In the Arbitration under the Rules of the United Nations Commission on International Trade Law and the United States – Peru Trade Promotion Agreement

GRAMERCY FUNDS MANAGEMENT LLC,
AND
GRAMERCY PERU HOLDINGS LLC,

Claimants

— v.—

THE REPUBLIC OF PERU,

Respondent

CLAIMANTS' AMENDED NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

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TABLE OF ABBREVIATED TERMS

2001 CT Decision	Constitutional Tribunal Decision dated March 15, 2001
2005 Congressional Report	2005 report by the Agrarian Commission of Congress
2011 Congressional Report	2011 report by the Agrarian Commission of Congress
2013 CT Order	Constitutional Tribunal Decision dated 16 July 2013
ABDA	Land Reform Bondholders' Association
CPI	Consumer Price Index
Decree N° 653	Legislative Decree N° 653 of 1991 (also known as the Agricultural Sector Investment Promotion Act)
DR ER	Expert Report of Delia Revoredo
Emergency Decree	Peruvian Government's Emergency Decree N° 088-2000
GFM	Gramercy Funds Management LLC
SE ER	Expert Report of Sebastian Edwards
GPH	Gramercy Peru Holdings LLC
INEI	National Institute of Statistics and Informatics
Land Reform	Peru's expropriation and redistribution of agrarian land, for which the Government issued Land Bonds as purported compensation
Law N° 26207	1993 legislation expressly repealing the Fourth Transitory provision of Decree N° 653
Law N° 26597	1996 legislation providing, *inter alia*, that delivery of Land Bonds constituted fair compensation for expropriated land
MEF	Peru's Ministry of Economy and Finance
NAFTA	North American Free Trade Agreement
NOI	Notice of Intent to Commence Arbitration
RK WS	Witness Statement of Robert Koenigsberger
Treaty	United States-Peru Trade Promotion Agreement of February 1, 2009
VAT	Value-Added Tax

I.

INTRODUCTION

1. Through regulatory sleight of hand, Peru's Government and its Constitutional Tribunal have transformed Gramercy's holding in Peruvian Agrarian Land Reform Bonds ("Land Bonds" or "Bonds") from a highly valuable investment into virtually worthless scraps of decaying paper.

2. Instead of the approximately US $1.6 billion value that Gramercy's Bonds represent, the Peruvian Government—purportedly implementing a dubious decision of the Constitutional Tribunal—imposed by decree a value-destroying mandatory repayment scheme under which Gramercy would receive merely US $1.1 million. That is less than *one tenth of one percent* of the Bonds' true value.

3. In doing so, the Republic of Peru ("Peru" or "Respondent") has violated the United States-Peru Trade Promotion Agreement ("Treaty").

A. Gramercy's Investment

4. When Gramercy Funds Management LLC ("GFM") and Gramercy Peru Holdings LLC ("GPH") (collectively, "Gramercy" or "Claimant") invested in over 9,700 Land Bonds during 2006 to 2008, it legitimately expected that Peru would responsibly honor its debt.

5. After all, Peru was a darling of emerging market countries. It was admirably recovering from years of economic mismanagement characterized by instability and severe inflation that had peaked at over 12,000% on an annualized basis. It boasted strong growth and sound fiscal management. And it actively sought foreign investment, including by passing investment protection laws, settling all of its other defaulted debt with international creditors, floating new SEC-registered bonds to international markets, and entering into investment treaties, including the Treaty underpinning this arbitration.

6. Moreover, Peru had specifically made clear that despite the Government's long default in paying the Land Bonds, they remained valid sovereign obligations that had to be paid, and paid at so-called "current value" calculated by using the Peruvian Consumer Price Index ("CPI"). As numerous Peruvian court decisions, decades of practice in Peru and the Civil Code established, the "current value" principle ensures that an old obligation must be updated so that it has the same purchasing power in the overall economy at the time of payment that it did when it was created.

7. Peru's commitment to pay the Land Bonds at current value was critical. The Land Bonds had originally been issued in lieu of cash compensation for vast areas of agrarian land that a leftist, unelected, military-controlled Peruvian dictatorship expropriated starting in 1969. Yet, over the ensuing years, Peru's currency had been so devalued by inflation—the currency in which the Land Bonds had been issued, the *Soles de Oro*, was worth a paltry one one-billionth of Peru's current *Soles*—that the Bonds had become worthless if accorded only their face value.

8. Hence it was a landmark event when in 2001 Peru's Constitutional Tribunal definitively rejected the Government's attempt to pay only nominal value ("2001 CT Decision"). The Constitutional Tribunal held that a "basic sense of justice" required payment of updated value, that "fair compensation" could not be treated as "unalterable and independent of the effects of time," and that the Government's attempt to avoid application of the current value principle to the Land Bonds had breached "the current value principle inherent to property." **CE-11**, Constitutional Tribunal, Decision, Exp. N° 022-96-I/TC, March15, 2001, "Foundations" Section, ¶¶ 1, 2, 7.

9. In the next several years leading up to Gramercy's investment, Peru's Constitutional Tribunal, its Supreme Court, its Congress, senior members of Peru's executive branch, and others all consistently confirmed the Constitutional Tribunal's 2001 current value holding, and indicated that the correct method for updating the Land Bond debt to current value was to apply the Peruvian CPI, plus interest. As a former Constitutional Tribunal Justice—who drafted that 2001 CT Decision—explains in her expert report, "Peruvian courts have generally held that the Land Bonds have to be updated using CPI and that the Constitution, the Civil Code, and the 2001 CT Decision all imposed an obligation on the Government to pay the current value of the Land Bonds under CPI." Expert Report of Delia Revoredo ("DR ER") ¶ 29.

B. Peru's Treaty Breaches

10. Regrettably, in 2013 and 2014, President Humala's administration—in league with the Constitutional Tribunal that had over a decade before protected bondholders' rights—completely reversed course and took nefarious steps to destroy the value of the Land Bonds.

11. *First*, in July 2013, the Constitutional Tribunal issued a new decision that significantly undermined its consistent prior rulings, rested on a false factual conclusion that had no evidentiary basis and is even tainted by forgery.

12. Since successive administrations had not paid on the Bonds in the decade following the landmark 2001 CT Decision, in 2011

bondholders sought an order compelling enforcement of the 2001 CT Decision. Yet, based on the unsupported and untrue factual assertion that using the CPI method "would generate severe impacts on the Budget of the Republic, to the point of making impracticable the very payment of the debt," the Constitutional Tribunal ordered the Government to establish a mandatory and exclusive process for updating the debt using a "dollarization" method ("2013 CT Order"). **CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013, "Whereas" Section, ¶ 25. Under that method, the Peruvian debt would be converted to U.S. dollars and then updated using a U.S. Treasury bond.

13. That the central premise on which this decision was based—that Peru could not afford CPI updating—had literally not a single page of support in the Constitutional Tribunal's official record, and that the Constitutional Tribunal denied a petition a few months later to clarify the basis for this quintessentially factual finding, are themselves troubling.

14. Subsequent revelations about the Constitutional Tribunal's process in coming to this decision are, however, even more shocking.

15. After an eleventh-hour intervention by the Humala administration, what had been a four-person majority favoring bondholders and supporting CPI updating suddenly became three votes for dollarization, just as the administration had demanded. And to carry out this dollarization scheme before the Tribunal's term expired, someone—most likely at the behest of the Constitutional Tribunal's Chief Justice, Oscar Urviola—actually used white out correction fluid and a typewriter to transmogrify what had been the draft majority opinion favoring CPI into a forged "dissent" of one of those Justices. Manufacturing such a dissent was essential. That dissent became the basis on which Chief Justice Urviola determined that the Tribunal had deadlocked in a three-to-three "tie," and that he therefore could exercise a "casting" vote. This is how the Chief Justice turned three votes for dollarization into the four votes necessary for him to claim that it was an opinion of the Tribunal.

16. These events—after hours meetings with administration representatives, a last-minute decision at odds with a draft that represented the culmination of 18 months of work, a central factual finding without any record support and that is in fact false, and the use of white out to concoct an official record at the country's highest constitutional authority—may sound fanciful. But they are all too real. For example, the Lima police department's forensics unit has confirmed the extensive use of white out on the purported "dissent." The genesis of the 2013 CT Order and the use of white out to forge official records have become the subject of an ongoing criminal proceeding. Two of the six Justices who participated in that episode have become complainants

in the criminal proceeding, and a third Justice has publicly decried the invalidity of the decision because the circumstances did not legitimately call for a casting vote even counting the forged "dissent."

17. In her expert report, former Constitutional Tribunal Justice Delia Revoredo demonstrates the 2013 CT Order's invalidity. But the scandalous nature of the Order goes beyond its mere invalidity, as Justice Revoredo explains:

> To be clear, no jurisdictional organ in Peru, including of course the Constitutional Tribunal, should allow their decisions to be manipulated (including creating fake documents through the use of white-out). To again state the obvious, this would cast a very dark shadow on what should be one of Peru's most respected institutions; and would raise severe concerns about respect for the independence of the Constitutional Tribunal's jurisdictional activity.
>
> DR ER ¶ 68.

18. *Second*, the Government took full advantage of the opening it had created at the Constitutional Tribunal. In January 2014 and thereafter, it issued Supreme Decrees that purported to calculate current value using a dollarization method, but that in fact make the Bonds worthless.

19. The Supreme Decrees are remarkably deceitful. They have the veneer of legitimacy. They are issued by the highly regarded Ministry of Economy and Finance ("MEF") presided at the time by Luis Miguel Castilla. They purport to implement the Constitutional Tribunal's mandate to provide current value and *not* nominal value. They contain seemingly precise mathematical formulas by which to calculate current value. Even a highly sophisticated bondholder reviewing the formulas would likely instinctively believe that the Supreme Decrees had some validity and that at long last, after having waited decades, the Government might finally own up to its debt.

20. It turns out, however, that the Supreme Decrees are a sham. Among other problems, the exclusive verification and payment process they establish is actually a series of traps designed to further delay payment; reserves the right to make no payment at all at the MEF's discretion; and requires bondholders to waive rights in advance as the price of simply seeking to participate in the process. Even worse, the MEF mathematical formulas have fundamental errors that make them nonsensical and are basically economic gibberish. In the words of Professor Sebastian Edwards, who for over thirty years has studied

Latin American economies and published extensively on exchange rates and other relevant subjects:

> The MEF formula, taken as a whole, is a completely nonsensical construction that results in economically unreasonable results . . . . However, not only is it fatally flawed and economically meaningless, it is also biased. That is, it has the effect of *systematically* undervaluing any land bond whose value is to be updated. . . . [The formula] has no basis in economics and yields arbitrarily low valuations that are entirely disconnected from their true value.
>
> Expert Report of Sebastian Edwards ("SE ER") ¶¶ 133, 148, 160.

21. While the Decrees and the formulas they contain are inscrutable in their logic, their effect on value is all too clear. The updating process they provide actually destroys the Land Bonds' value. No matter the specifics of any given Land Bond—which class of Land Bonds it is from, when it was issued, how many of the original coupons remain—the MEF formulas consistently produce values that are far less than one percent of CPI value. For example, Gramercy's Bond No. 008615, which had an original face value when issued in 1972 of 10,000 *Soles de Oro* and about half its coupons remaining, is worth US $16,161.85 under CPI—enough to buy a used car, pay school tuition, make home improvements or the like. In contrast, under the MEF formula, it is worth *less than a single penny*—not enough to buy a cup of coffee, a newspaper or really anything at all. Indeed, Gramercy would have more value if its Bonds had just been converted to U.S. dollars at the official exchange rates when issued and not updated at all over the past 40 years than it would stand to receive under the "updating" that the Supreme Decrees offer.

