Recital F (Doc. H-19).

seller that it stood to gain more by selling the Bonds to Gramercy and retaining a partial interest in possible recovery through Gramercy's international pressure campaign, rather than tendering into the Bondholder Process for certain payment.

- **Gramercy abused the Treaty proceeding.** Having eliminated hundreds of Bonds from tender into the Bondholder Process, Gramercy then hid the very existence of those Bonds from the Tribunal, all while alleging that low Process participation levels are relevant to its Treaty claims. As noted, Professor Reisman confirmed at the hearing that such conduct is an abuse of the Treaty proceeding. [256]

## F. The Hearing Confirmed That Gramercy's Monetization Efforts Continue

### 1. Gramercy Boycotted And Suppressed Participation In The Bondholder Process

69. Gramercy's focus on elements of the Bondholder Process ignores a fundamental, undisputed fact: Gramercy decided to boycott the Process entirely. Instead, further to its strategy from the outset, Gramercy perpetuated its abusive pressure campaign against Peru in an effort to secure far more preferable treatment for itself than for the legitimate Peruvian bondholders who participated in the lawful resolution under Peruvian law. Elements of the Gramercy campaign are comprehensively documented in the record and were further confirmed at the hearing, as previously detailed.[257] Among other elements, the hearing confirmed – even as Gramercy emphasized participation levels in the Bondholder Process as purported support for its Treaty claims – that Gramercy itself propagated misinformation designed to suppress participation in the Process.[258]

70. Gramercy's efforts to undermine the Process were further accentuated at the hearing by the new revelation that Gramercy had secretly acquired additional Bonds and withheld them from the Bondholder Process – further reducing participation levels even as Gramercy purports to challenge those levels as inadequate. Presented with this new evidence, which was revealed during the cross-examination of Gramercy's executives, the experts for both Peru and Gramercy confirmed that Gramercy's suppression of participation was decidedly relevant to consideration of the Bondholder Process:

- Dr. Wühler confirmed that it was an "objective fact" that Gramercy's decision to purchase the Tranche 2 Bonds and withhold them from the Bondholder Process "would be one reason for reduced participation rates."[259]
- Mr. Olivares-Caminal admitted that the participation rates he had presented used an incorrect baseline, as he had failed to account for both Gramercy's Tranche 1 Bonds and the newly-disclosed Tranche 2 Bonds.[260] In fact, Vice Minister Sotelo testified that Mr. Olivares-Caminal also had failed to account for another more than 1 billion soles oro in Bonds which were never delivered to bondholders, and remained in the custody of the Banco de la Nación.[261]

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[256] Hr'g Tr. 1844:20-1845:15 (Day 5) (Reisman Direct).

[257] *See, e.g,* Post-Hearing Brief on Jurisdiction of Peru § II.D.

[258] *See, e.g.*, Opening Statement of Peru, Slide 73; Hr'g Tr. 280:2-281:13 (Day 1) (Peru Opening).

[259] Hr'g. Tr. 2268:1-6 (Day 6) (Wühler Redirect).

[260] Hr'g. Tr. 1543:19-1545:7 (Day 4) (Olivares-Caminal Cross).

[261] Hr'g. Tr. 1035:12-1037:4 (Day 3) (Sotelo Cross).

- Professor Reisman confirmed that it was "doubly misleading" and "abusive" as a matter of law that Gramercy had secretly acquired additional Bonds, withheld those Bonds from the Bondholder Process, and failed to account for the Bonds when alleging low participation rates as part of its Treaty claims.[262]

71. Indeed, notwithstanding Gramercy's efforts to malign the Bondholder Process, Peru demonstrated at the hearing that some of the bondholders who sold their bonds to Gramercy would have received significantly higher compensation had they participated in the Process. Among other examples, one bondholder would have received more than US$ 1.6 million more than Gramercy paid, and another would have received more than US$ 1 million more than Gramercy paid.[263] Gramercy has no substantive response.[264]

### 2. Gramercy's Permanent Campaign Continues

72. Even after Gramercy's submission of its claims to arbitration (and after repeated admonitions by the Tribunal) Gramercy continues its monetization strategy of pressuring Peru. During the Hearing, Mr. Joannou confirmed that Gramercy had paid and continues to pay lobbyists.[265] In fact, recently publicized lobbying forms indicate that, in the second quarter of 2020, Gramercy paid three different lobbying firms a total of US$ 310,000 to lobby multiple branches and agencies of the U.S. Government. This follows the $460,000 Gramercy spent on lobbying in the first quart of 2020.[266] Overall, since 2015, Gramercy has now invested more than US$ 4,000,000 in lobbying related to the Land Bonds.[267]

73. Moreover, Gramercy surrogates continue to disseminate misinformation about Peru, including, for example that Peru "defaulted on billions of dollars' worth of sovereign land bonds and now refuses to repay the Americans who are owed." Indeed, on the last day of the Hearing, an article was published in Peruvian press titled "Peruvian State might lose major arbitration," which referred to individuals associated with Gramercy's bondholder group affiliates, as Peru noted in real time.[268] Indeed, in this context, the politicization of the dispute continues. During the Hearing, Peru provided an example of how: a recent phone call from a high-level member of the Non-Disputing Party detailing how Gramercy lobbyists had contacted him repeatedly and alleged that counsel to Peru was personally blocking Peru from paying billions to American workers and interfering with their freedom of speech.[269]

## III. Gramercy's Meritless Treaty Claims

74. Gramercy's persistent withholding of evidence and perpetually shifting case theories cannot disguise a fundamental truth: Gramercy has failed, throughout the proceeding and at the Hearing, to prove that it has a Treaty case. Gramercy's post-Hearing brief focuses myopically on issues of Peruvian law and procedure, and is almost entirely devoid of any

[262] Hr'g Tr. 1844:20-1845:15 (Day 5) (Reisman Direct).

[263] Opening Statement of Peru, Slide 75.

[264] *See* Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 95.

[265] Hr.g. Tr. 804:17-20 (Day 2) (Joannou Cross).

[266] *See* Peru Letter to Tribunal, 21 May 2020 (R-82).

[267] *See, e.g.*, Statement of Rejoinder ¶¶ 304-312; Statement of Defense ¶ 132; Post-Hearing Brief on Jurisdiction ¶ 32; Letter from Peru to the Tribunal, 3 August 2020 (R-87).

[268] Hr'g. Tr. 2594:4-8 (Day 7).

[269] Hr'g. Tr. 2591:3-2592:3 (Day 7).

treatment of the governing Treaty standards as a matter of international law. The submission thus reinforces, as the record has long established, that Gramercy's case concerns the acquisition of claims in a preexisting domestic Peruvian dispute with respect to old physical instruments issued to Peruvians and governed by Peruvian law. Application of the relevant Treaty standards to the evidence adduced at the Hearing confirms, once again, that Gramercy has failed to prove that Peru breached any obligation under the Treaty. Indeed, Peru has not.

## A. The Hearing Confirmed That Gramercy Failed To Prove An Expropriation

75. Gramercy's expropriation claim under Article 10.7 of the Treaty fails to meet basic requirements, as previously established, because Gramercy (1) failed to show any substantial deprivation; (2) failed to show any "rare circumstances" that would render this Government action expropriatory; and (3) failed to show any interference with reasonable expectations. In each respect, the Hearing confirmed that Gramercy's claim is meritless.

### 1. Gramercy Failed To Show Any Substantial Deprivation

76. It is well established, the Contracting Parties agree, and Gramercy concedes that an expropriation requires the destruction of all or virtually all value, as previously detailed.[270] Thus, expropriation claims regularly fail even where measures have a significant economic impact on an investment if they do not destroy the value.[271] Here, it is undisputed that Gramercy could have obtained substantial compensation if it had tendered the Bonds into the Bondholder Process – more than the total purchase price which Gramercy paid entirely with third-party client funds, having made no contribution of its own. Accordingly, the expropriation claim must fail, as Hearing testimony (detailed in full above) confirmed.

- **Gramercy knew that the Bonds were "worthless."** Mr. Koenigsberger confirmed Gramercy's assessment that Peru had purportedly "defaulted" on the Bonds, the Bonds "had been issued in an outdated and massively devalued currency," and the face value of the Bonds was "worthless."[272] Gramercy's damages expert, Mr. Edwards, also confirmed that the Bonds were "virtually worthless."[273]
- **Gramercy acquired Bond claims for US$ 33 million using client money.** Gramercy's witnesses confirmed, as its long-withheld purchase contracts had revealed years into this case, that the total purchase price was US$ 33 million.[274]

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[270] *See, e.g.*, U.S. Submission ¶ 24 ("It is a fundamental principle of international law that, for an expropriation claim to succeed a claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment."); *Sempra v. Argentine Republic*, Award ¶ 285 (RA-88) (requiring that "the value of the business has been virtually annihilated"); *Tza Yap Shum v. Peru*, Award ¶ 144 (RA-116) (requiring a "total or substantial deprivation of the value"); *see also* Statement of Rejoinder § IV.C.1; Statement of Defense § IV.A; Gramercy's PHB on Merits and Remedies ¶ 59.

[271] *See, e.g.*, *Perenco v. Ecuador*, Decision on Remaining Issues ¶¶ 680-687 (CA-158) (no expropriation despite 99% reduction in revenue above reference price); *CMS v. Argentina*, Award ¶¶ 69, 263-264, 396 (RA-75) (no expropriation despite 92% alleged reduction in share value); *LG&E v. Argentina*, Decision on Liability ¶¶ 177, 198-200 (RA-81) (no expropriation despite 90% alleged reduction in value of license holdings); *Glamis Gold v. United States*, Award ¶¶ 17, 357, 534-536 (RA-101) (no expropriation despite 60% reduction in value of mining project); *Cargill v. Mexico*, Award ¶¶ 361, 366, 368, 378 (RA-365) (no expropriation despite 33% to 79% reduction in earnings); *see also* Republic of Peru, Opening Statement at 125 (H-2).

[272] Hr'g Tr. 461:21-462:7, 464:18-21 (Day 2) (Koenigsberger Cross).

[273] Hr'g Tr. 1641:11-22 (Day 5) (Edwards Cross) (confirming that "nominal value plummeted" and became "virtually worthless").

[274] *See, e.g.*, Hr'g Tr. 1650:22-1651:6 (Day 5) (Edwards Cross); Hr'g Tr. 793:21-794:17 (Day 2) (Joannou Cross).

- **Peru granted a "hair extension" on all Bonds.** Peru's Quantum experts testified that the fair market value of Gramercy's Bonds was *38 cents* as of 1992, and that Peru added value to all Bonds by granting a "hair extension" of nearly *900 million percent* through the formula applied under the Bondholder Process.[275]
- **Gramercy could have obtained US$ 34 million.** Gramercy's witnesses confirmed the undisputed fact that Gramercy could have obtained US$ 34 million if it had tendered the Bonds into the Bondholder Process.[276]

77. Gramercy argues that these undisputed facts present a "false comparison" because the nominal purchase price for the Bonds between 2006 and 2008 is worth more in real terms.[277] This is irrelevant. Tribunals often consider acquisition price, including with respect to an expropriation claim.[278] And, even if Gramercy would have obtained less in real terms than it had paid, it is beyond question that the Treaty is not an insurance policy against investment risk or loss – much less a guarantee of profit.[279] In fact, the Treaty expressly affirms that "[t]he fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred."[280] It remains the case that the value of the Bonds was not destroyed in the Bondholder Process: there was no certainty as to the value of the Bonds at the time of Gramercy's acquisition and the US$ 34 million payout which Gramercy chose to repudiate was substantial.