22. For over two years, Gramercy has repeatedly asked the Government to engage in negotiations or at least to tell Gramercy if Gramercy has misunderstood something about the Supreme Decrees' formulas. The Government has stonewalled, and tellingly has never fully addressed the value-destroying effect of its Supreme Decrees. And why should it, when the whole point of winning permission to use dollarization was to deprive bondholders of the amounts that would be due to them under the conventional CPI updating method that Peru's own courts have routinely applied in cases involving the Land Bonds.

23. This is conduct that no responsible nation should condone, much less one that has investment-grade credit ratings and aspires to gain the respect of its peers and of international markets, membership in the Trans-Pacific Partnership, and eventual admission to the

Organization for Economic Cooperation and Development. With respect to this arbitration, it is conduct that the Treaty and international law forbid.

24. Fundamentally changing the legal framework through arbitrary decisions and decrees, relying on phantom analyses of budgetary crises that do not exist, forging government records to justify procedural tricks, concocting complex but economically irrational formulas, establishing unfair mandatory procedures, and depriving bondholders of virtually all the value of their investments—whether taken alone or together, this is precisely the sort of conduct against which international law and the Treaty protect U.S. investors like Gramercy. In particular, Peru has indirectly expropriated Gramercy's investment in violation of Article 10.7; failed to afford Gramercy the minimum standard of treatment in violation of Article 10.5; discriminated against Gramercy in violation of Article 10.3; and denied Gramercy effective means for enforcing its rights in the Land Bonds in violation of Article 10.4.

25. Accordingly, in this arbitration Gramercy seeks reparation equal to the current value of its investment in the Land Bonds, namely US $1.6 billion dollars as of April 30, 2016, an amount that will be greater at the time of the award.

II.

PARTIES

26. GFM is a limited liability company organized under the laws of the State of Delaware, United States of America. It is an asset manager that principally invests in emerging markets. GFM and its owners have considerable experience investing in Latin America and have often helped States find cooperative and mutually beneficial solutions to challenging situations. At all times GFM or its predecessors have controlled Gramercy's investment in the Land Bonds.

27. GPH is a limited liability company organized under the laws of the State of Delaware, United States of America. GPH is the entity that directly purchased and acquired title to the Land Bonds. GPH has at all times been under the management and control of GFM or its predecessors.

28. Gramercy can be contacted at the following address:

Gramercy Funds Management LLC
Gramercy Peru Holdings LLC
c/o James P. Taylor, Esq.
20 Dayton Avenue
Greenwich, CT 06830

United States of America

29. Peru is a party to the Treaty. Pursuant to Annex 10-C of the Treaty, Peru shall be notified of claims arising under the Treaty at the following address:

> Dirección General de Asuntos de Economía Internacional
> Competencia e Inversión Privada
> Ministerio de Economía y Finanzas
> Jirón Lampa 277, piso 5
> Lima, Perú

III.

BACKGROUND

A. The Land Reform Bonds

30. In 1968, the Peruvian military overthrew the democratically elected President Fernando Belaúnde Terry in a bloodless coup d'état. A year later, the Military Government, led by leftist dictator Juan Velasco Alvarado, promulgated the Land Reform Act, which enabled the State to engage in wide-scale expropriations of land owned by wealthy and middle-class families, to be redistributed to rural laborers and small-scale farmers (the "Land Reform" or "*Reforma Agraria*"). **CE-1**, Decree Law N° 17716, Land Reform Act, June 24, 1969, Art. 1, 2, 3, 67, 74. The stated purpose of the Land Reform was to establish a "fair system of ownership … which w[ould] contribute to the Nation's social and economic development." *Id*. Art. 1.

31. Under the Land Reform, the Government forcibly seized 15,826 parcels of land, comprising more than nine million hectares, between 1969 and 1979—an area about the size of Portugal, along with buildings and equipment. **CE-2**, José Matos Mar and José Manuel Mejía, "La Reforma Agraria en el Perú," Instituto de Estudios Peruanos, 1980, p. 171. Independent experts have conservatively estimated the current value of the expropriated land to be US $42.4 billion as of 2015. **CE-199**, Land Reform Bondholders Association's Application before the Constitutional Tribunal, March 16, 2015, ¶ 6 (citing an expert report by Deloitte).

32. Peru's Constitution, however, forbade expropriation without compensation. Article 29 of the Political Constitution of Peru of 1933 the basic rule provided that:

> Property is inviolable. No person may be stripped of his property except . . . for reasons of public utility or common interest, legally

> established, and only after payment of fair compensation.
>
> **CE-3**, Political Constitution of Peru 1933, Art. 29, as amended by Law N° 15242 of 1964.

33. Anticipating land expropriations, in 1964 Article 29 was amended to allow that "[i]n the case of expropriation for the purposes of Land Reform . . . the law may establish that compensation be paid in installments or through bonds of mandatory acceptance." *Id.* Hence, beginning in 1969, the Velasco administration, instead of paying cash compensation for expropriated property, forced landowners to accept three "classes" of Land Bonds: Class A with an annual interest rate of six percent and a term of twenty years; Class B with an annual interest rate of five percent and a term of twenty five years; and Class C with an annual interest rate of four percent and a term of thirty years. **CE-1**, Decree Law N° 17716, Land Reform Act, June 24, 1969, Art. 174. The use the expropriated land had at the time of the taking determined the class of Land Bonds that were given to landowners as compensation. *Id*. Art. 177. The Government ultimately issued the Land Bonds with an aggregate principal amount of approximately "13.285 billion *Soles Oro*." **CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR, N° 11459/2004-CR, and N° 11971/2004-CR, p. 13. While that amount was not in fact "fair value," it was all the Government paid. **CE-54**, Caballero & Alvarez, *Aspectos Cuantitativos de la Reforma Agraria 1969-1979*, Instituto de Estudios Peruanos, 1980, pp.60–61.

34. Through Article 175 of the Land Reform Act, the Government provided its guarantee "without reservations whatsoever" to pay the Land Bonds, and it later issued another decree that made the Land Bonds "freely transferrable." **CE-1**, Decree Law N° 17716, Land Reform Act, June 24, 1969, Art. 175; **CE-16**, Decree Law N° 22749, November 13, 1979, Art. 5 ("The Land Reform Debt Bonds shall be freely transferrable.").

35. Peru's mismanagement of the economy, starting with the military dictators in the late 1960s and 1970s, through President Alan García's first term in office from 1985 to 1990, sent the country into an economic tailspin that included severe inflation and currency devaluation. **CE-9**, Prospectus Supplement to Prospectus dated January 19, 2005, filed July 15, 2005, p. 27. Between 1980 and 1987 Peru's annual inflation rate never dipped below 50%. **CE-226**, World Bank, Graph of Peruvian Inflation, 1980-1987. Between 1988 and 1990, the economic situation continued to worsen and inflation spiraled out of control. In 1990 Peru's annual inflation soared to 7,481.7%, peaking in August 1990 to an annualized rate of 12,378%. **CE-98**, Reinhart & Savastano, *The Realities of Modern Hyperinflation*, June 2003, p. 21;

CE-227, World Bank, Table of Peruvian Annual Inflation, 1987-1992; *see also* **CE-228**, World Bank, Graph of Peruvian Inflation, 1980-1992.

36. As a consequence, the Government changed currency twice in the span of six years—in 1985, from the *Sol de Oro* (the currency in which the Land Bonds were issued) to the *Inti*; and in 1991, from the *Inti* to the *Nuevo Sol*. **CE-4**, Law N° 24064, January 11, 1985, Art. 1, 3 (establishing that one *Inti* was equal to one thousand *Soles de Oro*); **CE-5**, Law N° 25295, January 3, 1991, Art. 1 (establishing that one *Nuevo Sol* is equal to one million *Intis*). Today, the nominal equivalent of one *Sol de Oro* is 0.000000001—one one-billionth—of a *Nuevo Sol*, which is now denominated simply as the *Sol*. **CE-6**, Central Reserve Bank of Peru, Table of Equivalencies, January 5, 2016; **CE-214**, Law N° 30381, December 14, 2015 (denominating the Peruvian national currency as *Sol* as of December 15, 2015 without affecting the value of the currency).

37. As the economy deteriorated in the 1980s, the Government began defaulting on the payment of the Land Bonds despite its unreserved "guarantee." By the early 1990s, the Government ceased making any payments at all. On May 6, 1992, the Government liquidated the Agrarian Bank, through which the coupon payments were made. **CE-7**, Decree Law N° 25478, May 8, 1992.

B. Peru Actively Encouraged Foreign Investment

38. Following the economic upheaval of the 1980s, a new Peruvian Government, led by President Alberto Fujimori, adopted a series of measures to stabilize and liberalize Peru's economy. Among other steps, in the early 1990s the Government "implemented a set of economic reform policies" also known as the "Washington Consensus," which included lowering trade barriers, lifting restrictions on capital flows, and opening the country to foreign investment. SE ER ¶ 24; **CE-138**, U.S. Department of State, 2009 Investment Climate Statement—Peru.

39. As part of its effort to encourage foreign investment, in 1991 Peru enacted the Foreign Investment Promotion Law (Legislative Decree N° 662) and the Framework Law for Private Investment Growth (Legislative Decree N° 757). Recognizing the importance of foreign investment, the Foreign Investment Promotion Law acknowledged that:

> Foreign investment and the transfer of technology are vital to the economic dynamism required for the development of the country . . . [and that] . . . [i]t is the Government's objective to remove the obstacles and restrictions to foreign investment to

> guarantee equal rights and obligations among foreign and domestic investors.
>
> **CE-67**, Legislative Decree N° 662, August 29, 1991, Intro.

The Foreign Investment Promotion Law also confirmed that "[t]he foreign investors' property rights have no limitations except as provided by the Constitution of Peru." **CE-67**, Legislative Decree N° 662, August 29, 1991, Art. 4. The Framework Law for Private Investment Growth, for its part, was enacted to "grant . . . juridical security to investors." **CE-68**, Legislative Decree N° 757, November 8, 1991, Intro. As such, Article 8 of the Law reiterated that "[t]he State guarantees private property without limitations different from those enshrined in the Constitution." *Id*. Art. 8. The Government also encouraged foreign investors to invest in newly privatized enterprises. **CE-138**, U.S. Department of State, 2009 Investment Climate Statement—Peru, pp. 3-4.

40. Peru's 1993 Constitution consolidated the Government's commitments to uphold property rights and to treat domestic and foreign investors equally. Reaffirming the principle contained in the 1933 Constitution, the 1993 Constitution unambiguously recognized that "[t]he right to property is inviolable" and that "[t]he State guarantees it." **CE-72**, Peru Constitution of 1993, June 15, 1993, Art. 70. While the Constitution allowed the State to expropriate, such measures could only be taken upon payment in cash of fair compensation. *Id*. Art. 70, 71. Finally, the Constitution guaranteed non-discriminatory treatment to foreign investments and investors vis-à-vis property rights. *Id*. Art. 63.

41. The economic reforms were highly successful, leading the Peruvian economy to evolve "from a closed, protected economy to a more open and deregulated economic system." **CE-8**, Prospectus Supplement to Prospectus dated January 19, 2005, filed January 31, 2005, p. [27]. Peru has since become one of the fastest-growing economies in Latin America, quadrupling its GDP in the span of fourteen years. Peru's GDP increased from US $51 billion in 2000 to US $202.6 billion in 2014. *See* **CE-215**, World Bank, World Development Indicators—Peru GDP, December 12, 2015, p. 3. Starting in the early 2000s, foreign direct investment increased exponentially, rising from US $2.579 billion in 2005 to US $12.24 billion in 2012, increasing more than 50% between 2006 and 2007 alone. **CE-186**, ProInversion, Foreign Direct Investment, 2013, p. 1.

42. During this period, Peru actively solicited foreign investment. For example, starting in 2002 and continuing thereafter, Peru registered with the United States Securities and Exchange Commission ("SEC") prospectus supplements for the offering of "dollar-denominated global bonds." **CE-93**, Prospectus Supplement to

Prospectus dated November 14, 2002, filed November 25, 2002; **CE-96**, Prospectus Supplement to Prospectus dated January 22, 2003, filed January 30, 2003; **CE-97**, Prospectus Supplement to Prospectus dated January 22, 2003, filed March 03, 2003; **CE-100**, Prospectus Supplement to Prospectus dated November 12, 2003, filed November 14, 2003; **CE-109**, Prospectus Supplement to Prospectus dated November 12, 2003, filed October 06, 2004; **CE-104** Prospectus Supplement to Prospectus dated November 12, 2003, filed April 26, 2004. It registered three more prospectus supplements in 2005 alone. **CE-8**, Prospectus Supplement to Prospectus dated January 19, 2005, filed January 31, 2005; **CE-9**, Prospectus Supplement to Prospectus dated January 19, 2005, filed July 15, 2005; **CE-10**, Prospectus Supplement to Prospectus dated January 19, 2005, filed December 14, 2005.

43. In these documents, Peru reiterated its commitment to the rule of law and transparency of government. For example, the Prospectus Supplement filed on January 31, 2005 stated that "President Toledo vowed to restore democracy, fiscal discipline and transparency to the government," and that he remained committed to fostering "private investment by reinvigorating structural reforms and promoting investment." **CE-8**, Prospectus Supplement to Prospectus dated January 19, 2005, filed January 31, 2005, pp. [24, 25].

44. As further evidence of its intention to attract foreign investment, Peru entered into numerous trade and investment agreements—including 33 bilateral investment treaties and 16 free trade agreements. On April 12, 2006, Peru signed the Treaty with the United States, and then ratified that Treaty, which then entered into force on February 1, 2009. **CE-225**, United Nations Conference on Trade and Development—Division of Investment and Enterprise, Table of Peru - Other Investment Agreements, March 24, 2016.

C. Peru Expressly Acknowledged Its Obligation to Pay the Land Bond Debt at Current Value

45. At different times since 1991, Peruvian institutions, starting with President Alberto Fujimori and later followed by Congress, the Supreme Court, the Constitutional Tribunal, and other government officials, all recognized Peru's obligation to pay the Land Bonds and to do so based on their "current value"—the amount today that corresponds to the economic value they had at the time of issuance.

46. In an effort to promote investment in the agricultural sector, President Alberto Fujimori enacted Legislative Decree N° 653 of 1991, the Agricultural Sector Investment Promotion Act ("Decree N° 653"). Decree N° 653 mandated that the State pay fair market value in cash as compensation for the expropriation of land, and expressly acknowledged

the State's obligation to pay compensation for "ongoing expropriations" at fair market value. **CE-66**, Legislative Decree N° 653, July 30, 1991, Fourth Transitory Provision, Art. 15.

47. Unfortunately, in the 1990s the Peruvian Congress took steps to frustrate the payment of the Land Bonds. In 1993, Congress enacted Law N° 26207, which expressly repealed the relevant provision of President Fujimori's Legislative Decree N° 653 ("Law N° 26207"). **CE-73**, Law N° 26207, July 2, 1993, Art. 3. Then, in 1996, Congress issued Law N° 26597 ("Law N° 26597"). Law N° 26597 provided that the delivery of Land Bonds *in and of itself* constituted fair compensation for the expropriated land, and that the Land Bonds had to be paid at their "nominal value plus the interest set forth for each . . . bond . . . regardless of the time at which said bonds are to mature." **CE-84**, Law N° 26597, April 24, 1996, Art. 2. Law N° 26597 also stated that Article 1236 of the Civil Code—which enshrines the so-called "current value principle" (*principio valorista*)—would not apply to the Land Bonds. *Id*.

48. This congressional resistance to paying the Land Bonds set the stage for a major turning point. In December 1996, the Engineers' Bar Association filed a constitutional action petitioning the Constitutional Tribunal to declare Law N° 26597 unconstitutional. The Engineers' Bar Association argued that the Land Reform expropriations had actually been "confiscations," because landowners had received Land Bonds that were worth far less than the expropriated land, and that, due to "inflation," the value of the Land Bonds had been eroded in relation "to the actual value of the expropriated lands." **CE-11**, Constitutional Tribunal, Decision, Exp. N° 022-96-I/TC, March 15, 2001, "Background" Section, ¶ 6.

49. On March 15, 2001, the Peruvian Constitutional Tribunal expressly acknowledged the State's obligation to pay the Land Bonds at current value, finding that Law N° 26597 had breached "the current value principle inherent to property." *Id*. "Foundations" Section, ¶ 7.

50. *First*, the Constitutional Tribunal declared Article 1 of Law N° 26597 unconstitutional, holding that "the criteria for the updated valuation and payment of the expropriated land" responds to "a basic sense of justice . . . , in accordance with Article 70 of the Constitution," which Law N° 26597 ignored when it provided for payment of the face value amount only. *Id*. "Foundations" Section, ¶ 1.

51. *Second*, the Constitutional Tribunal also found Article 2 of Law N° 26597 unconstitutional because it attempted to equate the mere delivery of the Bonds with payment of the fair value of the expropriated land, even though the Bonds did not actually constitute payment in and of themselves. As such, the Constitutional Tribunal condemned the

Government for aiming to give the Land Bonds an "unalterable" treatment that was indifferent to "the effects of time." *Id*. Foundations, ¶ 2.

52. By striking down the above provisions of Law N° 26597, the 2001 CT Decision recognized that Peru's 1993 Constitution required payment of the Land Bonds at current value, as mandated by Article 1236 of the Civil Code. Former Justice Delia Revoredo, who was sitting on the Constitutional Tribunal and signed the 2001 CT Decision, explains that the current value principle enshrined in Article 1236 of the Civil Code means that the "payment of a debt must represent, at the time of payment, the value that such debt had when it was undertaken." DR ER ¶ 14. Former Justice Revoredo further explains that the Tribunal, in its 2001 Decision, "confirmed that the current value principle is inherent to property," "made clear that paying the Land Reform Bonds at face value would be confiscatory," and obliged Peru to "apply the Current Value Principle," in order to "neutralize the effects of inflation and the loss of the currency's purchasing power in such a way that payment reflects the bonds' original value." *Id*. ¶¶ 24-26, 28.

D. CPI Is the Predominant Updating Methodology in Peru

53. The principal methodology for establishing the current value of debts in Peru has long been the Consumer Price Index ("CPI") methodology.

54. In proceedings to enforce payment of the Land Bonds, Peru's Supreme Court confirmed that the Land Bonds have to be updated using CPI, pursuant to the obligation to pay current value set forth in the 2001 CT Decision. *See*, *e.g.*, **CE-14**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1002-2005 ICA, July 12, 2006, Fifth and Fifteenth Considerations. Moreover, Lima Courts of Appeals used CPI to update the value of debts. *See*, *e.g.*, **CE-79**, Lima Court of Appeals, Fourth Chamber, Appeal on Proceeding N° 1275-95, September 28, 1995. Additionally, the Government itself used CPI to update the value of tax liabilities and its antitrust authority has used it to update the value of the benefit accrued from an antitrust law violation. **CE-90**, Supreme Decree N° 064-2002-EF, April 9, 2002, Article 5.1; **CE-132**, Supreme Decree N° 024-2008-EF, February 13, 2008, Article 2; **CE-205**, INDECOPI, Resolution 030-2015/CLC-INDECOPI, August 12, 2015, ¶ 186.

55. The Peruvian Congress likewise acknowledged Peru's obligation to pay the Land Bonds at their current value using CPI. A 2005 report by the Agrarian Commission of Congress ("2005 Congressional Report") noted that the Government "could not constitutionally elude its obligation to pay the Land Reform debt" and deemed it "necessary" to provide current value for the Land Bonds.

CE-12, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR N° 11459/2004-CR, and N° 11971/2004-CR, p. 13. That same report recommended to Congress the approval of a bill mandating the use of the CPI for Metropolitan Lima published by the National Institute of Statistics and Informatics ("INEI") to update the value of the principal, adding that interest should accrue on the updated principal, so that "the bondholder would have the guarantee that its claim would hold its value in real terms (principal), but also that it would earn interest equivalent to the opportunity cost of its capital." *Id*. pp. 32-33. Recognizing the undisputed prevalence of CPI, the 2005 Congressional Report noted that the CPI is the "*official*" factor applied by the State to update national accounts and that no government or private agency "has questioned the validity" of the CPI for such purposes. *Id*. p. 14 (emphasis added).

56. While Congress approved the text of the bill contained in the 2005 Congressional Report—including its mandate to update the value of the Land Bonds using CPI—President Alejandro Toledo vetoed the bill on April 19, 2006, shortly before his term in office ended. **CE-115**, Land Bonds Bill, March 27, 2006, Art. 8; **CE-116**, Alejandro Toledo, President of Peru, Presidential Veto, April 19, 2006. President Toledo's stated reason for opposing the proposed law was that the Land Bonds should be updated using an "Adjusted Consumer Price Index," without providing details on how such an adjusted index would be developed. **CE-116**, Alejandro Toledo, President of Peru, Presidential Veto, April 19, 2006, p. 2. At no point, however, did he contend that the Land Bonds should be paid at nominal value, or that a method other than a Peruvian CPI should be used to update the Bonds.

57. Moreover, at around this time, prominent members of the Executive Branch openly endorsed using CPI for purposes of updating the value of the Land Bonds. For instance, former General Director of the Ministry of Agriculture's Legal Affairs Office, Juan Péndola Montero, stated that the Ministry's Legal Affairs Office (in issuing its opinion on Bill N° 456/2006-CR, later incorporated into the Land Reform Bond Debt Swap Bill) recommended using the adjusted CPI calculated by the INEI. **CE-122**, Ministry of Agriculture, Report N° 1328-2006-AG-OGAJ, December 20, 2006, pp. 2, 4. Also, the director of INEI, Farid Matuk, in March 2005 argued before a congressional working group dealing with land reform bills that the CPI methodology should be used to update the Land Reform Debt, as was the case with the land reform debts in Nicaragua and Yugoslavia. **CE-110**, Expreso, INEI: Land Reform Debt Should be Recalculated using CPI, March 1, 2005. Likewise, on November 23, 2006, the Director of the Strategy and Policy Office of the Ministry of Agriculture of Peru, Luz Marina Gonzáles Quispe, also supported the idea of using the price indexes to adjust the value of the debt. **CE-121**, Technical Report N° 071-2006-AG-OGPA/OEP, November 23, 2006, Section II.3.

58. Indeed, the CPI method was so well accepted that the Constitutional Tribunal would not permit a competing method. On August 2, 2004, the Constitutional Tribunal once again affirmed the application of the current value principle to the Land Bonds, recalling that bondholders have a right to request a court to order the payment of the updated value of their Land Bonds ("2004 CT Decision"). **CE-107**, Constitutional Tribunal, Decision, File N° 0009-2004-AI/TC, August 2, 2004, "Foundations" Section, ¶ 17. In that case the Constitutional Tribunal concluded that a Government decree, Emergency Decree N° 088-2000 ("2000 Emergency Decree"), to update the Land Bonds using a "dollarization" method was constitutional, but only as an option that bondholders could elect and not as a mandatory method for determining value. *Id.* (citing **CE-88**, Emergency Decree N° 088-2000, October 10, 2000). As Justice Delia Revoredo explains, the Constitutional Tribunal thus "made clear that preventing bondholders from accessing the judiciary" and imposing "an updating methodology excluding indexation" on the Land Bonds "would be unconstitutional." DR ER ¶ 35.