78. Gramercy also contends that the purchase price reflected a "steep discount," purportedly due to "Peru's own conduct," and that Peru cannot "benefit from its own unlawful conduct."[281] In fact, it is undisputed that the Bonds became virtually worthless as a result of years of economic instability and severe inflation, not purportedly "unlawful" conduct – any such conduct, in any event, falling outside the scope of the Treaty, which entered into force in 2009. If anything, Gramercy's contention that it paid a steeply discounted price for the Bonds from 2006 to 2008 underscores the prevailing uncertainty at the time – effectively repudiating its claim as to expectations based on purported certainty as of 2001. Indeed, if the framework governing the Bonds were as certain then as Gramercy now claims, no reasonable bondholder would have sold to Gramercy at such a discount. Any contrary assumption presumes fraudulent misrepresentation on Gramercy's part, from which it cannot possibly expect to profit.

79. Such persistent inconsistencies in Gramercy's claims highlight the weakness of its case. Ultimately, as the Quantum experts further explained, this is the opposite of an expropriation case:

> [I]n your typical expropriation case, you have something of value that is taken away because of the measures, and then [a] [c]laimant will ask for compensation, the Fair Market Value of the investment just prior to the Measures. In this case, though, *Claimants' investment had virtually zero value prior to the Measures. It is only because of the Measures that some value is added to that investment*. What Claimant

[275] *See, e.g.*, Hr'g Tr. 2416:5-17 (Day 7) (Quantum Direct); Quantum Presentation at 13, 40.

[276] *See, e.g.*, Hr'g Tr. 1628:11-13 (Day 5) (Edwards Direct); Hr'g. Tr. 593:6-12 (Day 2) (Koenigsberger Cross).

[277] Gramercy's PHB on Merits and Remedies ¶¶ 63-64.

[278] *See, e.g., Tecmed v. Mexico*, Award ¶¶ 186, 191, 195 (RA-65); *OAO Tatneft v. Ukraine*, Award on the Merits ¶ 608 (RA-361); *see also* Statement of Rejoinder ¶¶ 327-328 (discussing same).

[279] See, e.g. Waste Management v. Mexico (II), Final Award ¶¶ 114, 177 (RA-69).

[280] Treaty, Annex 10-B ¶ 3(a)(i) (RA-1).

[281] Gramercy's PHB on Merits and Remedies ¶ 64.

> claims, though, is that [Peru] didn't add enough value. [$]33.6 million is not enough; we want [$]1.8 billion. That's the value that [Peru] should have added.[282]

80. While Gramercy's claim was already fatally flawed, the revelation at the Hearing that it had made additional secret Bond acquisitions in 2017 cements the claim's lack of merit. As Mr. Koenigsberger revealed, Gramercy decided that it was a "good investment" to spend millions of additional dollars (again in client money) to acquire hundreds of additional Bonds – *years after* the 2013 Constitutional Tribunal Resolutions and 2014 Supreme Decrees which Gramercy has alleged amount to an expropriation.[283] Moreover, Mr. Joannou testified that Gramercy increased its valuation of the Tranche 2 Bonds in financial statements for 2018, which post-dates every single measure which Gramercy challenges in this case.[284] Gramercy's own conduct thus underscores that the Bond value *could not* have been destroyed by measures in 2013, 2014, or 2017. Indeed, if the value of the Bonds actually had been destroyed, as Gramercy alleges, its clients would be interested to learn that Gramercy knowingly threw away millions of their dollars to acquire still more Bonds.

### 2. Gramercy Failed To Show Any "Rare Circumstances"

81. There can be no expropriation absent a substantial deprivation or destruction of value. Gramercy's claim fails on that basis alone. The Treaty further specifies, moreover, that "*[e]xcept in rare circumstances*, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[285] Gramercy failed to demonstrate any such "rare circumstances," as previously detailed.[286] In fact, Peru's regulatory actions were applied equally to all bondholders; served the legitimate public interest of resolving a longstanding domestic dispute arising from a unique period in Peru's history; and were implemented on the basis of fundamental public welfare objectives, including constitutional prerogatives of promoting the general welfare, providing basic services, and ensuring fiscal balance and sustainability.[287] Peru's witnesses confirmed the same in Hearing testimony.[288]

82. Gramercy never addressed this Treaty provision until the Hearing, where it suggested that Peru had "gross[ly] misread[]" the Treaty to "create[] what it claims is a presumption against expropriation."[289] Peru did not "create" any presumption; the language reflects well-established principles of international law, on which the Contracting Parties

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[282] Hr'g Tr. 2359:9-20 (Day 7) (Quantum Direct) (emphasis added); *see also* Quantum Presentation at 17 (H-14).

[283] *See supra* Section II.E; *see also, e.g.*, Third Amended Notice of Arbitration and Statement of Claim ¶ 150 (alleging "mathematical certainty that the 2013 CT Order, the 2013 Resolutions, and the Supreme Decrees have a devastating economic impact that is tantamount to expropriation").

[284] Hr'g. Tr. 872:7-10 (Day 2) (Joannou Cross).

[285] Treaty, Annex 10-B ¶ 3(b) (RA-1) (emphasis added); *see also id.* ¶ 3(a)(iii) (requiring consideration of "the character of the government action"); Treaty, Preamble (Contracting Parties resolving to "[p]reserve their ability to safeguard the public welfare") .

[286] *See, e.g.*, Statement of Rejoinder ¶¶ 338-345; Statement of Defense ¶¶ 239-246.

[287] *See, e.g.*, Constitutional Tribunal Resolution dated 16 July 2013 (RA-286), Whereas Clause ¶¶ 3, 15, 25, 29; Report No. 014-2014-EF/52.04, Office of Public Debt of the Ministry of Economy and Finance, 17 January 2014, ¶ 14 (Doc. R-15);

[288] *See, e.g.*, Hr'g Tr. 1171:11-21 (Day 4) (Castilla Direct) ("Fiscal responsibility is a key concept in managing the Peruvian economy. And here, its basis is in the 1993 Constitution, which enshrines the principles in connection with this concept, particularly a balanced budget. And there are a number of rules then that govern the State in this respect, and this is especially important because it determines the legal and regulatory framework of fiscal policy for addressing the many needs of a developing country such as Peru in terms of resources, social sector, infrastructure, and others.").

[289] Hr'g Tr. 65:8-18 (Day 1) (Gramercy Opening); Gramercy Opening Presentation at 72-73.

have confirmed agreement.[290] In fact, one of Gramercy's own legal authorities, a commentary on U.S. Model BIT's, describes this very Treaty language as "the presumption of non-expropriation."[291] Gramercy also incorrectly argued that the language does not apply because Peru's measures did not concern public health, safety, or the environment.[292] Gramercy ignores that the Treaty makes clear – through the use of "such as" – that the specified objectives are illustrative, not exclusive. Indeed, the Treaty also states that, "[f]or greater certainty, the list of 'legitimate public welfare objectives' in this subparagraph is not exhaustive."[293] Once again, Gramercy has misread the Treaty, ignored the Contracting Parties' agreement, and misstated fundamental principles of international law.

### 3. Gramercy Failed To Show Any Interference With Reasonable Expectations

83. The absence of an expropriation is reinforced by consideration of "the extent to which the government action interferes with distinct, reasonable investment-backed expectations," as specified in the Treaty and previously detailed.[294] While Gramercy has argued that legitimate expectations form the basis for a minimum standard of treatment claim – they cannot, as addressed below[295] – the Treaty provides for consideration of expectations only in Annex 10-B, in respect of expropriation. That assessment, the Contracting Parties agree, "requires an objective inquiry of the reasonableness of the claimant's expectations, which may depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made."[296] The Hearing confirmed that Gramercy had no reasonable expectation that a Bond investment would perform as it now alleges, let alone that Peru interfered with such expectations. As detailed above in the fuller treatment of the facts:

- **Gramercy invests in risky, distressed assets.** Conspicuously absent from Gramercy's Hearing presentation and post-Hearing brief is any mention of its own business model. As Mr. Koenigsberger conceded, Gramercy invests in "distressed emerging market assets"; risk is greater in such markets; Gramercy uses hedging and other methods to manage risk; Gramercy is "*not in the business of giving certainty or assurances*"; and Gramercy advises its clients that they "*must be prepared to bear the loss of their entire investment*."[297]
- **Gramercy knew that the Bonds were subject to longstanding uncertainty.** Gramercy's limited due diligence indicated the Bonds were the subject of a preexisting domestic dispute, including years of litigation and multiple unsuccessful efforts in the political branches. Mr. Koenigsberger confirmed Gramercy's assessment that the Bonds were facially "worthless" and subject to various ongoing

[290] *See, e.g.*, U.S. Submission ¶ 22 ("Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. This principle is not an exception that applies after an expropriation has been found, but rather is a recognition that certain actions, by their nature, do not engage State responsibility.") (citing various authorities).

[291] Brown, Chester (ed.), Commentaries on Selected Model Investment Treaties, 2013 at 791 (CA-90).

[292] Hr'g Tr. 65:8-12, 66:3-7 (Day 1) (Gramercy Opening); Gramercy Opening Presentation at 72-73.

[293] Treaty, Annex 10-B, n.20 (RA-1).

[294] Treaty, Annex 10-B ¶ 3.a.ii (RA-1); *see also* Statement of Rejoinder ¶ 334; Statement of Defense ¶ 228.

[295] *See, e.g.*, Hr'g Tr. 97:6-16 (Day 1) (Gramercy Opening); *see also infra* Section III.B.

[296] U.S. Submission ¶ 26.

[297] Hr'g Tr. 394:2-10, 408:7-409:18, 416:12-15, 416:21-417:1, 417:9-13, 424:16-20 (Day 2) (Koenigsberger Cross) (emphases added).

legal challenges, without resolution: "part of the difficulty for bondholders over many years" was that Peru "wanted to kick the can to the next administration."[298]

- **The Peruvian legal framework was anything but "certain."** The 2001 Sentence on which Gramercy now purports to rest its case – less than two pages in the operative part – established no clear (or implicit) rule as to Bond valuation or payment procedure. Further to the lingering uncertainty, subsequent court decisions used various methods; the legislature tried and failed at least eleven different times to establish a legal framework; and the MEF repeatedly confirmed the absence of any such framework (and had no authority to create one on its own), as the testimony of both Parties' Peruvian law experts confirmed.[299]
- **Gramercy acquired "expectative rights" at a "steep discount."** Its own purchase contracts highlighted the prevailing uncertainty, including by specifying that Gramercy acquired an "expectative right" to possible payment – "a gamble," as Dr. Hundskopf explained.[300] As noted, Gramercy itself has characterized the purchases as taking place at a "steep discount," reflecting the lack of clarity as to how the Bonds would be valued and paid. Mr. Koenigsberger confirmed in testimony: "I don't think it was clear at that time."[301]
- **Gramercy sought to change the legal framework.** Gramercy's strategy from the outset included lobbying to change the law in its favor. Its executives confirmed on cross-examination that Gramercy hired lobbyists, tried to influence the Constitutional Tribunal, engaged with legislative authorities, and aimed to purportedly "catalyze a consensual resolution."[302] The fact that Gramercy never achieved the legal changes or "resolution" it sought underscores the uncertainty that lingered well after its alleged Bond acquisitions.
- **Gramercy's internal valuations reflected ongoing uncertainty.** Mr. Joannou confirmed that, [redacted][304] [redacted][305]

[298] Hr'g Tr. 461:21-462:7, 464:18-21, 489:2-11 (Day 2) (Koenigsberger Cross).

[299] *See supra* Section II.B.

[300] Hr'g Tr. 2014:22-2015:3 (Day 6) (Hundskopf Direct).

[301] *See, e.g.*, Hr'g Tr. 472:8-11 (Day 2) (Koenigsberger Cross) ("Q. If it was clear how to monetize the Land Bonds, then why didn't the Peruvian citizens who held Bonds monetize them at that time? A. I don't think it was clear at that time.").