59. Hence by 2006 the state of law was "abundantly clear," as Justice Revoredo confirms:

> [B]y 2006, Peruvian law established that the Land Reform Bonds had to be paid at current value, that the CPI was the normal method for calculating current value, that the Peruvian courts were available to bondholders to vindicate their rights to payment of the Land Reform Bonds' current value, and that the government could not impose a mandatory payment mechanism that offered less than current value, or prevented the bondholders from seeking current value in courts.
>
> *Id*. ¶¶ 28, 36.

E. Gramercy Invested in Reliance on Peru's Favorable Investment Climate and Commitment to Honor the Land Bond Debt

60. Gramercy began investing in the Land Bonds at the end of 2006. Over the next two years, Gramercy acquired over 9,700 Land Bonds of different face values, issue dates, and classes. Witness Statement of Robert Koenigsberger ("RK WS") ¶ 37.

61. The Land Bonds are physical bonds, with annual payment coupons comprising both interest and principal. As Mr. Koenigsberger describes, to acquire the Bonds Gramercy transacted with hundreds of bondholders, in many cases through face-to-face meetings in Peru. *Id.* ¶¶ 36-40. Once Gramercy and each bondholder agreed on the terms,

they executed a written contract, and each selling bondholder then endorsed his or her Land Bonds to GPH, and physically delivered the Land Bond certificates. *Id*. All of these transactions took place in Peru, all of the money Gramercy invested in the Land Bonds was paid into Peru and the Land Bonds are still located in Peru. *Id.*

62. Gramercy saw the acquisition of the Land Bonds as an investment in Peru and in its continued development. At the time, as Mr. Koenigsberger recalls, "Peru's economy had been performing very well for several years," and it was "trying to present itself as a country that encouraged foreign investment and that actively promoted its fiscal responsibility and commitment to honor its debts." *Id.* ¶¶ 23, 25. Additionally, "[a]s part of its efforts to attract foreign investment, Peru had successfully settled outstanding debt on multiple occasions. After normalizing with the IMF and the World Bank in [1993], President Fujimori implemented the Brady debt restructuring . . . in 1995, and more recently, in 2005 Peru had concluded the settlement of its obligations with the Paris Club." *Id.* ¶ 24.

63. Gramercy's decision to invest in the Land Bonds was also premised on Peru's commitment to honor its obligation to pay the Land Bond debt at current value. Contemporaneous documents confirm Gramercy's reliance on the 2001 CT Decision and on the widespread recognition that using CPI was the proper method for determining the Land Bonds' current value. In a due diligence memorandum dated January 24, 2006, for example, Gramercy stressed the importance of the 2001 CT Decision and the constant success of bondholders in obtaining payment following this decision:

> The most important of these court rulings was made by the [Constitutional Tribunal] which … ruled that it is unconstitutional to treat land reform debt as nominal value claims, and ruled that *land reform claims are an indemnization debt, and has to be paid at its real value, adjusted for inflation*.
>
> …
>
> bondholders have won all lawsuits since the constitutional tribunal decision was published, including in the supreme courts. . . . *The supreme court judges . . . have clearly and explicitly said that they are now applying the value principle as ordered by the [Constitutional Tribunal], using the consumer price index for inflation adjustment, plus retroactive interest as required by law.*

> **CE-114**, Memorandum from David Herzberg to Robert Koenigsberger, January 24, 2006, p. 2 (emphasis added).

64. Based on the foregoing expectations, Gramercy used capital that was raised from U.S.-based investors to make an investment in the Land Bonds. Gramercy expected to obtain a return on the investment by organizing fragmented bondholders in order to streamline negotiations with the Peruvian Government and arrive at a consensual resolution of the Land Bond debt—a solution that would benefit not only Gramercy, but all other bondholders as well as the Government itself. *See* RK WS ¶¶ 34-35.

F. After Gramercy Invested, Peru Reaffirmed the CPI's Predominance

65. Gramercy acquired the last of its Land Bonds in 2008. *Id.* ¶ 37. Thereafter, and especially after the global economy began to rebound from the 2008 financial crisis, Gramercy continued to develop connections to the bondholder community to pave the way for a global resolution of the Land Bond debt. *Id.* ¶¶ 41-42.

66. During President Alan García's second tenure (from July 2006 to July 2011), Peru's Congress made a second attempt to implement the Peruvian Constitution's and 2001 CT Decision's mandate to pay the Land Bonds at current value. After considerable study, in a May 31, 2011 report ("2011 Congressional Report"), the Agrarian Commission of Congress recognized that the 2001 CT Decision "ratifies the right of land bondholders to update the value of outstanding obligations, pursuant to [A]rticle 1236 of the Civil Code." **CE-160**, 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, p. 16, ¶ 3. It cited the opinions of the Presidency of the Council of Ministers and the INEI, that use of the CPI Metropolitan Lima published by the INEI "is consistent with Legislative Decree N° 510, by means of which the official adjustment factor is established." *Id*. pp. 9-10. The Commission accordingly recommended approval of the Land Reform Bond Debt Swap Bill, establishing that the Land Bonds would be updated using the INEI's Metropolitan Lima CPI, and failing this, using the CPI published by Peru's Central Reserve Bank. *Id*. pp. 16, 18, Art. 8.

67. While Congress was studying the draft bill to pay the Land Bonds, then-Minister of Economy and Finance, Ismael Benavides, publicly stated that the Government was studying alternatives to pay the Land Bonds, and reportedly announced that the Government would submit a bill to Congress to enact an exchange of Land Bonds for newly issued bonds. **CE-156**, *Actualidad Empresarial, Gobierno Anuncia que*

Pagará los Bonos de la Reforma Agraria, March 3, 2011; **CE-154**, El Comercio, *Banco de Crédito Enjuicia al Estado por Deuda de US$27 Millones*, December 24, 2010. In an official report—approved by the Council of Ministers on May 25, 2011—the MEF stated that "the Executive has been working on a Draft Bill that will be submitted to Congress to deal with the Land Reform Bonds issue." **CE-159**, Ministry of Economy and Finance, Multiannual Macroeconomic Framework for years 2012-2014, May 25, 2011, p. 119.

68. On July 18, 2011, the Permanent Commission of Congress approved the Land Reform Bond Debt Swap Bill contained in the 2011 Congressional Report. Unfortunately, that approval came only ten days before the terms of Congress and of then-President Alan García were due to expire. Just as President Toledo had done in 2006, President García announced, on July 21, 2011, that he would veto the bill and return it to Congress, because it posed "several unknown economic consequences," as the number of outstanding Bonds and their value had not been calculated. **CE-164**, La República, *Alan García Observará Proyecto de Ley de Pago de Bonos de la Reforma Agraria*, July 21, 2011. President García's statements came after Gana Peru, the political party of Ollanta Humala—then-President elect of Peru—had openly criticized the draft bill, dubbing it a "time bomb." **CE-162**, Congress of Peru, Permanent Committee, Debate Transcript, June 28, 2011, p. 61; **CE-163**, RPP Noticias, Congreso Aprobó Ley para Canje de Bonos de la Reforma Agraria, July 20, 2011. President García's announcement led Congress to desist on the Land Reform Bond Debt Swap Bill and it did not proceed to a second vote.

69. The bills Presidents Toledo and García rejected were intended to provide an amicable and global resolution for all bondholders. While these bills did not pass, bondholders continued to retain a critical option to secure payment: they had a legal right to go to court and get a judgment. Dozens of bondholders succeeded in obtaining final judgments representing the current value of their Land Bonds, and Gramercy had hundreds of suits pending covering all of its Land Bonds. RK WS ¶¶ 41-42.

70. In cases that reached final judgment, Peruvian courts—including the Peruvian Supreme Court—held that the Constitution, the Civil Code, and the 2001 CT Decision all imposed an obligation on the Government to pay the current value of the Land Bonds using CPI. *See*, *e.g.*, **CE-128**, Supreme Court, Constitutional and Social Law Chamber, Cassation Ruling N° 2146-2006-LIMA, September 6, 2007; **CE-15**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1958-2009, January 26, 2010; *see also* **CE-148**, Civil Court of Pacasmayo, Resolution, Case File N° 163-73, January 29, 2010, Sixth Consideration and Decision (upholding an expert report that updated the value of Land Bonds using CPI); **CE-**

142, Specialized Civil Court of Pacasmayo, Expert Report, File N° 163-1973, December 18, 2009, pp. 4, 7, 8; **CE-126**, Superior Court of La Libertad, Second Civil Chamber, Resolution, Case File N° 652-07, June 14, 2007, First, Fifth, and Seventh Considerations and Decision (upholding an expert report that updated the value of Land Bonds using CPI); **CE-119**, Fifth Civil Court of Trujillo, Expert Report, File N° 303-72, November 6, 2006, pp. 4-5; **CE-134**, Superior Court of Lima, First Civil Chamber, Ruling, Case File N° 01898-2007, August 14, 2008, First, Ninth, and Tenth Considerations and Decision (upholding the trial court's ruling approving an expert report that updated the value of Land Bonds using CPI); **CE-117**, Fourteenth Civil Court of Lima, Expert Report, File N° 31548-2001, May 4, 2006, pp. 10, Annexes 1, 2. Moreover, public accountants—who routinely draft expert reports as court-appointed experts—stated at the National Congress of Public Accountants in 2010 that CPI was considered the official methodology for updating the value of Land Bonds. **CE-153**, Presentation in the XXII National Congress of Peruvian Public Accountants, October 28-31, 2010, Sections 4.1.3, 4.3 (stating that CPI is the official method used by the Peruvian government, and that it allows an unbiased determination of the amount of the debt).

G. Peru Breached its Obligation to Pay the Land Bond Debt at Current Value

1. The 2013 CT Order

(a) The 2013 CT Order's Holding

71. After two failed attempts by Congress to pass bills that would have implemented the 2001 CT Decision, in October 2011, the Engineers' Bar Association asked the Constitutional Tribunal to enforce the 2001 CT Decision. The Engineers' Bar Association complained about the Government's ten-year delay in complying with the 2001 CT Decision (and even longer delay in paying the Land Bonds) and requested the Constitutional Tribunal to order the Government, at last, to do so.

72. A year after the Engineers' Bar Association filed its request for enforcement of the 2001 CT Decision, the Chief Justice of the Constitutional Tribunal at the time, Ernesto Alvarez, publicly stated that the Tribunal would issue a decision ordering an "adequate compensation" for bondholders, adding that the Government was bound to pay its domestic debt. **CE-173**, Peru21, *El TC Exigirá al Gobierno Pagar los Bonos de la Reforma Agraria*, November 2, 2012. Then-Minister of Economy and Finance, Luis Miguel Castilla, also indicated that the Government would comply with the Constitutional Tribunal's decision on the petition filed by the Engineers' Bar Association. *Id.*

73. The Constitutional Tribunal deliberated for almost two years on the enforcement request—even losing one of its seven members, Justice Ricardo Beaumont, in the interim—and issued its enforcement order on July 16, 2013. Justice Gerardo Eto, joined by Chief Justice Oscar Urviola and Justice Ernesto Alvarez, authored the ostensible opinion of the Tribunal. Justices Carlos Mesía, Fernando Alberto Calle, and Juan Francisco Vergara each dissented. **CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013.