[302] *See, e.g.*, Hr'g Tr. 621:13-21, 580:20-586:21 (Day 2) (Koenigsberger Cross); 804:11-20 (Day 2) (Joannou Cross).

[303] Hr'g. Tr. 805:7-15, 808:13-17 (Day 2) (Joannou Cross); *see also, e.g.*, [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY]; [redacted] [DESIGNATED CONFIDENTIAL BY GRAMERCY].

[304] *See, e.g.*, Hr'g. Tr. 563:4-566:6 (Day 2) (Koenigsberger Cross); Hr'g Tr. 815:3-817:11 (Day 2) (Joannou Cross).

[305] Hr'g. Tr. 811:16-18, 838:13-839:9 (Day 2) (Joannou Cross).

84. Gramercy's own assessments and conduct beginning in 2006 repudiate its claimed expectations of "certainty" based on the 2001 Constitutional Tribunal decision. Instead, the testimony of Gramercy's executives confirmed that Gramercy – an investor in risky, distressed, emerging market assets – acquired Bonds precisely because they were embroiled in a preexisting domestic dispute; and that the uncertainty over Bond valuation and payment persisted for years after the acquisitions. Gramercy had a "speculative hope – as opposed to an internationally-protected expectation" that it might profit from this uncertainty.[306] Accordingly, there can be no reasonable, investment-backed expectations, let alone any interference with such reasonable expectations that would support an expropriation claim.

## B. The Hearing Confirmed That Gramercy Failed To Prove A Minimum Standard Of Treatment Violation

85. Gramercy's minimum standard of treatment claim under Article 10.5 fails to meet basic requirements, as previously established, because Gramercy (1) failed to show any legitimate expectations, or even that such expectations are relevant to the minimum standard; (2) failed to show any arbitrary, grossly unfair, or unjust conduct; and (3) failed to show any denial of justice. In each respect, the Hearing confirmed that Gramercy's claim is meritless.

### 1. Gramercy Failed To Show Any Legitimate Expectations

86. It is well established, and the Contracting Parties agree, that legitimate expectations are not an element of the customary international law minimum standard of treatment set forth in Article 10.5 of the Treaty.[307] At the Hearing, Professor Stern invited the Parties to comment on the ICJ's 2018 decision in the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* case.[308] That decision confirms what the prevailing weight of authority already shows: "references to legitimate expectations may be found in arbitral awards . . . that apply treaty clauses providing for fair and equitable treatment," but "[i]t does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation."[309] Gramercy agrees that this proposition is "uncontroversial," but nonetheless suggests that it is "inapt to this case."[310] Gramercy's insistence that legitimate expectations are a component of the minimum standard – as with other elements of its case – flies in the face of the Treaty, the Contracting Parties' agreement, and prevailing international law authorities.

87. Accordingly, and as previously detailed, the purported frustration of Gramercy's alleged expectations cannot form a basis for a violation of Article 10.5 of the

[306] *Antaris Solar GmbH v. Czech Republic*, Award, ¶ 435 (RA-364); *see also id.* ¶¶ 431, 435 (ruling that claimant's "actions were essentially opportunistic," and that "the investment protection regime was never intended to promote and safeguard those who . . . 'pile in' to take advantage of laws which they must know may be in a state of flux").

[307] *See, e.g.*, U.S. Submission ¶ 38 ("The concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation."); *Glamis Gold v. United States*, Award, ¶ 620 (RA-101) (holding that "[m]erely not living up to expectations cannot be sufficient to find a breach of" the minimum standard); *Cargill v. Mexico*, Award, ¶ 290 (RA-365) (same).

[308] Hr'g Tr. 202:18-203:13 (Day 1) (Gramercy Opening).

[309] Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, 2018 I.C.J. REP. 507, 1 Oct. 2018, ¶ 162 (H-20).

[310] Gramercy's PHB on Merits and Remedies ¶ 32.

Treaty.[311] In any event, as addressed above, and not reiterated here for reasons of efficiency, the Hearing confirmed that Gramercy has no case on legitimate expectations. Thus, even assuming for the sake of argument that Gramercy's expectations were relevant to the minimum standard, they only underscore the absence of any Treaty breach.

### 2. Gramercy Failed To Show Any Arbitrary, Grossly Unfair, Or Unjust Conduct

88. It is well established, and undisputed, that the minimum standard threshold for non-judicial measures is high, prohibiting conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."[312] Gramercy suggests that "Peru does not dispute either that a government act that is arbitrary or irrational falls below the Treaty's minimum standard of treatment."[313] This understates the threshold which Gramercy's claim must – but cannot – clear. In fact, as the Contracting Parties agree, the Article 10.5 analysis "'must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate within their borders,'" such that even "[a] failure to satisfy requirements of domestic law does not necessarily violate international law."[314] Indeed, tribunals routinely emphasize:

> [An investment treaty] tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some values over others and adopted solutions that are ultimately ineffective or counterproductive.[315]

89. Thus, for example, the tribunal in *ADF v. United States* "emphasize[d]" that, "even if the U.S. measures were somehow shown or admitted to be *ultra vires* under the internal laws of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment," and dismissed claims where the claimant had alleged that an executive agency violated the regulatory framework.[316] In *Eastern Sugar v. Czech Republic*, as another example, the tribunal rejected a fair and equitable treatment claim even where the measures were "rashly introduced on an insufficient legislative basis, ineffectively implemented, and had a disturbing feature."[317] Likewise, in this case, the Hearing confirmed that Gramercy may take issue with various elements of Government decision-making, but its second-guessing does not meet the high threshold required to prove a breach of the minimum standard of treatment:

- **The MEF implemented the Constitutional Tribunal's mandate in good faith.** Contrary to Gramercy's unsupported allegations of a malfeasant MEF, Minister Castilla and Vice Minister Sotelo both confirmed, in no uncertain terms, that the

[311] *See, e.g.*, U.S. Submission ¶ 38 ("The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."); *see also* Peru, Opening at 134; Statement of Rejoinder ¶¶ 348-349.

[312] *Waste Mgmt. v. Mexico (II)*, Award ¶ 98 (RA-69); *see also* Peru's Opening at 127 (citing authorities).

[313] Gramercy's PHB on Merits and Remedies ¶ 59.

[314] U.S. Submission ¶ 35 (quoting *S.D. Myers v. Canada*, First Partial Award ¶ 263 (RA-57)).

[315] *GAMI v. Mexico*, Award ¶ 93 (RA-71) (quoting *S.D. Myers v. Canada*, First Partial Award ¶ 261 (RA-57)).

[316] *ADF v. United States*, Award ¶ 190 (CA-73).

[317] *Eastern Sugar v. Czech Republic*, Partial Award ¶ 274 (RA-370).

MEF carefully adhered to the parameters established by the Constitutional Tribunal, and implemented the ruling in good faith pursuant to Peruvian law.[318]

- **The updating formula provides reasonable compensation.** While ostensibly focused on alleged flaws in the MEF process, Gramercy's claim ultimately hinges on the Supreme Decree updating formula – according to Gramercy, an arbitrary and foregone conclusion intended to destroy Bond value. As Peru's Quantum experts confirmed, however, the formula "has no mathematical, economic, or theoretical flaws and provides a reasonable, in fact favorable, outcome for bondholders with unclipped/unpaid coupons that were worthless when the Agrarian Bank closed."[319] While Gramercy also seeks to find fault in formula clarifications over time, it is undisputed that the August 2017 formula is the only one ever applied in the Bondholder Process.
- **The Supreme Decrees were developed through a lawful deliberative process.** Indeed, clarifications to the updating formula underscore that the Supreme Decrees were developed through a deliberative process, supported by technical reports, legal reports, statements of reason, and aide memoires – all in the record but which Gramercy's expert admitted not to have reviewed in full – as well as the reports of two different independent experts.[320] While Gramercy contests whether the independent experts were correct and whether certain administrative procedures (*e.g.*, prepublication) were fully followed, such allegations, even if assumed to be true, do not rise to the level of an international Treaty breach.
- **The Bondholder Process comports with international norms.** Gramercy cites participation levels and alleged procedural flaws. But the undisputed fact remains that Gramercy opted to boycott the Process, not because of procedural issues but because it was dissatisfied with the payment formula. Notwithstanding Gramercy's various efforts to undermine a Process it opted to forego, Dr. Wühler – the only expert on such procedures to appear here – confirmed that it is fair and effective, consistent with international claims and compensation procedures.[321]

90. Contrary to the weight of authority, Gramercy's claim relies heavily on purported violations by Peru of its own laws when implementing a regulatory framework for domestic instruments that applied almost exclusively to Peruvian bondholders. Gramercy's detailed treatment of issues of Peruvian law and procedure in its post-Hearing brief, with no treatment at all of the applicable international law standards, underscores the fundamental weakness of its claim. Indeed, Gramercy has failed to show any arbitrary, grossly unfair, or unjust conduct rising to the level of a breach of Article 10.5 of the Treaty.

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[318] *See, e.g.*, Hr'g. Tr. 900:4-10, 970:12-15 (Day 3) (Sotelo Direct) ("What the Ministry did at all times and what it does, in particular, in connection with these proceedings is to act in good faith. It's always acted in good faith."); Hr'g. Tr. 1255:19-1256:3 (Day 4) (Castilla Cross) ("There was no room to determine whether that was the correct rationale or not. We were observing. We were complying with the Judgment. There was – it was not our job to challenge, to question, the Judgment by the Tribunal. That is the last instance in the country on this subject."); Hr'g. Tr. 1179:2-4 (Day 4) (Castilla Direct) ("[W]e always acted in good faith, trying to diligently carry out that ruling."); *see also supra* Section II.D.

[319] Peru's Quantum Expert Presentation, at 53 (H-14); *see also* Hr'g. Tr. 2431:16-2432:12 (Day 7) (Quantum Direct); *infra* Section IV.

[320] *See, e.g.*, Hr'g. Tr. 1979:4-1984:21 (Day 5) (Bullard Cross); *see also supra* Section II.D.

[321] *See, e.g.*, Wühler Presentation at 10 (H-12); *see also supra* Section II.D.

### 3. Gramercy Failed To Show Any Denial Of Justice

91. It is well established, and the Contracting Parties agree, that a denial of justice claim must surmount a high threshold, given the significant deference which international law accords the decisions of domestic courts;[322] that an investor has standing to claim for denial of justice only if it or its investment has been denied justice in a court proceeding;[323] that exhaustion of local remedies is a substantive element of the claim;[324] and that a denial of justice requires grotesque, egregious, or outrageous judicial conduct.[325] The Hearing confirmed that Gramercy failed to meet these exacting requirements as to either version of its claim – *i.e.*, its original claim relating to the July 2013 Resolution, as well as its more recent evolution of the claim relating to the Bondholder Process.

92. With respect to the July 2013 Resolution, nothing that transpired at the Hearing can alter the fundamental, undisputed fact that Gramercy was not a party to the Constitutional Tribunal proceedings. *On that basis alone, the denial of justice claim must fail*. Further, even assuming for the sake of argument that Gramercy had standing to challenge the Constitutional Tribunal proceedings – it does not – testimony confirmed that Gramercy's still-unproven conspiracy theory as to the genesis of the Resolution does not rise to the level of a denial of justice.

- **Minister Castilla expressly rejected any allegation of MEF interference.** Gramercy grossly distorts Minister Castilla's testimony when it suggests that he "all but confessed to" MEF interference with the Constitutional Tribunal.[326] As detailed above, the Minister categorically denied any MEF interference, any purportedly "historic" secret meeting, and any warning by the MEF that the Bond debt was as high as US$ 18.5 billion.[327] Gramercy's arguments, directly at odds with the transcript, are as striking as they are unfounded.
- **Gramercy's "forgery" allegations remain debunked.** Repeated references to a so-called "forged dissent" do not make it so. In fact, Gramercy failed to address evidence from the official investigation confirming that the use of whiteout was a "habitual practice" of the Tribunal that "never varied the decision" and was used only for "formal corrections."[328] Gramercy's expert, Dr. Castillo, confirmed that he was not even asked to opine on alleged issues of forgery.[329]
- **Gramercy continues to ignore relevant evidence.** Gramercy disregards statements by the Tribunal Justices that further refute its theory – including, as detailed above, that "never in my life has the Executive established any type of pressure, we have never had it;"[330] denials that they received "any type of document" from the MEF;[331]

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[322] *See, e.g.*, U.S. Submission ¶ 46; *Chevron v. Ecuador*, Second Partial Award ¶¶ 8.36, 8.41 (RA-152); *Mondev Int'l Ltd. v. United States*, Award ¶ 136 (RA-62).

[323] *See, e.g.*, U.S. Submission ¶ 43; *Arif v. Moldova*, Award ¶ 435 (RA-128).

[324] *See, e.g.*, U.S. Submission ¶ 47; *Chevron v. Ecuador*, Interim Award ¶ 235 (RA-98); J. PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 111 (CA-156).

[325] *See, e.g.*, U.S. Submission ¶¶ 44-45; *Chevron v. Ecuador*, Second Partial Award ¶ 8.40 (RA-152); *Arif v. Moldova*, Award ¶ 442 (RA-128); J. PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 83 (RA-72).

[326] Claimants' Post-Hearing Brief on Merits and Remedies ¶ 45.

[327] *See, e.g.*, Hr'g. Tr. 1177:17-1178:8, 1208:1-3, 1210:3-12, 1230:15-1232:12 (Day 4) (Castilla Cross); *see also supra* Section II.D.

[328] *See, e.g.*, Peru's Congress, Subcommission on Constitutional Complaints, Transcript, 9 Jan. 2019, at 44, 51 (R-1100).

[329] Hr'g. Tr. 1409:19-1410:15 (Day 4) (Castillo Cross).

[330] Peru's Congress, Subcommission on Constitutional Complaints, Transcript, 9 Jan. 2019, at 37 (R-1100).

and that "the resolution was always going to be the same."[332] Gramercy also ignores that the MEF, which purportedly engineered the Resolution to its liking, immediately sought to have it annulled.[333] And, while emphasizing the purported impropriety of alleged *ex parte* meetings, Gramercy fails to address that its own representatives met with Constitutional Tribunal President.[334]

- **The Resolution is valid, binding, and repeatedly affirmed.** Gramercy's more recent emphasis on unproven extrajudicial interference by the MEF belies yet another weakness in its claim: the ongoing validity of the July 2013 Resolution. The Resolution was carefully reasoned and faithfully applied Peruvian law; the Tribunal upheld it by a majority in August and again in November 2013; the Justices separately reaffirmed their votes in congressional testimony; and the Order remains final, valid, and binding.[335] Indeed, even if the Resolution were wrong as a matter of Peruvian law – it is not – that still would fall far short of the high threshold required for a denial of justice.[336]

93. Faced with the fatal flaws in its claim, Gramercy has argued more recently that it was denied justice as a matter of procedure because the Bondholder Process is an exclusive compensation mechanism that eliminated the ability to pursue remedies in local courts.[337] This reformulation of the claim fares no better. Gramercy cannot dispute that it hinges on judicial avenues which it chose to bypass for years. And Gramercy offers no response to the well-established international law principle that court access may be restricted for a non-discriminatory, legitimate public purpose – as is the case here.[338] In each respect, testimony confirmed that this iteration of the denial of justice claim likewise must fail.

- **Gramercy chose not to avail itself of Peruvian courts.** The belated emphasis on court access is belied by the fact that Gramercy chose, for reasons never revealed in this arbitration, not to pursue court claims as to the majority of its alleged Bonds. Gramercy represented for years that it participated in "hundreds" of proceedings, but later asserted that it had pursued claims in only seven.[339] At the Hearing, Gramercy alleged for the first time that the Bonds in those cases accounted for "27% of the full

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[331] Peru's Congress, Subcommission on Constitutional Complaints, Transcript, 9 Jan. 2019, at 14, 37 (R-1100).

[332] Constitutional Tribunal, Record of Full Session of Tuesday 16 July 2013, 16 July 2013, at 33 (R-1072).

[333] Hr'g. Tr. 1177:7-11 (Day 4) (Castilla Direct) ("The reaction was to challenge that Decision, because we considered that they were invading the authority of the Ministry of Economy and Finance beyond, let's say, what would be reasonable. This challenge was dismissed by the Court.").

[334] *See, e.g.*, Hr'g Tr. 580:20-582:9 (Day 2) (Koenigsberger Cross); Gramercy Email, 9 Oct. 2013 (CE-546) ("[W]e are discussing the above issues with the president of the tribunal, Oscar Urviola.").

[335] *See, e.g.*, Hr'g. Tr. 2064:8-10 (Day 6) (Hundskopf Cross); Hr'g. Tr. 2097:17-19 (Day 6) (García-Godos Direct); Hr'g. Tr. 1177:13-15, 1255:18-19 (Day 4) (Castilla Direct); *see also* Peru's Statement of Rejoinder § IV.B.1.c.

[336] *See, e.g.*, U.S. Submission ¶ 45; J. PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 81 (RA-72) ("The erroneous application of national law cannot, in itself, be an international denial of justice.").

[337] *See, e.g.*, Gramercy's Opening at 181-184; Gramercy's PHB on Merits and Remedies ¶¶ 97-102.

[338] *See, e.g.*, J. PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 138 (CA-156) ("Limitations are accepted when they are motivated by a legitimate public purpose, when the means are proportional to that objective, and when the very essence of the right is not impaired."); *see also Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111, 6 March 1956 (RA-368) ("The modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners."); *see also* Peru's Opening at 142; Statement of Rejoinder ¶ 370.

[339] *See, e.g.*, Statement of Claim ¶ 136 ("Gramercy is a party to hundreds of legal proceedings in Peru."); Third Amended Statement of Claim ¶ 157 (C-34) ("GPH became eligible to apply to become a party to these [hundreds of] legal proceedings. Beginning in approximately 2011, GPH initiated applications in seven . . . .").

updated value" of its Bond portfolio.[340] This merely confirms, as Mr. Koenigsberger also testified, that Gramercy took up local proceedings only as to a "subset" of Bonds.[341] Gramercy *chose* not to avail itself of local courts as to the majority of its holdings, just as Gramercy *chose* to boycott the Bondholder Process entirely. Instead, Gramercy elected to pursue a campaign to pressure Peru to pay more than Peruvian law allows, as previously detailed. Gramercy's newfound emphasis on local court access is disingenuous, at best – and cannot support a denial of justice claim.

- **Bondholder Process exclusivity serves a legitimate public purpose, is non-discriminatory, and is consistent with international best practices.** The Constitutional Tribunal reasonably ruled that the Process had to be mandatory – for all Bondholders, without discrimination – in order to meet the constitutional goal of balancing the Bond obligations with the State's ability to fulfill other sovereign obligations.[342] Indeed, permitting bondholders to pursue separate and inconsistent remedies on a case-by-case basis in courts would undermine the orderly resolution of the Bond debt. Dr. Wühler confirmed that this exclusivity is "in line with, and even more accommodating than, the standard practice of comparable programs."[343] Gramercy chose not to cross-examine him on the issue.
- **The Bondholder Process offers sufficient due process guarantees.** The Supreme Decree establishes that certain issues are subject to judicial and/or administrative appeal, including ownership, authentication, registration, updating, and form of payment.[344] Dr. Wühler confirmed that "there is certainly sufficient, if not more than sufficient, due process here, both within the process and outside the procedure, including the ability to appeal."[345] Gramercy suggests that the appeals are a "chimera," but cites as its only example a bondholder who unsuccessfully challenged the valuation formula which applies without exception to all Bonds.[346] In any event, the fact that the bondholder pursued both an administrative appeal and an *amparo* action in court (apparently still pending) confirms the availability of procedures safeguarding due process.

94. Gramercy's alternative denial of justice claim boils down, as always, to a dollar amount: Gramercy is dissatisfied that it cannot obtain a different Bond valuation in Peruvian court proceedings (which it previously opted, in large part, to forego) than it could have obtained through the Bondholder Process (which it opted to boycott). Gramercy's mischaracterization of the issue as one of alleged access to the courts or means to enforce rights is repudiated by Hearing testimony and other evidence of record. As with its claim centered on the 2013 Resolution, this version of the denial of justice claim must be dismissed.

[340] Gramercy's Opening at 205.

[341] Hr'g Tr. 635:18-19 (Day 2) (Koenigsberger Redirect).

[342] *See* Constitutional Tribunal, Resolution, 8 Aug. 2013 ¶¶ 15-16 (CE-180).

[343] Wühler II ¶ 28; *see also* Wühler I ¶¶ 64, 66.

[344] *See* Supreme Decree 242-2017-EF, 19 Aug. 2017, Arts. 2.2, 7.4, 9.2, 14.2, 17.7 (RA-23); *see also* Peru's Opening at 143 (addressing same).

[345] Hr'g Tr. 2174:1-5 (Day 6) (Wühler Direct); *see also* Dr. Wühler Presentation at 4 (H-12).

[346] Gramercy's PHB on Merits and Remedies ¶ 100 (citing Witness Statement of Ms. L ¶ 42 (CWS-8)).

### C. The Hearing Confirmed That Gramercy Failed To Prove An Effective Means Violation

95. As previously established, and as the referenced testimony confirms, Gramercy's effective means claim fails for the same reasons – even assuming that Gramercy could import, through the MFN provision in Article 10.4, an effective means clause in a 1994 Peru-Italy treaty. In fact, the Treaty, the Contracting Parties' agreement, and well-established law all confirm that Gramercy has no recourse to the effective means clause.

- **The Treaty prohibits expansion of the minimum standard.** Gramercy has said it seeks a "more protective articulation" of the minimum standard of treatment.[347] Article 10.5, however, expressly precludes access to other treaties to expand that standard.[348] The Contracting Parties thus agree that the MFN provision cannot "be used to alter the substantive content of the fair and equitable treatment obligation under Article 10.5, including the obligation not to deny justice."[349]
- **The Treaty requires identification of "like circumstances."** Article 10.4 limits the MFN obligation to treatment accorded investors or investments "in like circumstances." The Contracting Parties agree that "[i]gnoring the 'in like circumstances' requirement would serve impermissibly to excise key words."[350] Even post-Hearing, Gramercy continues to ignore this express requirement.
- **Effective means offers no meaningfully different protection.** The United States confirms, and jurisprudence recognizes, that the minimum standard of treatment "encompasses the same guarantees," and that the clause was not included in later U.S. treaties (including this Treaty) because "the customary international law principle prohibiting denial of justice rendered a separate treaty obligation unnecessary."[351] On this point as well, Gramercy offers no response.

### D. The Hearing Confirmed That Gramercy Failed to Prove A National Treatment Violation

96. Gramercy's national treatment claim under Article 10.3 fails to meet basic requirements, as previously established, because Gramercy (1) failed to identify any relevant comparator, and is not "in like circumstances" with all Peruvian bondholders; and (2) failed to show it was accorded any less favorable treatment, let alone less favorable treatment based

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[347] Statement of Reply ¶ 479. In its post-Hearing brief, Gramercy contradicts and confuses its own argument by stating, incorrectly, that Article 10.5 is "inapposite" because the "effective means claim arises under Article 10.4[]." Gramercy's PHB on Merits and Remedies ¶ 102.