74. Although the Constitutional Tribunal reaffirmed the Government's obligation to pay the Land Bonds' current value, the Tribunal rejected the well-established CPI method for updating the Land Bonds in favor of a "dollarization" method. Specifically, the Constitutional Tribunal instructed the MEF to calculate the adjusted value of the Land Bonds by, *first*, converting the nominal value of the Land Bonds to U.S. dollars using a "parity exchange rate," and, *second*, by applying to that dollar-equivalent value the interest rate of the "United States Treasury Bonds." **CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013, "Whereas" Section, ¶ 24. The Constitutional Tribunal also ordered that "within six months from the issuance of this Order," the Executive Branch "shall issue a supreme decree regulating the procedure for the registration, valuation and forms of payment of the land reform bonds." *Id*. "Has Resolved" Section, ¶ 3.

75. The Constitutional Tribunal rejected the CPI method because it "would generate severe impacts on the Budget of the Republic" and potentially render payment of the debt "impracticable." *Id*. "Whereas" Section, ¶ 25. However, this central premise is objectively inaccurate: Peru plainly can pay the Land Bond debt at CPI-derived current value without severe impact on its budget. SE ER ¶¶ 206-209. Perhaps more troubling than this significant factual inaccuracy, however, is that procedurally this argument was not part of the Government's formal pleadings, and the record of the case contained no evidence at all supporting it. The MEF later acknowledged that it had conducted no analysis on the impact that the payment of the Land Bonds under CPI would have on the Government's budget. **CE-18**, Ministry of Economy and Finance, Memorandum N° 447-2014-EF/52.04, October 15, 2014. Such lack of support is "clearly contrary to the fundamental right to due process, and common sense," making it invalid under Peruvian law. DR ER ¶ 52.

76. The 2013 CT Order suffers additional flaws, as Justice Revoredo explains. *Id*. ¶¶ 41-65. By allowing Peru to "pay less than fair value," the Constitutional Tribunal modified the 2001 TC Decision, and it did so through a mere enforcement order. *Id*. ¶¶ 43-44. By definition, an enforcement order cannot modify a prior decision. Any modification by the Constitutional Tribunal of a prior decision would

have required a so-called "manipulative" or "interpretative" judgment with no less than five votes—which the 2013 CT Order did not have. *Id*. ¶ 45.

(b) Wrongdoings and the Use of White-Out in the Issuance of the 2013 CT Order

77. Almost immediately after the 2013 CT Order was issued and appeared on the Constitutional Tribunal's website, its legitimacy was called into question by astonishing claims about the process that led to it, namely that one of the dissents was fraudulently created to manufacture the votes that the Chief Justice of the Constitutional Tribunal thought he needed to issue the 2013 CT Order.

78. According to Justice Mesía, by the end of June 2013, Justice Eto (who had been working on the Order for over a year and a half) submitted to the full bench of the Tribunal a draft order upholding the bondholders' claim and ordering payment based on CPI. **CE-31**, Motion of Carlos Mesía before the 12th Criminal Prosecutor's Office of Lima, October 23, 2015, ¶ 2. The six sitting Constitutional Tribunal Justices discussed the draft in conference on or about Tuesday, July 9, 2013. A majority of four justices—Justices Eto, Mesía, Alvarez and Urviola—endorsed the draft order. The draft opinion included signature blocks for each of those four justices, and two of them—Justices Eto and Mesía—actually signed the draft and initialed each of its nine pages. *Id*. ¶ 3; *see also* **CE-25**, Institute of Legal Medicine and Forensic Sciences, Expert Report N° 12439 - 12454/2015, pp. 5, 10-29.

79. News that the Constitutional Tribunal was about to order payment of the Land Bonds using CPI must have been leaked to President Humala or those close to him. That same day, Tuesday, July 9, 2013, President Humala publicly warned the Constitutional Tribunal to "abstain from issuing rulings on sensitive issues . . . such as, for example, the land reform bond[s]." **CE-26**, El Comercio, *Ollanta Humala pidió al TC "abstenerse a dar fallos en temas sensibles,"* July 9, 2013, p. 1. At that time, Congress was scheduled to appoint replacements for five out of the six sitting Justices of the Constitutional Tribunal just eight days later, on July 17, 2013. *Id*.; *see also* **CE-179**, Noticias Perú Hoy, *Tres Miembros de Gana Perú son Nombrados Magistrados del Tribunal Constitucional*, July 17, 2013.

80. Two days after President Humala's admonition, one of his legal advisors, Eduardo Roy Gates, met with Chief Justice Urviola. Mr. Roy Gates has been the target of pointed corruption allegations in other cases. **CE-203**, El Comercio, *Eduardo Roy Gates Será Investigado por Comisión Belaúnde Lossio*, July 1, 2015. The Constitutional Tribunal's visitors log shows that Mr. Roy Gates and Chief Justice Urviola met

after hours on Thursday, July 11, 2013. **CE-27**, Register of visitors to the Constitutional Tribunal, July 11, 2013, p. 2.

81. While the details of that conversation remain unknown, Justice Urviola has admitted that he had previously met with Mr. Roy Gates to discuss the Land Bonds case. **CE-176**, El Comercio, *Presidente del TC sí se Reunió con Asesor Legal de Ollanta Humala*, June 25, 2013, p. 2. What is known is that Chief Justice Urviola then made a sudden about-face, withdrawing his support for the CPI method in favor of dollarization. According to former Justice Eto's sworn testimony, former Chief Justice Urviola provided him with "an alternate draft," rejecting CPI in favor of dollarization. **CE-28**, Statement to the Criminal Prosecutor's Office of Gerardo Eto Cruz, August 28, 2015, Question 6. According to Justice Eto's testimony, Justice Urviola asked him to sign the new draft and present it to the other Justices as if Justice Eto had been its author. *Id*. Hence, during the July 16, 2013 En Banc Session of the Constitutional Tribunal—the session a day before Congress was scheduled to replace most of the Justices, and when final signatures were to be added to the previously debated draft affirming CPI updating—Justice Eto submitted an entirely new draft order for discussion. Chief Justice Urviola and Justice Alvarez joined in the opinion, while Justice Mesía "expressed his disagreement with [this] new draft opinion." **CE-177**, Constitutional Tribunal, Minutes of the En Banc Session, July 16, 2013, p. 2.

82. Because it was the first time that Justice Mesía saw that "alternate draft" using dollarization, he demanded that Chief Justice Urviola afford him forty-eight hours to review the new draft and write a dissent, as the Tribunal's Rules of Procedure specified. **CE-24**, Letter from Carlos Mesía sent to Oscar Urviola, July 22, 2013, p. 2. **CE-108**, Constitutional Tribunal, Administrative Resolution N° 095-2004-P-TC, September 14, 2004, Art. 44; *see also* DR ER ¶¶ 59-60. Chief Justice Urviola, however, did not afford Justice Mesía any time to write his dissent. **CE-29**, Statement to the Criminal Prosecutor's Office of Carlos Fernando Mesía Ramírez, Questions 4, 6, 7, 9-12.

83. Instead, that afternoon someone transformed what had been the original majority opinion endorsing CPI into what purported to be Justice Mesía's dissent—by erasing with white-out correction fluid Justice Eto's signature from every page in which it appeared and the signature blocks for Justices Urviola and Alvarez, as well as by replacing "the Ruling of the Constitutional Tribunal" with the "Dissenting Opinion of Justice Mesía Ramírez." **CE-25**, Institute of Legal Medicine and Forensic Sciences, Expert Report N° 12439 - 12454/2015, pp. 5, 10-29. As Oscar Díaz—the Secretary Reporter of the Constitutional Tribunal—later conceded before a Lima Criminal Court that Justice Mesía did not consent, approve or otherwise authorize this action. **CE-36**, Transcript of the hearing on charges filed against

Oscar Díaz, January 6, 2016, pp. 23, 46. Thereafter, Mr. Díaz publicly resigned from his position as the Secretary Reporter of the Constitutional Tribunal. **CE-255**, Gestión, *Reputación del TC manchada con Liquid Paper*, February 5, 2016. However, it subsequently emerged that he immediately found new employment—with the Constitutional Tribunal, where he continues to work despite the ongoing criminal charges against him. *Id.*

84. On the basis of Justice Mesía's forged "dissent," Chief Justice Urviola and the Secretary Reporter of the Constitutional Tribunal considered that there was a 3-3 tie at the Constitutional Tribunal. **CE-177**, Constitutional Tribunal, Minutes of the En Banc Session, July 16, 2013, p. 2. This tie was said to entitle Chief Justice Urviola to cast a tie-breaking vote, giving the new order the four votes required to make it effective. The Constitutional Tribunal then issued the new "majority" order along with Justice Mesía's forged "dissent" and two authentic dissents penned by other Justices, the day before Congress appointed the replacements of all sitting Justices except for Chief Justice Urviola.

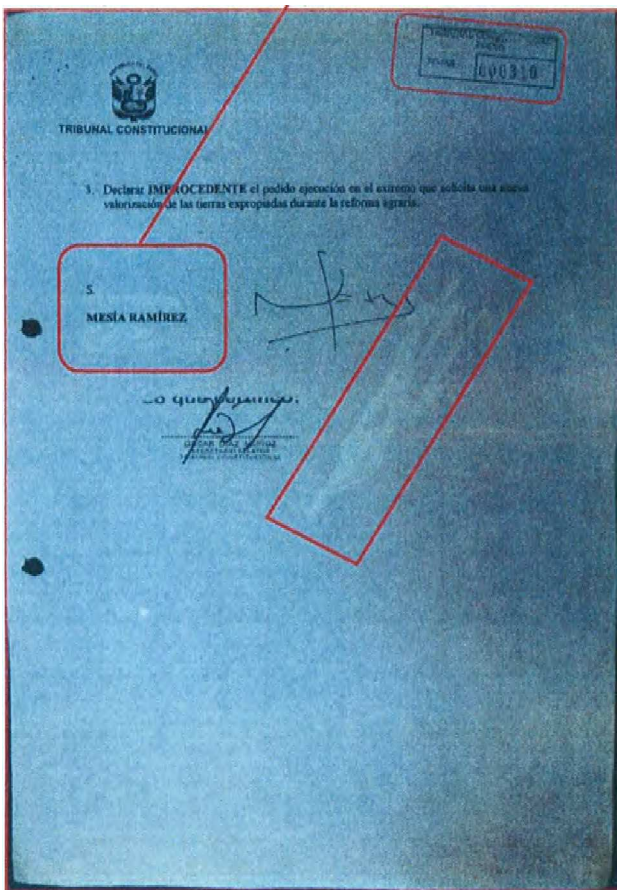
85. That very same day—July 16, 2013—Chief Justice Urviola did something unusual for any Justice or Judge in Peru: he appeared on a nightly talk show defending the merits of the Order. He provided details about the case and casually conceded that he had been in contact and even coordinated with the MEF in the course of issuing the 2013 CT Order and that there were economic studies and interactions with economic consultants showing that CPI would have created a budgetary imbalance and that dollarization was a more appropriate methodology. **CE-178**, La Hora, Dr. Oscar Urviola, Presidente del TC, Entrevistado por Jaime de Althaus, July 16, 2013, mins. 6:40-11:00. Coordination with the MEF is evident in the fact that the dollarization approach espoused in the 2013 CT Order, has the same characteristics as the method that was recommended by the "external advisor" to the MEF, at least two years before the 2013 CT Order was issued. **CE-166**, Ministry of Economy and Finance, Economic Growth with Social Inclusion, Report for Years 2006-2011, p. 86; *see also* **CE-197**, Gestión, *La Deuda Agraria y el Dr. Liquid Paper*, January 25, 2015, p. 2. However, such economic studies and interactions with economic consultants, if any, were never part of the official record, and thus were not made available to any bondholder. In fact, the MEF has stated that no such studies were conducted. **CE-18**, Ministry of Economy and Finance, Memorandum N° 447-2014-EF/52.04, October 15, 2014, p. 2.