[348] Treaty, Arts. 10.5.2 (RA-1) (stating that it "do[es] not require treatment in addition to or beyond that which is required by" the customary international law minimum standard); *id.* Art. 10.5.3 (stating that "a breach of another provision . . . of a separate international agreement, does not establish that there has been a breach of this Article").

[349] U.S. Submission ¶ 57. Both Contracting Parties also reserved, in respect of MFN, "the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to [the Treaty]." Treaty, Annex II. Gramercy contends that "Peru already knows this argument is wrong" because it was rejected in *Bear Creek v. Peru*. Gramercy's PHB ¶ 102. But Gramercy cites the portion of the award summarizing the claimant's arguments; the tribunal did not even reach the issue. Notwithstanding this misdirection, the Contracting Parties agree that the Annex is relevant. *See* U.S. Submission ¶ 56 ("[A] claimant must also establish that the alleged non-conforming measures that constituted 'less favorable' treatment are not subject to the reservations contained in Annex II").

[350] U.S. Submission ¶ 56; *see also Ickale v. Turkmenistan*, Award ¶ 329 (RA-142) ("[D]ifferences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations,' without effectively denying any meaning to the terms 'similar situations.'").

[351] U.S. Submission ¶ 36; *see also, e.g., Chevron v. Ecuador*, Partial Award on the Merits ¶ 243 (RA-106).

on nationality.[352] In fact, the entire claim rests upon a single, wholly irrelevant issue: the prioritization of cash payments among bondholders who actually participated in the Bondholder Process, up to a maximum of 100,000 Soles (approximately US$ 30,000). The Hearing confirmed that Gramercy's claim is meritless.

### 1. Gramercy Failed To Identify A Relevant Comparator

97. Article 10.3 provides that the national treatment obligation applies only to "treatment" accorded foreign investors who are "in like circumstances" with Peruvian nationals. As the United States has highlighted, "[t]his is an important distinction intended by the Parties."[353] It is well established as a matter of international law, and the Contracting Parties agree, that a foreign investor is not "like" host State nationals merely because they invest in the same field or same category of assets.[354] Tribunals repeatedly have ruled, for example, that a sophisticated foreign investor is not "in like circumstances" with small-scale local investors in the same industry, and thus that differential treatment cannot support a national treatment claim.[355] Here, Gramercy purports to compare itself generally to all Peruvian bondholders – a group comprised largely of individuals, with comparatively small holdings, in vastly different circumstances – without identifying any fact-specific comparator. At the Hearing and in its post-Hearing brief, Gramercy did not even address this issue, let alone identify a relevant comparator. The claim must be dismissed on that basis alone.[356]

### 2. Gramercy Failed To Show Any Less Favorable Treatment, Based On Nationality Or Otherwise

98. It is fundamental, and the Contracting Parties agree, that the national treatment obligation only prohibits differential treatment that is *nationality based*.[357] The prioritization of cash payments in the Bondholder Process is not nationality based, as previously detailed.[358] Rather, the payment structure ordered by the Constitutional Tribunal and implemented by Supreme Decree reflects a rational, legitimate policy decision by Peru, pursuant to fundamental constitutional principles, to make reasonable distinctions between

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[352] *See, e.g.*, Statement of Rejoinder § IV.C.3; Statement of Defense § IV.C.

[353] U.S. Submission ¶ 53.

[354] *See, e.g.*, U.S. Submission ¶¶ 51-52 (noting that "identifying appropriate comparators . . . requires consideration of more than just the business or economic sector," and that a claimant "or its investment should be compared to a national investor or investment that is alike in all relevant respects but for nationality").

[355] *See, e.g.*, *Rusoro Mining Ltd. v. Venezuela*, Award ¶ 563 (RA-147) (ruling that claimant, a large mining company, was not "in like circumstances" with small-scale miners, and "the difference in treatment is justified by valid policy reasons"); *Bayindir v. Pakistan*, Award ¶ 410 (RA-102) (concluding that small-scale local contractors were not "like" the claimant due to differences in "expertise and experience of the contractors").

[356] *See, e.g.*, U.S. Submission ¶ 51 ("If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 10.3 can be established."); *Champion Trading Co. v. Egypt*, Award (RA-82) ¶¶ 154-155; *see also id.* ¶ 156 ("Since the Arbitral Tribunal came to the conclusion that the companies were not in a like situation, it does not need to analyze the other requirements which prohibit discrimination on the grounds of nationality.").

[357] *See* U.S. Submission ¶ 50 ("Article 10.3 is intended to prevent discrimination on the basis of nationality . . . . It is not intended to prohibit all differential treatment among investors or investments."); *see also, e.g.*, *Loewen v. United States*, Award ¶ 139 (RA-66) (confirming that the national treatment obligation is "direct[ed] only to nationality-based discrimination and . . . proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome"); *GAMI v. Mexico*, Final Award ¶ 114 (RA-71) (rejecting claim even where the "Government may have been misguided" and "may have been clumsy in its analysis," because the "measure was plausibly connected with a legitimate goal of policy").

[358] *See, e.g.*, Supreme Decree no. 242-2017-EF, 19 Aug. 2017, Arts. 16(c), 18 (CE-275); Constitutional Tribunal Res., 16 July 2013 (RA-286); Statement of Rejoinder ¶¶ 379-385; Statement of Defense ¶ 287.

various bondholders – including the elderly and the young, original and non-original holders, individuals and legal entities, and legal entities acquiring under different circumstances.[359]

99. The Hearing again underscored that Gramercy was not accorded less favorable treatment, let alone nationality-based treatment, as a result of this cash payment structure. In fact, the entire claim is predicated on an irrelevancy:

- **Payment categories are consistent with international best practices.** Dr. Wühler confirmed that the creation of different claimant categories for the sequence of payments is "very common in claims and competition processes."[360]
- **Gramercy cannot show differential treatment.** Whether or not Gramercy might have fallen into the "speculative" holder category is irrelevant. It is undisputed that Gramercy opted to boycott the Bondholder Process and, thus, did not receive *any* treatment in respect of cash (or other) payments. Any allegedly less favorable treatment that might have arisen is, at most, a mere hypothetical.
- **Gramercy never sought payment in cash.** Mr. Koenigsberger confirmed in testimony that Gramercy would "be content to receive contemporary Peruvian sovereign bonds as a method of payment," and that Gramercy had specifically indicated to Peru in the past that it would accept non-cash forms of payment.[361]
- **Gramercy's alleged claims far exceed the cash limit.** Cash payments are expressly limited to 100,000 Soles (approximately US$ 30,000), which is an insignificant fraction of the amount Gramercy claims. As the President of the Tribunal observed at the Hearing, "100,000 [S]oles for this Arbitration is irrelevant. It may be important for small bondholders."[362] It is not relevant for Gramercy or this case.

100. In any event, Gramercy's theory that the speculative holder category was "designed to discriminate against Gramercy"[363] remains unsupported by any evidence, from the Hearing or otherwise. Gramercy badly distorts the testimony of both Minister Castilla and Vice Minister Sotelo when it suggests that they "refused to answer questions about this category."[364] In fact, both witnesses plainly explained that they were not involved in the creation of the payment categories and thus could not speak to their origins.[365] The documents which do speak to the origins, including the Constitutional Tribunal Resolutions, Supreme Decrees, and supporting documents for the Supreme Decrees (*e.g.*, legal reports, technical reports, and other contemporaneous documentation, all produced by Peru), make no mention of Gramercy and lend no support to the unsupported allegation that it was targeted.

101. Gramercy's unproven discrimination theory cannot change the undisputed fact that its national treatment claim is based upon treatment which Gramercy never received, as part of a Process which Gramercy chose to boycott; a form of payment Gramercy never sought to obtain; and a payment amount so small as to be irrelevant to Gramercy's alleged holdings. Because Gramercy has failed to show, and indeed cannot show, *either* a relevant comparator *or* less favorable treatment based on nationality, its Article 10.3 claim must fail.

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[359] *See, e.g.*, Constitutional Tribunal Res., 16 July 2013 ¶ 29 (RA-286); Constitution of Peru, Art. 4; Constitutional Tribunal Explanatory Res., 4 Nov. 2013 (RA-230); Hr'g. Tr. 2173:17-21, 2185:20-2186:6 (Day 6) (Wühler).

[360] Hr'g Tr. 2173:16-21 (Day 6) (Wühler Direct); *see also* Direct Presentation of Dr. Wühler (H-12) at 4.

[361] Hr'g Tr. 454:19-455:13 (Day 2) (Koenigsberger Cross).

[362] Hr'g Tr. 2543:19-20 (Day 7) (Quantum Tribunal Questions).

[363] *See, e.g.*, Claimants' PHB on Merits and Remedies ¶ 96.

[364] Claimants' PHB on Merits and Remedies ¶ 96.

[365] *See, e.g.*, Hr'g Tr. 1072:1-22 (Sotelo Tribunal Questions); Hr'g Tr. 1264:9-1265:15 (Castilla Cross).

# IV. Gramercy's Meritless Case On Quantum

102. In its Post-Hearing brief, Gramercy repeats the old red-herring that "Peru can easily afford to pay."[366] The question before the Tribunal is different, however; Gramercy must show that Peru must pay and, if so, how much. But Gramercy has failed to present a legally cognizable quantum case. Gramercy does not provide any damages quantification that is recognized under international law.[367] Indeed, Mr. Edwards conceded that he did not consider what the allegedly expropriatory measures were or when they may have occurred or what Gramercy's expectations may have been at the time of its alleged investment.[368] Instead, Mr. Edwards, as he put it, followed his "assignment," which "was to calculate according to my methodology what was the intrinsic value of these Bonds."[369]

103. In fact, Gramercy has not raised a cognizable Treaty claim or damages case. Gramercy has not tied a specific breach to a specific damage, or a specific breach date, or a specific measure of damages under international law. Instead, Gramercy's quantum case, in essence, is a demand that Peru pay Gramercy the amount Gramercy wants the Bonds to be worth because it wants more than what it is entitled to under Peruvian Law ―which is more than what it paid and more than is available under Peruvian law in the Bondholder Process.

104. Peru has established that, assuming *arguendo* that Gramercy was deprived of its investment in or about 2013, the proper measure of compensation would be the fair market value of Gramercy's interest in the Bonds on the day before the alleged deprivation.[370] Given the uncertainty at the time of Gramercy's alleged deprivation, the acquisition price that Gramercy incurred to purchase the bonds represents the best contemporaneous assessment of the fair market value.[371] Fair market value is the typical standard in expropriation cases and prior to the alleged breaches, the Bonds "had virtually zero value"; and "[i]t is only because of th[ose] Measures that some value is added."[372] Gramercy has also failed to prove if there is a different standard of damages on each of its causes of action.[373]

105. Gramercy's exorbitant demand for US$ 1.8 billion is the "intrinsic" value of the Land Bonds – and that less would constitute a breach of the Treaty – is severely undercut by Gramercy's repeated submission of alternative damages calculations in this proceeding. To justify such claims, Gramercy has changed the methodological inputs in ways that are neither consistent with Peruvian Law nor with the arguments of its own experts. Some of its formulas apply CPI, others dollarization; some Edwards's 7.22% interest rate, others the stated coupon rates; some double interest, others single; and some a parity exchange with a base period of 1999-2018, others with a single month (May 2018). In so doing, Gramercy takes inconsistent positions with respect to its definition of the current value principle. Further, Gramercy has resorted to hiding information necessary to substantiate its ever-changing claims. For example, three of its newest claims are complete black boxes, as Gramercy has not even provided the underlying calculations. As another example, Gramercy never provided its internal model on which it bases its fair market value claim. Gramercy's inconsistent and unprincipled damages calculations are displayed in Figure No. 1.

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[366] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 134-140.

[367] *See, e.g.*, Statement of Rejoinder § IV.D.2.a.

[368] Hr'g. Tr. 1655:19-1656:11, 1744:7-1748:19 (Day 5) (Edwards Cross).

[369] Hr'g. Tr. 1655:12-14 (Day 5) (Edwards Cross).

[370] *See, e.g.*, Statement of Rejoinder § IV.D.2.a

[371] *See, e.g.*, Statement of Rejoinder § IV.D.2.a.

[372] Hr'g. Tr. 2359:9-20 (Day 7) (Quantum Direct).

[373] *See, e.g.*, Statement of Rejoinder § IV.D.2.a.

**FIGURE 1. SUMMARY OF DIFFERENT FACTORS IN GRAMERCY CALCULATIONS**

| | *Valuation (US$ millions)* | *Indexing Method* | | *Reference Date* | | *Parity Exchange* | | *Parity Exchange Base Period* | | | *CPI to Last Clipped Coupon Date* | | | *Interest from Last Clipped Coupon** | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Dollarization | CPI | Last Clipped Coupon | Issuance | Single Month Base | Average Period Base | January 1969 | May 2018 | Average: Jan. 1999 - May 2018 | Lima CPI | US CPI | None | 1 yr. US Treasury Yields | Coupon Rate | US CPI + 7.22 % | Lima CPI + 7.22% | Lima CPI |
| **NOTICE OF ARBITRATION** | | | | | | | | | | | | | | | | | | |
| **Edwards I** | 1,800 | | ✓ | | ✓ | | | | | | ✓ | | | | | | ✓ | |
| **Edwards II** | 1,718 | ✓ | | | ✓ | | ✓ | | | ✓ | | ✓ | | | | ✓ | | |
| **REPLY** | | | | | | | | | | | | | | | | | | |
| **Alternative 1** | 842 | | ✓ | | ✓ | | | | | | ✓ | | | | ✓ | | | ✓ |
| **Alternative 2** | 841 | | ✓ | | ✓ | | | | | | ✓ | | | | ✓ | | | ✓ |
| **POST HEARING BRIEF** | | | | | | | | | | | | | | | | | | |
| **Alternative 3** | 842 | | ✓ | | ✓ | | | | | | ✓ | | | | ✓ | | | ✓ |
| **Alternative 4** | 845 | ✓ | | ✓ | | | ✓ | | | ✓ | | | ✓ | ✓ | ✓ | | | |
| **Alternative 5** | 885 | ✓ | | ✓ | | ✓ | | | ✓ | | | | ✓ | ✓ | ✓ | | | |

Highlighted columns indicate factor used in Bondholder Process

* All rates are nominal except for the Lima CPI

## A. Gramercy's New Claims Deprive Peru Of Fundamental Due Process Rights And Must Be Rejected

106. In light of the problems with its original US$ 1.8 billion claim for the "intrinsic" value of the bonds, Gramercy with its Reply introduced two new attempts at damages claims for: (i) US$ 842 million, which Gramercy claims represents what it would have received in Peruvian court proceedings; and (ii) US$ 550 million (later updated to US$ 841 million), which Gramercy claims represents the fair market value of the Bonds.[374] Gramercy did not stop there.

107. In its Post-Hearing brief, Gramercy introduced three entirely new damages claims, without even providing the underlying calculations. The first (for US$ 841 million) represents what Gramercy claims it would have received "but for the MEF's unlawful interference in the" July 2013 Resolution; or, in other words, had Justice Mesia's dissent actually been the majority holding.[375] The second and third new claims (for US$ 845 and US$ 885 million, respectively), represent what Gramercy claims it would have received "but for the MEF's unlawful implementation of the 2013 CT Order."[376] In each of these, Gramercy presents the following two supposed "adjustments" to Peru's formula: (i) the parity exchange rate; and (ii) compensatory interest. These final two new claims in turn differ from each other in that Gramercy applies a different parity exchange rate base period in each.

108. Gramercy's belated submission of alternative damages claims violates the Treaty, the UNCITRAL Rules, and Procedural Order No. 1; and, accordingly, should be rejected.[377] The inadmissibility of new claims at such a late stage of the proceeding is also supported by jurisprudence.[378] Peru's fundamental right to due process, present a defense, and be heard require that these new claims not be entertained.

## B. The Hearing Confirmed That Gramercy Is Not Entitled To Any Compensation

109. Peru has established that Gramercy bears the burden of proving damages with reasonable certainty, including that Peru's actions were the proximate cause of those alleged damages, and that Gramercy has an interest in the Land Bonds on which it bases its claims.[379] Moreover, Gramercy must also prove that it is entitled to the amounts of compensation it seeks under each claim.[380] Gramercy has failed to discharge these burdens. During the Hearing, Gramercy attempted to confuse the established "reasonable certainty"

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[374] Gramercy, Corrected Statement of Reply ¶ 510.

[375] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 118-119.

[376] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 123-133.

[377] Treaty, Art. 10.16(2)(c) (RA-1) (requiring that the notice of intent specify "the legal and factual basis for each claim."); UNCITRAL Rules, Art. 20.2 ("the Statement of Claim shall include the following particulars:…(d) [t]he relief or remedy sought; (e) [t]he legal grounds or arguments supporting the claim."); Procedural Order No. 1 ¶¶ 9-12 ("[t]he Statement of Claim shall set forth the facts, the legal arguments and the relief sought" and that in "second written submissions "[a]bsent leave from the Tribunal for good cause, no new argument shall be presented.").

[378] *See, e.g., Fraport A.G. Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment dated 23 Dec. 2010 (RA-111) ¶ 200 ("The right to present one's case . . . includes the right of each party to make submissions on evidence presented by its opponent. If an arbitral tribunal fails to accord such a right, then its award will be subject to annulment."); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/94/4, Decision of the *Ad Hoc* Committee dated 5 Feb. 2002 (RA-61) ¶ 57 (confirming that the right to be heard is a "fundamental right [that] has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other").

[379] *See, e.g.*, Statement of Rejoinder § IV.D.1; Statement of Defense ¶¶ 299 *et seq.*

[380] *See, e.g.*, Statement of Rejoinder § IV.D.2.

standard by citing a single case from 2014, which it claimed supports a "balance of probabilities" standard.[381] This case is an outlier and distinguishable from the many others clearly articulating the "reasonable certainty" standard.[382] Moreover, even if Gramercy were right that the correct standard is "balance of probabilities," it still fails to meet it.

110. In fact, in each of its claims in this proceeding, Gramercy asks the Tribunal to go back in time and, as Peru's Quantum experts explained "redo the Bond from the very beginning and change the terms" so that it can get the almost 10 billion percent hair extension it claims.[383] Peru's Quantum experts confirmed that Gramercy's approach would effectively mean that the Bonds were void from their very inception and would require the reopening of previously settled debts, which, they confirmed, is "hard from an economic perspective to accept."[384] During the Hearing, Mr. Edwards conceded that Gramercy's claims require the Tribunal to go beyond the Bonds' original terms:

> Q. So, what Gramercy is asking for in this Arbitration is, effectively, more than what the original Bondholders would have received at the time; correct?
>
> A. That's obviously correct.[385]

111. Gramercy's claims also overlook the basic and indisputable holdings of the July 2013 Resolution. Yet on Gramercy's logic, the current value principle means whatever will get Gramercy the returns it wants (and/or has promised to its clients). Gramercy's myriad claims are also inconsistent with its own expectations at the time of its investment and with its own internal models for valuing the Bonds, as Peru has established.

112. In addition, as Peru has established, Gramercy is not entitled to damages because there is no causal link between Gramercy's damages calculation and Peru's alleged breaches.[386] Each of Gramercy's many damages claims suffers this same fate because each commits the same fundamental error—assuming (incorrectly) that the Bonds have a value greater than that established by their original terms and available under applicable Peruvian law, including the current value principle. Because they do not, and because Peru provides value consistent with Peruvian law, there is no causation. Gramercy also cannot establish causation because it chose not to participate in the Bondholder Process and because it has not authenticated its Land Bonds (or otherwise established them to be authentic).[387]

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[381] Opening Statement of Gramercy, Slide 206 (citing *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 685 (CA-119).

[382] *See, e.g.*, Statement of Rejoinder § IV.D.1; Statement of Defense § V.1. In particular, in that case, the tribunal was seeking to determine damages using a discounted cash flow calculation as a measure for the fair market value for a long-term gold project, which necessarily required an "assessment of the quantum of the mineral deposits likely to be extracted over the 20 year period of the extended concession." *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 691 (CA-119). No comparable damages claim inherently requiring years of assumptions has been made in this case. Moreover, the Gold Reserve tribunal confirmed "damages cannot be speculative or merely 'possible.'" *See id.* ¶ 685.

[383] Hr'g. Tr. 2416:21-2417:1, 2447:1-2 (Day 7) (Quantum Direct).

[384] Hr'g. Tr. 2373:15-19 (Day 7) (Quantum Direct).

[385] Hr'g. Tr. 1811:5-9 (Day 5) (Edwards Cross).

[386] *See, e.g.*, Statement of Defense § V.A; Statement of Rejoinder § IV.D.1.b.

[387] In addition, Gramercy's claim that under the "lone expert report was actually established law" scenario suffers from additional proximate cause defects, as Peru has established, including that, Gramercy fails to establish that Peru's actions proximately caused Gramercy to not prevail before the Peruvian courts; that Gramercy never submitted the vast majority of its alleged bondholding to local proceedings, and, even if it had, there is no reason to assume that Gramercy would have prevailed. *See* Statement of Rejoinder § IV.D.1.b.

### 1. Gramercy Is Not Entitled To Compensation For What It Claims Is The "Intrinsic" Value Of The Land Bonds

113. Gramercy claims that it is entitled to US$ 1.8 billion, which it asserts is the "true intrinsic value" of the Bonds as of 31 May 2018.[388] As Peru established, Gramercy fails to meet its burden of proving these damages with reasonable certainty. As a threshold matter, claims for the "intrinsic" value are inconsistent with established damages principles in international investment law.[389] Gramercy's "intrinsic" value standard is simply too subjective to provide any meaningful measure of damages, as Peru's Quantum experts have noted.[390]

114. In this regard, Peru's Quantum experts have confirmed that the formula used by Peru, including each of the components of which Gramercy complains (dollarization, parity exchange rate, updating date, and interest rate), "has no mathematical, economic, or theoretical flaws and provides a reasonable, in fact favorable, outcome for bondholders with unclipped/unpaid coupon that were worthless when the Agrarian Bank closed."[391] They also concluded that the Bondholder Process provides participating bondholders with a massive 900 million percent hair extension, as opposed to a haircut, as Gramercy incorrectly claims.[392] It is thus undisputed that Peru's Bondholder Process would have provided more to Gramercy than it paid (with other people's money) to acquire the Bonds.[393]

115. Gramercy's "intrinsic" value claim is based on Gramercy's assumption that the current value principle established by the Constitutional Tribunal in 2001 "had a clear and objective meaning."[394] This is incorrect both factually and as a matter of Peruvian law, as Peru has established.[395] It is also confirmed by Gramercy's continuing manipulation of various inputs in its many alternative damages claims. In fact, on cross-examination, Mr. Edwards confirmed he had no clear guidance even on the meaning and scope of the current value principle, much less any idea whether his tangled calculations were anywhere in the vicinity thereof.[396] In fact, Gramercy is unable to identify any evidence from the time of its acquisition that it understood there to be a clear or implicit legal rule as to the valuation of the Bonds, much less one mandating the methodology demanded by Mr. Edwards.[397]

116. Gramercy also has failed to prove that it is entitled to the amount of compensation it seeks under the claim. Peru's Quantum experts confirmed that Mr. Edwards's original CPI-based calculation ("Edwards I") has significant flaws, including:

- **Disconnection from current value principle.** Mr. Edwards was unable to explain why the current value principle supposedly mandated the use of a CPI method, rather than a dollarization method, such as that provided in the 2013 Resolution or the MEF's Decrees. Mr. Edwards even asserted previously that "[b]oth the CPI Method

[388] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 104.