(c) Subsequent Criminal Proceedings

86. This shocking conduct within the Constitutional Tribunal has become a scandal in Peru, with persistent media inquiries seeking to uncover the truth, and even commencement of a criminal investigation.

87. The story about the forged dissent first broke in the press in January 2015. **CE-197**, Gestión, *La Deuda Agraria y el Dr. Liquid Paper*, January 25, 2015. In March 2015, Augusto Pretel Rada, a bondholder, filed a criminal complaint against Oscar Díaz Muñoz, the then-Constitutional Tribunal's Secretary Reporter, accusing him of falsification of court documents using white-out in connection with Justice Mesía's dissent. **CE-30**, Criminal Complaint of Augusto Pretel, March 30, 2015. Justice Mesía later joined in the complaint, as did Justice Eto, and both confirmed that Justice Eto's draft order was fraudulently transformed into Justice Mesía's dissent. **CE-31**, Motion of Carlos Mesía before the 12th Criminal Prosecutor's Office of Lima, October 23, 2015; **CE-221**, Motion of Gerardo Eto before the 36th Criminal Judge of Lima (Vilma Buitron Aranda), February 11, 2016.

88. A forensic report prepared by the Institute of Legal Medicine and Forensic Sciences confirmed one of the complaint's core allegations—that white-out was used to alter the original draft. **CE-25**, Institute of Legal Medicine and Forensic Sciences, Expert Report N° 12439 - 12454/2015, pp. 5, 10-29. The report contains multiple images of the "dissent," showing it to be literally splattered with white-out. Below is an image of the signature page of Justice Mesía's purported dissent, which shows white-out covering Justice Eto's signature, as well as white-out covering the last names of the Justices who originally joined in that draft opinion.



CE-25, Institute of Legal Medicine and Forensic Sciences, Expert Report N° 12439 - 12454/2015, p. 23.

89. The foregoing events led Lima prosecutors to charge Mr. Díaz with falsification of court documents in November 2015. Among other things, in deciding to bring criminal charges against him, the Criminal Prosecutor concluded that Mr. Díaz:

> [S]aying that there were no irregularities in the questioned opinion—only amendments in order to reflect what happened with the opinions of the tribunal *en banc* at the session on July 16, 2015—and also stating that he did not know who made the changes, . . . is not credible [because] he is the person who is directly responsible for receiving the individual opinions issued at the *en banc* sessions. Therefore [Oscar Díaz] cannot be unaware of who made those changes . . . he would have been able to notice that it was

> unusual for a dissenting opinion to contain so many "amendments," as he calls them.
>
> **CE-213**, 12th Criminal Prosecutor of Lima, Criminal Claim against Oscar Diaz, File N° 119-2015, November 20, 2015, "Whereas" Section, Seventh.

90. The Prosecutor also implicated former Chief Justice Urviola as the top representative of the Constitutional Tribunal, and suggesting that the case be analyzed by Peru's Chief Prosecutor:

> [Chief Justice Urviola] represents [the Constitutional Tribunal] and has the responsibility for convening, presiding over, and setting the agenda for the *en banc* sessions and hearings and he is also responsible for taking the measures necessary for the functioning of the *en banc* sessions and hearings. Therefore, upon verifying the commission of the crime in question, it is understood that as its highest representative, [Chief Justice Urviola] could not be disengaged from the acts that took place. For indeed, the order that contained the questioned dissenting opinion was published on the [Constitutional Tribunal's] webpage, and is signed by all of the justices who participated. Accordingly, it is pertinent that these acts be analyzed by the Chief Prosecutor's Office, which is the office with jurisdiction to take up the handling of acts related to the possible commission of crimes of the justices of the Constitutional Tribunal.
>
> *Id.* "Whereas" Section, Ninth.

91. On January 6, 2016, a Peruvian judge ruled that there was sufficient evidence on the record against Mr. Díaz to warrant initiation of formal criminal proceedings overseen by the judiciary. **CE-35**, El Comercio, *PJ investiga a relator del TC por falsificación de documentos*, January 7, 2016; *see also* **CE-36**, Transcript of the hearing on charges filed against Oscar Díaz, January 6, 2016, pp. 24, 45-46.

92. As if a forged dissent was not enough to taint the 2013 CT Order, Justice Calle Hayen, a member of the Constitutional Tribunal at the time, stated that the 2013 CT Order was issued without majority, because the three dissenting Justices each espoused a different position (including Justice Mesía's forged dissent). Justice Calle wrote an amendment to the Minutes of the July 16, 2013 En Banc Session of the

Constitutional Tribunal, in which he stated "he did not understand how there could be a tie when the vote of Justice Mesía Ramirez was also reasoned," meaning that Justice Mesía had not concurred with Justice Calle or Justice Vergara's votes or their reasons for dissenting. **CE-177**, Constitutional Tribunal, Minutes of the En Banc Session, July 16, 2013, p. 4. Therefore, there was no tie, and Justice Urviola was not authorized to exercise a tie-breaking vote. DR ER ¶ 64.

93. All in all, half of the Justices—three out of six—comprising the Constitutional Tribunal in July 2013 have publicly stated that the 2013 CT Order is invalid. Two of them have even joined criminal proceedings alleging forgery and accused the Secretary Reporter and Chief Justice Oscar Urviola of committing the crime of forgery. **CE-29**, Statement to the Prosecutor's Office of Carlos Mesía Ramirez; **CE-221**, Motion of Gerardo Eto before the 36th Criminal Judge of Lima (Vilma Buitron Aranda), February 11, 2016. One of them has voiced his opinion publicly that even Justice Mesía's forged dissent would not have allowed Chief Justice Urviola to cast the tie-breaking vote necessary to issue the 2013 CT Order. **CE-252**, *Las Cosas Como Son*, Panamericana TV December 13, 2015; **CE-253**, *Las Cosas Como Son*, Panamericana TV, December 20, 2015. According to former Justice Delia Revoredo, these events "would cast a very dark shadow on what should be one of Peru's most respected institutions." DR ER ¶ 68.

(d) Clarifications to the 2013 CT Order

94. Several requests for clarification and petitions for reconsideration were filed against the 2013 CT Order. The Constitutional Tribunal issued two resolutions, on August 8, 2013 and November 4, 2013 ("August 2013 Resolution" and "November 2013 Resolution," respectively) whereby it clarified its 2013 CT Order. The Tribunal dismissed the petitions for reconsideration and the requests for clarification—the latter for lack of standing, and consequently issued a *sua sponte* clarification.

95. In its August 2013 Resolution, the Tribunal expressly recognized that CPI is "usually applied for updating debts," but that the "balanced budget principle" and the rights of bondholders to payment under CPI should be sacrificed in favor of dollarization in order to enable the Government to "fulfill other basic obligations." **CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, "Whereas" Section, ¶¶ 14-15. The Tribunal also clarified that the procedure for payment that the Executive Branch was entrusted to enact through a supreme decree was to be "mandatory," meaning that "henceforth the claims for payment of said [Land Reform] debt may only be raised through the abovementioned procedure, and not through a judicial action." *Id*. "Whereas" Section, ¶ 16, "Rules" Section, ¶ 4.d. With this clarification the Constitutional Tribunal withdrew the

bondholders' right to judicial protection for the payment of the Land Bonds, forcing them to file a claim with the Executive Branch instead. *Id*.

96. In the November 2013 Resolution, the Constitutional Tribunal dug in its heels and made the situation even worse for bondholders.

97. *First*, it refused to rule on a request for clarification filed by the Land Reform Bondholders' Association ("ABDA"). In its petition, ABDA had asked the Tribunal to "explain on what basis [it] determined that applying the Consumer Price Index would make paying the land reform bonds 'unfeasible'," pointing out that the 2013 CT Order made no reference to a "debt quantification report or any official information sent by the [MEF]" to support its claim that payment under CPI was "unfeasible." **CE-183**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, November 4, 2013, "Whereas" Section, ¶ 7. The Tribunal dismissed ABDA's request by stating that it was "inadmissible" because it "dispute[d] the Tribunal's reasoning" and, as such, it was not actually a request for clarification. *Id*. "Whereas" Section, ¶ 8. The Tribunal added that requests related to the manner in which the "methodology chosen by the Tribunal will make possible the updating of the debt," are "inadmissible . . . because said calculations are the responsibility of the [MEF] and not of this Tribunal." *Id*.

98. *Second*, the Constitutional Tribunal dismissed other petitions that requested the Tribunal to elaborate how the MEF should implement the dollarization method, reiterating that the "calculation[s] [of the updated value of the debt under dollarization] is the responsibility of the [MEF]." *Id*. "Whereas" Section, ¶ 14. In doing so, however, the Tribunal confirmed that the procedure adopted by the MEF to update the value of the Land Bonds could *not* amount to nominal payment and it reserved its jurisdiction to review the MEF's updating mechanism. *Id*. "Whereas" Section, ¶¶ 10, 12, 14.

99. *Finally*, the Tribunal announced that bondholders had a term of five years to submit their claims to the MEF. Failure to do so for bondholders who had not initiated judicial proceedings would mean the loss of their right to claim *any* value on the Land Bonds—as the procedure to be enacted by the MEF would be the exclusive remedy. *Id*. "Whereas" Section, ¶ 4, "Rules" Section, ¶ 2; *see also* **CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, "Whereas" Section, ¶ 16, "Rules" Section, ¶ 4.d.

2. The Supreme Decrees

100. Despite the irregularities in the Constitutional Tribunal's July 2013 Decision, the MEF, led by then Minister Luis Miguel Castilla, relied on it as justification for issuing two Supreme Decrees, on

January 17 and 21, 2014 (collectively, "Supreme Decrees"). The Supreme Decrees established an administrative procedure which purports to register, authenticate, value, and pay the Land Bonds. The valuation formula set forth in the Supreme Decrees has the stated purpose, albeit not the practical effect, of providing current value as mandated by the 2013 CT Order. **CE-37**, Supreme Decree N° 17-2014-EF; **CE-38**, Supreme Decree N° 19-2014-EF.

101. The Supreme Decrees calculate the updated principal amount due on each Land Bond in three steps: *first*, they convert the outstanding principal in *Soles de Oro* to U.S. dollars using a so-called "parity exchange rate"; *second*, they apply to the converted principal amount the rate of interest from a U.S. Treasury bill; *third*, they convert the dollars back to *Soles* at the average official exchange rate for 2013. **CE-38**, Supreme Decree N° 19-2014-EF, Annex 1.

102. The Supreme Decrees express the parity exchange rate by a seemingly complex mathematical formula. That formula is:

$$P_d^{\text{"Soles Oro/\$"}} = Q_d^{\text{Soles Oro/\$}} \times \frac{Peru\ CPI_d}{U.S.\ CPI_d} \times \frac{1}{e^{\$/Sol\ Oro}}$$

SE ER ¶ 129.

The seeming precision such a formula implies, and the fact that it was presented by Peru's vaunted MEF in a formal decree, gives it a veneer of legitimacy.

103. It turns out, however, that this formula is not a valid way of deriving a parity exchange rate. As Professor Sebastian Edwards, an expert in economics with over 30 years of experience in the field, explains:

> The MEF's formula, taken as a whole, is a completely nonsensical construction that results in economically unreasonable results. . . . [W]hile the MEF parity exchange rate should be expressed as a certain number of Soles Oro per U.S. dollar—which is, of course, the definition of an exchange rate between the two currencies—the right-hand side of the equation is, nonsensically, expressed in terms of the Soles Oro per U.S. dollar, *squared*. It is mathematically impossible for a unit of value to be equivalent to the same unit of value squared. . . . [T]he MEF parity exchange rate formula is fatally flawed and economically meaningless.

Id. ¶¶ 133, 147-148.

104. The Supreme Decrees then apply to the incorrectly restated principal amount a significantly lower interest rate than a real rate of return, than the four to six percent interest rate stated on the face of each Land Bond, or even than the interest rate of a comparable long-term U.S. Treasury bond. Instead, the Supreme Decrees apply the interest rate for U.S. Treasury bills (also known as T-bills) of just one-year duration, which is currently less than one percent. **CE-38**, Supreme Decree N° 19-2014-EF, Annex 1. As Professor Edwards noted, "[t]he MEF does not explain why it selected a short-term, essentially risk-free yield, based on the U.S. economy, as an input. Indeed, it is difficult to understand how the return on a short-term security issued in the United States would constitute the relevant opportunity cost for the holders of long-term and defaulted Peruvian securities." SE ER ¶ 156. Additionally, the interest appears to stop accruing in 2013. As Professor Edwards explains:

> To the extent that this reflects an intention to end the compounding of interest at any point prior to the date on which payment is made to the bondholders, the MEF Formula is again incorrect. . . . I know of no conceptual basis on which to stop the compounding of interest prior to the ultimate payment date.
>
> *Id*. ¶ 157.

105. Finally, the Supreme Decrees convert the U.S. dollars back to *Soles* at the nominal average exchange rate for 2013, instead of the exchange rate on the date of payment. This means that bondholders will get no protection from any loss of currency value of the updated amount from 2013 onwards. **CE-38**, Supreme Decree N° 19-2014-EF, Annex 1. The combined effect of these flaws has led Professor Edwards to conclude that "the MEF proposed formula for updating the value of the land bonds has no basis in economics and yields arbitrarily low valuations that are entirely disconnected from their true value." SE ER ¶ 160; *see also* **CE-254**, *Cuarto Poder, Las Cosas Como Son, La Licuadora de los Bonos Agrarios*, América TV, August 11, 2015.

106. The practical result of the Supreme Decrees is to reduce the worth of the Land Bonds to *less than one tenth of one percent* of the value under the CPI method (*i.e.*, a 99.9% reduction from current value). According to Professor Edwards, Gramercy's Land Bonds are worth in excess of US $1.6 billion using the CPI method, and in excess of US $1.5 billion applying an economically and mathematically rational dollarization method, yet only a meager US $1.1 million using the formula set forth in the Supreme Decrees. SE ER ¶ 158. The Supreme Decrees thus provide only a tiny fraction of the Land Bonds' true

current value. Indeed, the Land Bonds' value under the Supreme Decrees is even less than if they had simply been converted to U.S. dollars at the official exchange rate at the date of issuance, and not been further updated at all over the ensuing four decades. *Id* ¶ 159.

107. The Supreme Decrees also impose an administrative process for seeking payment of the Land Bonds that makes it unclear that any payment will be made at all. *First*, the Supreme Decrees grant the Government broad discretion to delay payment of the Land Bonds through a process envisioned to take up to ten years—during which the Land Bonds bear no interest—at the end of which the Government reserves the right to choose any form of payment—which could include new interest free bonds or even a non-financial form of property—or to refuse to pay altogether. **CE-37**, Supreme Decree N° 17-2014-EF, Art. 6-10, 12-18, Final Supplemental Provision N°4. *Second*, the Supreme Decrees provide an order of priority for the payment of the Land Bonds, mandating that companies that bought Land Bonds for "speculative ends"—which presumably is meant to describe Gramercy—are to be repaid, if at all, after all other bondholders. *Id*. Art. 19. *Finally*, the Supreme Decrees impose on bondholders a significant burden merely to participate in a process with no guarantee of payment: the waiver in advance of all rights and claims under the Land Bonds. *Id.* Art. 4, Final Supplemental Provisions N° 1, 2. Even those bondholders with pending court proceedings in which no ruling has been issued are ostensibly bound by the updating formula set forth in the Supreme Decrees. *Id*. Final Supplemental Provision N° 2.

H. Peru Has Rejected Efforts at Fair Resolution of the Land Bond Debt

108. On March 16, 2015, ABDA filed an application to set aside the Supreme Decrees as contrary to the 2001 Decision and 2013 CT Order. ABDA is one of the largest associations of land bondholders in Peru, with over 340 members. In addition, 101 individual bondholders, including Gramercy, expressly endorsed ABDA's application.

109. ABDA's application described in detail how the Supreme Decrees in reality offer only nominal value when compared to that using CPI. ABDA's brief was 69 pages long, was accompanied by 57 exhibits, and four expert reports. One of the expert reports was drafted by Ismael Benavides, former Minister of Economy and Finance of Peru, along with two other prominent Peruvian economists, who explained why Peru could afford to pay the Land Bonds under CPI. A second expert report, by Deloitte, conservatively calculated the present value of the expropriated land at more than US $42 billion, and mathematically demonstrated how the Supreme Decrees necessarily produced only nominal value. The third expert report, by two more Peruvian economists, demonstrated the mathematical and economic errors in the

Supreme Decrees' updating formula. The fourth and final expert report, by a U.S. Professor who is a highly-esteemed authority on macro-economics, described a valid method to calculate a parity exchange rate. **CE-199**, Land Reform Bondholders Association's Application before the Constitutional Tribunal, March 16, 2015, ¶¶ 6, 9, 64, 147.

110. The Constitutional Tribunal summarily rejected ABDA's petition. Just three weeks after ABDA submitted its petition, without even receiving an official rebuttal from the Peruvian Government, the Constitutional Tribunal refused to hear ABDA's application, and dismissed it for lack of standing and on the basis that the application was "premature." It took only one paragraph for the Constitutional Tribunal to conclude that ABDA—an organization whose sole purpose is to represent bondholders, which has more than 340 bondholders as members, and which had secured express endorsement from over 100 bondholders—had not demonstrated its "social representativeness" and thus could not intervene as an interested third party. **CE-40**, Constitutional Tribunal, Writ, April 7, 2015, "Foundations" Section, ¶ 6. Two of the Justices strongly dissented, arguing that ABDA clearly "ha[d] a legitimate interest in the . . . present proceeding," and stating further that:

> [ABDA's position] is bolstered if one takes into consideration that said association has put forth factual and legal grounds which should not be overlooked and has provided expert reports in more than 1000 pages that should be analyzed carefully . . . and . . . not resort to weak arguments of a formalist nature and unconcerned with justice to simply declare the inadmissibility of the petition due to a supposed lack of standing.
>
> **CE-40**, Constitutional Tribunal, Writ, April 7, 2015, Judge Blume Fortini's Dissent, ¶¶ 8-9.

111. For its part, Gramercy has sought amicable resolution of its claims for payment of the Land Bonds. Before the 2013 CT Order Gramercy had sought to engage with the Peruvian Government about how the Land Bond debt could be restructured. RK WS ¶ 47-48. The Government refused to discuss the matter prior to the Tribunal's decision. *Id.* After the 2013 CT Order, on December 31, 2013, Gramercy wrote to the President of the Council of Ministers and the MEF offering its assistance "to reach a global solution" for the Land Bond debt and requested a meeting. The Government did not reply to this letter. **CE-185**, Letter from Gramercy to President of the Council of Ministers and Minister of Economy and Finance, December 31, 2013. On April 21, 2014, after the Supreme Decrees were issued, Gramercy again wrote to the President of the Council of Ministers and the MEF

asking for a meeting to discuss a settlement. **CE-190**, Letter from Gramercy to the President of the Council of Ministers and the Minister of Economy and Finance, April 21, 2014. On May 14, 2014, the MEF declined the request for a meeting and directed Gramercy to the Supreme Decrees. **CE-192**, Letter from the Ministry of Economy and Finance to Gramercy, May 14, 2014.

112. Gramercy thereafter repeatedly sought to meet with the Government, seeking to bring to the Government's attention the Supreme Decrees' errors and inadequacies, and to discuss a fair resolution of the matter. RK WS ¶ 64. The Government rebuffed every one of these overtures. A Gramercy employee met in New York with the Minister of Economy and Finance, Alonso Segura, in May 2015 and Gramercy's representatives met in Washington, D.C. with Peru's Ambassador to the United States, Luis Miguel Castilla—who was Minister of Economy and Finance at the time the Supreme Decrees were issued—in December 2015 and again March 2016. *Id.* ¶ 68. However, the Government refused to engage in substantive discussions with Gramercy. *Id.* In addition, on December 23, 2015, Gramercy wrote a letter to Ambassador Castilla attempting to discuss the economic and mathematical shortcomings of the Supreme Decrees. *Id.*; **CE-216**, Letter from Gramercy to Dr. Luis Miguel Castilla, Ambassador of Peru to the United States, December 23, 2015. In the letter, Gramercy raised the criminal allegations relating to the 2013 CT Order. RK WS ¶ 66. In his response, Ambassador Castilla did not deny, rebut or address the allegations. *Id*. ¶ 67; **CE-217**, Letter from Dr. Luis Miguel Castilla, Ambassador of Peru to the United States to Gramercy, January 19, 2016. Following the Government's continued refusal to engage in meaningful discussions with Gramercy, on February 1, 2016, Gramercy served a Notice of Intent to Commence Arbitration ("NOI") pursuant to Article 10.16.2 of the Treaty.

113. Following the filing of the NOI, Gramercy has continued to reach out to the Government, and on March 1, 2016, met with Javier Roca Fabian, President of the Special Commission Representing the State in International Investment Disputes (*Comisión Especial que Representa al Estado en Controversias Internacionales de Inversión*), in the hopes of engaging in meaningful discussions about achieving a fair resolution of Gramercy's claims. RK WS ¶ 69. However, after several months of exchanging correspondence and phone calls, such discussions have yet to take place. *Id*. ¶ 70. Thus, Gramercy now formally commences this arbitration.

IV.

JURISDICTION

114. The Treaty grants a tribunal jurisdiction over measures adopted or maintained by a Party relating to "covered investments." **CE-139**, Treaty, Art. 10.1.1. A "covered investment" is, in turn, defined as "with respect to a Party, an investment . . . in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter." *Id.* Art. 1.3.

115. Gramercy satisfies each of these requirements because (*A*) the Land Bonds constitute "investments" as defined by the Treaty; (*B*) GPH and GFM are "investor[s] of another Party"; and (*C*) Gramercy's investment was "in existence as of the date of entry into force of" the Treaty.

A. The Land Bonds Constitute Investments under the Treaty

116. The Treaty defines "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment," and specifies that "[f]orms that an investment may take include . . . bonds, debentures, other debt instruments, and loans." *Id.* Art. 10.28. An investment must be made "in [Peru's] territory" in order to be considered a covered investment. *Id.* Art 1.3.

117. Gramercy's investment in the Land Bonds plainly satisfies each element of the definition of "investment" under the Treaty. *First*, because the Treaty explicitly includes "bonds" as a form of covered investment, the Land Bonds qualify as investments under the plain text of the Treaty. A footnote to Article 10.28 further clarifies that bonds "are more likely to have the characteristics of an investment" than other forms of debt. *Id.* at n. 12. In addition, Annex 10-F of the Treaty explicitly envisions that "public debt" may give rise to a claim under the Treaty. *Id.* Annex 10-F (Public Debt). It first provides that "[t]he Parties "recognize that the purchase of debt issued by a Party entails commercial risk." *Id.* It then states that, in order for a claimant to receive an award in its favor with respect to default or non-payment of public debt, a claimant must meet "its burden of proving that such default or non-payment constitutes an uncompensated expropriation for purposes of Article 10.7.1 or a breach of any other obligation under Section A [of the Treaty]." *Id.* The Treaty thus plainly contemplates that public debt—a category that includes the Land Bonds—constitutes a qualifying investment protected under the Treaty.