[389] *See, e.g.*, Statement of Rejoinder § IV.D.2.a.

[390] *See* Quantum II ¶ 131; Statement of Rejoinder § IV.D.2.a.

[391] Peru's Quantum Experts Presentation, Slide 53 (H-14); Hr'g. Tr. 2431:16-2432:12 (Day 7) (Quantum Direct).

[392] Hr'g. Tr. 2392:3-2416:17 (Day 7) (Quantum Direct).

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

[394] Gramercy's Post-Hearing Brief ¶¶ 11-31; Hr'g. Tr. 1629:3-7 (Edwards) (assuming "current value has an objective meaning and can be calculated easily and reliably by using CPI and using an estimate of foregone opportunity.").

[395] *See supra* Section II.B, C; Hr'g. Tr. 2356:18-2357:21 (Day 7) (Quantum Direct); Hr'g. Tr. 1700:5-17, 1717:10-13, 1795:4-1795:5 (Day 5) (Edwards Cross).

[396] *See* Hr'g. Tr. 1794:13-1796:11 (Day 5) (Edwards Cross).

[397] The 2006 Memorandum does not say CPI is mandated and does not refer to the 7.22% interest rate or the concept of compensatory interest. *See* 2006 Memorandum (CE-114).

and a correctly implemented Dollarization Method are consistent with the Current Value Principle."[398] In any event, Peru's methodology includes a CPI component within the parity exchange rate, as Mr. Edwards admitted at the Hearing.[399]

- **Retroactive CPI adjustment.** Peru's Quantum experts confirmed that one flaw in Mr. Edwards's calculations was his inappropriate use of a retroactive CPI adjustment.[400] On cross-examination, Mr. Edwards conceded that, because he seeks to correct for the effects of hyperinflation even with respect to coupons that were already paid by Peru, his retroactive CPI adjustment produced a result that would give Gramercy more than what the original Bondholders would have received when they were paid for their clipped coupons, as those coupons did not include any such correction for hyperinflation.[401] In spite of this, Mr. Edwards does not (and cannot) claim that the hyperinflation was a Treaty breach.

- **Unrealistic Interest Rate**. Peru's Quantum experts have confirmed that Mr. Edwards's proposed real interest rate of 7.22% is unrealistic, based on hindsight, and merely theoretical, as it is built on an aggregation of investments based on the entire Peruvian economy, when there is no such tradeable security in Peru,[402] as Mr. Edwards conceded on cross-examination.[403] Mr. Edwards's interest rate is also inconsistent with Gramercy's expectations, as during cross-examination, he confirmed that he did not cite any evidence of Gramercy's expectations for the interest rate it seeks and confirmed that Peru "could have done anything" and "can apply any rate they want."[404] Mr. Edwards's underlying data also suffers from significant gaps, which he also conceded on cross-examination.[405]

117. Mr. Edwards's dollarization-based calculation of "intrinsic" value ("Edwards II") includes these same fundamental flaws and an additional one: the inappropriate use of an *ex-post* parity exchange rate, *i.e.*, based on information that would not have been available to the original Bondholders.[406] Peru's Quantum experts confirmed that Peru's parity exchange rate's base period, which is the basis of Mr. Edwards's criticism, is

[398] Edwards II ¶ 7.

[399] Hr'g. Tr. 1621:8-13 (Day 5) (Edwards Tribunal Questions).

[400] Hr'g. Tr. 2365:5-20 (Day 7) (Quantum Direct).

[401] Hr'g. Tr. 1811:6-9 (Day 5) (Edwards Cross); *see also* Hr'g. Tr. 2365:7-20 (Day 7) (Quantum Direct) ("As we know, there is no claim for Coupons that were being paid., right? [B]ut he's starting not when the apparent nonpayment started, the bank closure, but going all the way back to the beginning. If you think of this like in a damages context that we usually think, when there's a bad event that happens or a measure, you create a but-for scenario to eliminate that, and that starts on the date of the Measure. You can't start it any earlier than when the Measure occurred. And in my mind, this is exactly what he's doing….").

[402] Hr'g. Tr. 2383:10-21 (Day 7) (Quantum Direct); see also Quantum I ¶ 147 (the interest rate calculation is based on "an amalgamation of data from different periods, randomly selected fixed averages, and different countries.").

[403] Hr'g. Tr. 1766:19-1767:12 (Day 5) (Edwards Cross). Inconsistently, Mr. Edwards criticized Peru's Quantum experts for using a parity exchange rate which he said is based on a foreign security, *i.e.*, U.S. Treasury bill rates. Hr'g. Tr. 1762:17-21 (Day 5) (Edwards Cross). Yet at least such securities exist in reality, in contrast with Mr. Edwards's manufactured rate.

[404] Hr'g. Tr. 1719:22 (Edwards Cross). *See also* Hr'g. Tr. 1717:10-1718:19, 1721:2-1724:3, 1732:18-20 (Edwards Cross) (confirming that that Edwards did not rely on Peruvian law (or Dr. Castillo) in devising the 7.22 % rate, and that there are other possibilities for interest that would comport with Peruvian law, which he did not calculate).

[405] Hr'g. Tr. 1738:13-16, 1741:14 (Day 5) (Edwards Cross).

[406] Hr'g. Tr. 2366:1-2367:5 (Day 7) (Quantum Direct) ("[Mr. Edwards is] using parity rates from '99 until 2018 as a basis to set parity back at issuance, and if we're simulating a bond restructuring back in time, obviously none of this data was known and could have been accomplished at the time. So, this is using some ex post information to simulate an ex ante exchange…. What is Peru responsible for solving here? Do they have to go back and redo the Bonds from the very beginning with new terms, new interest rates, inflation-adjusted principal, or are they solving nonpayment of Coupons when nonpayment began….").

"economically justified" and "perfectively valid" as it "corresponds to when the Land Reform program and the Bond program … took effect."[407] Indeed, it is based on data provided by Peru's Central Bank, a well-respected institution, as confirmed by Gramercy's legal expert.[408]

### 2. Gramercy Is Not Entitled To Compensation Under Its Alternative Damages Claims

#### a. Gramercy Is Not Entitled To Compensation Under Its "Lone Expert Report Was Actually Established Law" Claim

118. In its first alternative claim ("Alternative 1"), Gramercy alleges that "but for denial of court access, Gramercy would likewise have received at least US$ 841 million."[409] Peru understands that the calculation of this claim is identical to the prior claim.[410] As the basis of this argument, Gramercy relies on a lone expert report presented in one case in Peru in which it participated that involved 44 of its Bonds (about 0.4% of those in this proceeding) and was never decided before Gramercy withdrew. Gramercy fails to prove damages under this claim with reasonable certainty. This claim would require that the Tribunal assume that the lone court in question would actually issue a ruling consistent with this lone expert report (one of three presented in that case, which had varying methodologies, including with respect to whether interest should be simple or compounded).[411]

119. At the Hearing, Gramercy sought to highlight that it also had a right to go to court to demand payment on the Bonds. Yet, despite purporting to hold thousands of Bonds, Gramercy only sought to monetize a small amount through local litigations.[412] Indeed, by Gramercy's own account, it participated in only seven such proceedings by "substitut[ing] itself as a party in place of the original bondholder"[413] It did so in proceedings involving only around 215 Bonds (about 2% of its Bonds).[414] Gramercy provides no explanation for why it chose not to do so, it seems, for the other approximately 98% of its Bonds, if its rights to recover in court were as clear as Gramercy now claims. Moreover, Gramercy provides no explanation for why it waited years following acquisition to participate in these proceedings, which it started "in approximately 2011."[415]

120. This claim also requires assuming that Gramercy would have decided to and been able to pursue claims in Peruvian courts for all of its Bonds.[416] It also requires assuming that all of the other courts deciding these (non-existent) proceedings would reach the same conclusion as this lone court (which it did not actually reach) and that all of these courts would resolve all of these (non-existent) legal proceedings and allow Gramercy to collect by 31 May 2018, despite admitting that did not pursue such claims in Peruvian courts for the vast majority of its Bonds for years before (allegedly) withdrawing from the handful in which it did in 2016. As Peru has established, contemporaneous decisions applied different methodologies than the one proposed in the lone expert report in this case.

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[407] Hr'g. Tr. 2516:16-18, 2517:3, 2521:15 (Day 7) (Quantum).

[408] Hr'g. Tr. 1973:14-20 (Day 5) (Bullard Cross).

[409] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 120-122.

[410] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 121.

[411] Hr'g. Tr. 2419:11-22 (Day 7) (Quantum Direct); 2653:15-2464:1 (Quantum Cross).

[412] *See, e.g.,* Statement of Rejoinder §§ IV.B.2.b.i; Hr'g. Tr. 635:18-19 (Day 2) (Koenigsberger Redirect).

[413] Second Amended Koenigsberger I ¶ 42.

[414] Gramercy's Post-Hearing Brief ¶ 122; Gramercy Opening, Slide 205 (citing Statement of Rejoinder n.911).

[415] Second Amended Koenigsberger I ¶ 42.

[416] Gramercy's Post-Hearing Brief ¶ 122; Gramercy Opening, Slide 205 (citing Statement of Rejoinder n.911).

121. Moreover, as Peru's Quantum experts explained at the Hearing, this lone case involved a particular fact—that all bonds at issue had no clipped coupons.[417] As Peru's Quantum experts explained, Mr. Edwards engages in significant speculation in this claim: "Edwards interprets this calculation very favorably because he assumes that Gramercy would have been able to present Bonds with clipped Coupons, and those Coupons would have been adjusted from the issuance date, but that's not what the Experts in the local Peruvian case did. They were never presented with that alternative—with that option."[418] In addition, Gramercy's argument assumes that it its Bonds are authentic and would be authenticated.

122. Gramercy has also failed to prove that it is entitled to the amount of compensation it seeks under this theory, as it suffers from two of the same problems identified above: (i) the inappropriate retroactive CPI adjustment; and (ii) the unrealistic interest rate. It also should be rejected.

### b. Gramercy Is Not Entitled To Compensation For The Value Of Its Bonds Included In Its Unreliable Financial Statements

123. Gramercy's second alternative claim ("Alternative 2") is for what it alleges is the fair market value ("FMV") of its Bonds based on its internal model developed in 2009 (and supposedly updated over time), as reported in its financial statements.[419] Gramercy has not disclosed this model in this arbitration.[420] Accordingly, Gramercy has not met its burden.

124. Peru's Quantum experts confirmed that the financial statements do not represent the FMV of the Land Bonds.[421] In fact, they do not even purport to be a strict FMV of the Land Bonds, but rather reflect other factors included in Gramercy's secret internal model, such as the "ICSID scenario."[422] As Peru's Quantum experts explained: "the 550 million do not represent … the Fair Market Value of the Bonds. It is not Fair Market Value. It is Fair Value, and it doesn't represent the value of the Bonds but, actually, the claims associated with those Bonds. But just so you understand how the 550 million is constructed, it starts with a base scenario, which is really the intrinsic value that Edwards calculates or just all these different options. But it is the intrinsic value. It's not the market value."[423]

125. Gramercy did not even share this model with the financial statements auditors,[424] or Mr. Edwards.[425] [redacted][426] During the Hearing, Peru's Quantum experts explained that, because of this, "the auditors have no basis to challenge significant unobservable inputs. It is all … based on management assumptions.… The auditors could have been fine with the 34 million or 400 or 300. All they can check, really, is the math."[427] Moreover, Mr. Joannou admitted on cross-examination that [redacted]

[417] Hr'g. Tr. 2419:5-7 (Day 7) (Quantum Direct).
[418] Hr'g. Tr. 2420:12-19 (Day 7) (Quantum Cross).
[419] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 141-148.; Hr'g. Tr. 810:12-813:7 (Joannou Cross).
[420] Hr'g. Tr. 839:16-17 (Day 2) (Joannou Cross).
[421] Hr'g. Tr. 2425:14-2427:8 (Day 7) (Quantum Direct).
[422] Hr'g. Tr. 860:3-6 (Day 2) (Joannou Cross).
[423] Hr'g. Tr. 2425:14-2426:4 (Day 7) (Quantum Direct).
[424] Hr'g. Tr. 838:10-11 (Day 2) (Joannou Cross).
[425] Hr'g. Tr. 1654:21-1655:4 (Day 5) (Edwards Cross).
[426] *See generally* Quantum II, Appendix 6.
[427] Hr'g. Tr. 2426:9-2427:4 (Day 7) (Quantum Direct).

[redacted].[428] Of course, this is only what Peru has been able to uncover without the benefit of the model itself; and could be only the tip of the iceberg.

126. It is unsurprising that Gramercy would have an incentive to inflate the Bonds' value. [redacted] Gramercy's compensation from clients was tied to Gramercy's own valuations of the Bonds [redacted].[429] In its Post-Hearing brief, Gramercy argues that it "had financial incentives to 'be careful with the valuation,' since clients could exit their positions for cash at any time at Gramercy's valuation."[430] What Gramercy fails to mention, however, is that [redacted][431]

127. Hence, Gramercy's damages claim based on its internal model is entirely speculative. Any award on this basis would require the Tribunal to assume that the "unobservable" inputs Gramercy chose to include in this model (which it did not share with its auditors, Peru, and the Tribunal) were reasonable (and more so than the value for which they were actually exchanged) and consistent with Peruvian law. Notably, Gramercy's claim to an US$ 841 million FMV for the bonds is drastically different from the actual market price of the Bonds of US$ 33 million. It is also significantly different than the US$ 15 million acquisition price for interests in the Tranche 2 bonds, which it values at up to over US$ 1.9 billion—a very similar number to the amount claimed in this proceeding.[432]

### c. Gramercy Is Not Entitled To Compensation Under Its "Dissent Was Actually The Majority" Claim

128. In its third alternative claim ("Alternative 3"), which is new in the Post-Hearing brief, Gramercy alleges that "but for the MEF's unlawful interference with the 2013 CT Order, Gramercy would have received US$ 841 million."[433] According to Gramercy, this claim involves "(i) updating the unpaid principal for inflation using Peru's CPI, (ii) from the Land Bonds' issuance date, (iii) plus compound interest at the stated coupon rates."[434]

129. Aside from being an improper new claim, in breach of due process, as noted above, Gramercy fails to prove damages under this scenario with reasonable certainty. As Peru has established, Gramercy failed to establish that the MEF interfered (or even sought to interfere) with the Constitutional Tribunal's July 2013 Resolution. Even if it had (which it

[428] Hr;g. Tr. 844:16-850:3 (Day 2) (Joannou Cross).

[429] [redacted]; *see also* Hr'g. Tr. 773:7-9 (Day 2) (Lanava Cross).

[430] Gramercy's Post-Hearing Brief ¶ 146 (citing to Hr'g. Tr. 864:4-18 (Day 2) (Joannou Tribunal Questions).

[431] For example, [redacted] [DESIGNATED AS CONFIDENTIAL BY GRAMERCY].

[432] Investment Committee Memo, 25 April 2017 (H-17); Gramercy internal email dated 1 Marc 2017 (H-16).

[433] Gramercy's Post-Hearing Brief on Merits and Remedies ¶¶ 118-119.

[434] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 119.

has not), Gramercy's claim would still be speculative. The July 2013 Resolution was decided with the necessary votes, remains valid and binding, and has been confirmed on numerous occasions.[435] Gramercy's argument speculatively requires this Tribunal to assume that the Justices of the Constitutional Tribunal were denied the ability to deliberate and exchange drafts prior to its issuance, as well as to confirm it thereafter. In addition, Gramercy's argument assumes that it would have participated in the Bondholder Process envisioned by the dissent and that its Bonds would be authenticated. Gramercy has made no such showing and Peru has repeatedly demonstrated the myriad issues related to Gramercy's suppression of the Bondholder Process and the authenticity of its Bonds.

130. The required speculation goes further. Justice Mesia's dissent, for example, orders the application of CPI "during the period of suspension of the debt" "insofar as the State expresses the validity of CPI as a factor of updating the debt."[436] Accordingly, even according to Justice Mesia, CPI was "a" and not "the" factor for updating the debt. Moreover, Justice Mesia anticipated an additional step by the State. In any case, the amount of compensation Gramercy seeks under the claim suffers from two of the same problems identified above: (i) the inappropriate retroactive CPI adjustment; and (ii) the unrealistic interest rate. It should be rejected.

### d. Gramercy Is Not Entitled To Compensation Under Its "Valuation Methodology Is Actually Whatever Gramercy Wants" Claim

131. In its fourth and fifth alternative claims, also presented for the first time in Gramercy's Post-Hearing brief, Gramercy alleges that "but for the MEF's unlawful implementation of the 2013 CT Order," Gramercy would have received US$ 845 ("Alternative 4") or US$ 885 million. ("Alternative 5").[437] As also noted above, these new scenarios are improper and in breach of due process.

132. Based on the scant description provided by Gramercy, Peru understands that this claim involves: (i) changing the parity exchange rate to one of Mr. Edwards's two preferred rates (with different base periods); and (ii) adding compensatory interest.[438] In support, of these claims, Gramercy without leave from the Tribunal, submitted an Appendix with its Post-Hearing brief, further prejudicing Peru's due process rights. The Tribunal should not consider it. In any event, Peru attaches hereto a one page Appendix which notes that, for these claims, Mr. Edwards has accepted the methodology contained in Supreme Decree No. 242-2017-EF, except for two specific inputs: (i) the parity exchange rate; and (ii) compensatory interest. Moreover, his "adjustments" to these inputs are conceptually flawed.

133. As to the first change, Peru has established that there is no mandated parity exchange rate. During the Hearing, Mr. Edwards confirmed that "it is very difficult to choose the base that you have to apply, and when you do it, it is complex."[439] In any event, Mr. Edwards inappropriately uses *ex-post* information, as noted above. Gramercy's criticism of the parity exchange rate used by Peru is also inconsistent with its own position. In particular, Gramercy alleged that Peru's use of January 1969 (a single month) as the base period "contravenes" the "basic rule" of calculating parity exchange rates, which, according

[435] *See, e.g.,* Statement of Defense ¶ 272; Statement of Rejoinder ¶¶ 188-200.

[436] July 2013 Resolution, Mesia Dissent ¶ 23 (RA-288).

[437] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 123.

[438] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 123.

[439] Hr'g. Tr. 1822:13-15 (Day 5) (Edwards Tribunal Questions).

to Mr. Edwards, is to "never use one month."[440] Nonetheless, after laboriously reconstructing Mr. Edwards's two new separate quantifications under this scenario (which he did not provide), Peru's Quantum experts discovered that he, in fact, uses a base period of May 2018 (a single month) for one of them, thereby "contravening" his own made-up "rule." After all, Gramercy has no rules, but only a number in mind.

134. As regards compensatory interest, Gramercy applies the Bonds' stated coupon rates on top of the U.S. Treasury rate. In its Post-Hearing brief, Gramercy claims that the addition of compensatory interest is "required" by the "clear and well-established meaning" of the current value principle.[441] Yet, Gramercy's argument is belied by its own decision not to include compensatory interest in this manner in its own original claims (Edwards I and II). While some local courts in Peru may have applied compensatory interest in this manner, Gramercy's claim is incorrect, and the application of compensatory interest in the manner Gramercy demands has been specifically rejected in other fora, including the appeals presented by Gramercy's bondholder witnesses.[442] Gramercy's Peruvian law expert made clear that the current value principle is distinct from the application of compensatory interest and that the application of compensatory interest is "complementary" to it (rather than required by it.).[443] Moreover, the inclusion of interest at the U.S. Treasury bill rate already compensates for the time value of money, and as Peru's Quantum experts have confirmed is "more than fair" to bondholders.[444] Gramercy's calculation results in double-counting inflation, which is inconsistent with basic economics principles.[445]

135. Gramercy's claims are also conceptually flawed for the same reasons mentioned with respect to the prior claims, as they utilize: (i) the inappropriate retroactive CPI adjustment; and (ii) the unrealistic interest rate. They should be rejected.

### C. The Hearing Confirmed That Peru Is Entitled To Full Arbitration Costs And Expenses

136. Peru is entitled to full arbitration costs and expenses, with interest, under Articles 40 and 42 of the UNCITRAL Arbitration Rules, because Gramercy's claims are without merit, because this proceeding constitutes an abuse of the Treaty, and because of Gramercy's conduct, including its long-term pattern of aggravating the dispute and seeking to suppress participation in the Bondholder Process, as well as its repeated withholding and sandbagging of evidence, which has increased Peru's costs.

137. Indeed, Peru has established that Gramercy has engaged in a multiyear and multifaceted attack campaign against Peru on many fronts, including lobbying of the Non-

[440] Gramercy's Post-Hearing Brief ¶¶ 123-133; Hr'g. Tr. 1823:1-2 (Day 5) (Edwards Tribunal Questions).

[441] Gramercy's Post-Hearing Brief on Merits and Remedies ¶ 10.

[442] *See* Directoral Resolution No. 006-2018-EF/52.01, 18 January 2018 (R-1114); Directoral Resolution No. 042-2018-EF/52.01, 30 October 2018 (R-1115).

[443] Castillo ¶ 62; *see id.* ¶ 58 ("as part of the analysis of the current value principle it is necessary to note that this principle and the rules by which it is governed have a purpose other than that granted to interest payments. As I noted above, the purpose of the current value principle consists in maintaining the balance of the value of the performance of obligations to pay sums of money by protecting them from depreciation or monetary devaluation. By contrast, the accrual of interest occurs either to compensate the opportunity cost of money or the use of the loaned capital or to indemnify any delay in payment. We are therefore dealing with two distinct topics….").

[444] Quantum II ¶ 122.

[445] Hr'g. Tr. 2414:17-2415:10 (Day 7) (Quantum Tribunal Questions) ("Problem with that, as there are in some other calculations purporting to adhere to Current Value Principle. They are double-counting inflation… [T]he 4, 5, and 6 percent rates applied to these Bonds were nominal rates…. So, if you are taking a T-bill rate, which has inflation, and … then adding another nominal rate, you are double-counting the inflation portion.").

Disputing Party and Peru, the press, negative reports, social media, ratings agencies, international organizations, and pension funds, among others.[446] During the Hearing, Minister Castilla described his experience with Gramercy while serving as Ambassador of Peru to the United States as "hostile," including both "indirectly or directly, through lobbying and a lot of pressure brought to bear … 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."[447] Moreover, during the Hearing, Peru highlighted Gramercy's pattern of withholding basic documentation for years, only to subsequently sandbag Peru.[448]

# V. Request For Relief

138. 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;
- 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 due to Gramercy's failure and its persistently unacceptable conduct throughout this proceeding.

Respectfully submitted,

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31 August 2020

[446] *See, e.g.*, Statement of Rejoinder § IV.B.E; Statement of Defense § II.F; Hr'g. Tr. 2584:14-18 (Day 7).
[447] Hr'g. Tr. 1181:7-16 (Day 4) (Castilla Direct).
[448] *See supra* Section I; Hr'g. Tr. 223:2-17 (Day 1) (Peru Opening); Opening Presentation of Peru, Slides 44, 45.