118. *Second*, the investment in the Land Bonds is "own[ed] or control[led], directly or indirectly," by Gramercy. GPH is the titleholder of Gramercy's bonds, and therefore it directly owns 100% of the Land Bonds at issue in this arbitration. RK WS ¶ 36. GFM manages and controls the Land Bonds. Under GPH's Operating Agreement, GFM is the "Sole Manager" of GPH, which vests GFM with "exclusive power" to act on behalf of GPH and manage its affairs, and entitles it, among others, to exercise all rights of the assets held by GPH and to designate GPH's officers. **CE-165**, Amended Operating Agreement of GPH, Dec. 31, 2011, Art. 3.1. In addition, GFM is the manager of other affiliated entities that maintain direct and indirect ownership in GPH. RK WS ¶ 3.

119. *Finally*, Gramercy's investment in the Land Bonds was made "in [Peru's] territory." **CE-139**, Treaty, Art. 1.3. Gramercy invested in the Land Bonds through a series of direct purchases which all took place in Peru, and paid for the Land Bonds directly in Peru. Namely, the Bonds were acquired by GPH from individual bondholders in Peru, endorsed by the bondholders to GPH, and paid for through bank transfers with money made available in Peru. RK WS ¶¶ 34-37. Because the Bonds are actual paper documents that were not registered in any exchange, Gramercy and its representatives needed to negotiate with each bondholder individually, sign a contract, have the bondholder endorse each Bond to GPH, and take physical custody of every purchased Bond—all of which occurred in Peru. RK WS ¶¶ 36-37. In fact, none of the Bonds purchased by Gramercy have ever been transported outside Peru. *Id.* ¶ 41.

B. GFM and GPH Qualify as Investors under the Treaty

120. The Treaty further grants the Tribunal jurisdiction over measures adopted or maintained by a Party relating to "investors of another Party." **CE-139**, Treaty, Art. 10.1. The Treaty defines an "Investor of a Party" to include an enterprise of a Party "that attempts through concrete action to make, is making, or has made an investment in the territory of another Party." *Id.* Art. 10.28.

121. Both GFM and GPH are U.S. entities organized under the laws of the State of Delaware. Thus, both Claimants qualify as an "enterprise of a Party" under the Treaty. Further, as discussed above, Gramercy's investment was "made" in Peru—the funds for the Bonds were paid directly into Peru, negotiations for Gramercy's acquisition of the Bonds took place in Peru, and the physical Bonds themselves are maintained in Peru. RK WS ¶¶ 38, 40.

C. The Investments Were in Existence as of the Day of Entry into Force of the Treaty

122. Finally, the Treaty applies not only to investments "established, acquired, or expanded" after the entry into force, but also to investments "in existence as of the date of entry into force of [the Treaty]." **CE-139**, Treaty, Art. 1.3. The Treaty entered into force on February 1, 2009. Gramercy purchased the Land Bonds from late 2006 through 2008. RK WS ¶ 37. Thus, Gramercy's investment was "in existence" as of February 1, 2009, and qualifies for protection under the Treaty.

123. The Treaty further states that "[f]or greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement." **CE-139**, Treaty, Art. 10.1.3. Gramercy's claims in this arbitration are based on acts by Peru—including the July 2013 CT Order and the 2014 Supreme Decrees—that took place after February 1, 2009, the date of the Treaty's entry into force. *See* **CE-139**, Treaty, Art. 10.1.3.

V.

MERITS

124. Gramercy invested in the Land Bonds with the reasonable expectation that the Land Bonds would be paid at current value calculated using CPI. Through the 2013 CT Order and the 2014 Supreme Decrees, Peru abruptly reversed course, depriving the Land Bonds of virtually all their value, and doing so through shocking, dubious, and even illegal means. Peru has consequently breached Gramercy's rights under the Treaty, violating: (*A*) the indirect expropriation provision under Article 10.7; (*B*) the minimum standard of treatment obligation under Article 10.5; (*C*) the obligation to provide an investor no less favorable treatment than that provided to investors of third States under Article 10.3; and (*D*) Gramercy's effective means to enforce its rights under Article 10.4.

A. Peru Has Expropriated Gramercy's Investment in Breach of Article 10.7 of the Treaty

125. By establishing an exclusive and deceptive payment process that purports to pay the Land Bonds while actually stripping them of their value, Peru has committed an indirect expropriation of Gramercy's investment in breach of Article 10.7 of the Treaty.

126. Article 10.7 provides, in relevant part:

> No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 10.5.
>
> **CE-139**, Treaty, Art. 10.7 (footnote omitted).

127. Annex 10-B, in turn, defines the Parties' agreement regarding measures that constitute an indirect expropriation. It provides, in pertinent part, that an indirect expropriation occurs when "an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure." **CE-139**, Treaty, Annex 10-B, ¶ 3. Annex 10-B specifies that a determination of whether a taking constitutes an indirect expropriation requires "a case-by-case, fact-based inquiry that considers, among other factors": (*i*) "the economic impact of the government action"; (*ii*) the extent of the action's interference with "distinct, reasonable investment-backed expectations"; and (*iii*) "the character of the government action." *Id*.

128. Applying the standards set forth in Article 10.7 and Annex 10-B of the Treaty demonstrates that Peru has indirectly expropriated Gramercy's investment through the 2013 CT Order and the Supreme Decrees. Peru's conduct (*i*) destroys the value of Gramercy's investment in the Land Bonds; (*ii*) contravenes Gramercy's reasonable expectation that Peru would abide by its commitment to pay the Land Bonds at current value; and (*iii*) serves no legitimate purpose and discriminates against Gramercy.

1. The Supreme Decrees Destroy the Value of the Land Bonds

129. There can be no dispute of the mathematical certainty that the 2013 CT Order and the Supreme Decrees have a devastating economic impact that is tantamount to expropriation.

130. International tribunals have long recognized that a measure amounts to indirect expropriation when it leads to a substantial deprivation or effectively neutralizes the enjoyment of an investment. In *AIG Capital v. Kazakhstan*, for example, the tribunal held that:

> Expropriations ('or measures tantamount to expropriation') include not only open, deliberate and acknowledged takings of property (such as outright seizure or formal or obligatory transfer of

> title in favour of the Host State) but also covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part of the use or reasonably to be expected benefit of property even if not necessarily to the obvious benefit of the Host State.
>
> *AIG Capital Partners Inc. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of October 7, 2003, **CA-4**, ¶ 10.3.1 (footnote omitted).

Likewise, in *Alpha v. Ukraine*, the tribunal observed that:

> "[I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner." . . . [I]n order to establish an indirect expropriation of this sort, it is necessary to demonstrate that the investment has been deprived of *a significant part of its value*.
>
> *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award of November 8, 2010, **CA-6**, ¶ 408 (quoting *Starret Housing Corp. v. Iran*, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983)) (emphasis added) (footnote omitted).

See also Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award of August 20, 2007, **CA-16**, ¶¶ 7.5.11, 7.5.28 (noting that "[n]umerous tribunals have looked at the diminution of the value of the investment to determine whether the contested measure is expropriatory," and concluding that the government's actions "rendered the concession valueless and forced [the claimants] to incur unsustainable losses"); *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003, **CA-42**, ¶ 114 ("Although these forms of [indirect] expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that

effect."); *Metalclad v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award of August 30, 2000, **CA-33**, ¶ 103 ("[E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.").

131. Peru's actions clearly deprive Gramercy's investment of "a significant part of its value." *Alpha* Award, **CA-6**, ¶ 408. Indeed, they deprive Gramercy's investment of virtually all its value. Professor Edwards demonstrates that the current value of Gramercy's investment, based on the kind of conventional price indexation that is regularly used in Peru and was well accepted at the time Gramercy made its investment, is approximately US $1.6 billion. Yet the 2013 CT Order, and especially the 2014 Supreme Decrees that purport to implement it, reduce the value of Gramercy's investment to at most US $1.1 million, with Peru reserving the right to pay nothing at all.

132. Government acts that deprive an investment of over 99.9% of its value easily satisfy the standard for indirect expropriation. For example, in *Tecmed v. Mexico*, the tribunal concluded that Mexican regulatory action was an indirect expropriation because the measures "irremediably destroyed" "the economic or commercial value directly or indirectly associated with [the landfill's] operations and activities and with the assets earmarked for such operations and activities." *Tecmed* Award, **CA-42**, ¶ 117. As in *Tecmed*, Peru's actions destroy the "benefits and profits expected or projected by the Claimant." *Id*.; *see also CME Czech Republic B.V. (Netherlands) v. Czech Republic*, UNCITRAL, Partial Award of September 13, 2001, **CA-14**, ¶ 591 (National Media Council's "actions and omissions . . . caused the destruction of [the joint venture's] operations, leaving [the joint venture] as a company with assets, but without business").

133. Likewise, in *Señor Tza Yap Shum v. Peru*, Peru's taxing authority attached and froze the claimant's company's assets after concluding that the company had failed to pay taxes. *Señor Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award of July 7, 2011, **CA-40**, ¶¶ 81, 154. As a result of these measures, the company's net sales dropped drastically from 80 million Peruvian *Nuevos Soles* to 3.4 million *Nuevos Soles*, and the company was precluded from transacting with several banks. *Id*. ¶ 161. The tribunal rejected Peru's argument that it had not committed an expropriation because the company had generated some income and repaid debts during this period. *Id*. ¶ 168. Instead, the tribunal found that Peru's actions delivered "a blow to the heart of [the company's] operational

capacity" and destroyed its value, thus constituting an indirect expropriation. *Id.* ¶ 156; *see also id.* ¶¶ 151, 169-170. The fact that the 2013 CT Order and the Supreme Decrees accord Gramercy's investment only a trivial fraction of its legitimate value thus does not rebut but actually establishes the indirect expropriation.

2. Peru's Conduct Contravenes Gramercy's Investment-Backed Expectations

134. The Peruvian Government's substantial interference with "distinct, reasonable investment-backed expectations" likewise compels a finding that Peru indirectly expropriated Gramercy's investment. **CE-139**, Treaty, Annex 10-B, ¶ 3(a)(2).

135. As discussed more fully below, *see* Section V.B.2, Peru has contravened Gramercy's legitimate expectations upon which its investment was premised. Gramercy purchased the Land Bonds from 2006 to 2008 based on the legal framework governing them that Peru's own Constitution, its Constitutional Tribunal, its Supreme Court, its lower courts and its political branches had together established. As the 2001 CT Decision made abundantly clear, that framework required the Government to pay the Land Bonds at current value. Subsequent Supreme Court decisions ordering the payment of the Land Bonds using CPI confirmed Gramercy's expectation that Peru would honor this legal obligation. Peru's courts and political branches repeatedly reaffirmed these principles.

136. Gramercy also invested with the expectations that it could go to Peruvian courts and win judgments that would confirm its entitlement to payment at genuine current value. RK WS ¶ 42. Gramercy is a party to hundreds of legal proceedings in Peru. *Id.* Despite the veto and threatened veto of the bills proposing broad resolution of the Land Bond debt, Gramercy always had this recourse—until the 2013 CT Order and its clarification decisions, in conjunction with the Supreme Decrees.

137. Through the 2013 CT Order and the Supreme Decrees Peru has eviscerated the legal framework under which Gramercy invested. While still professing to require payment of current value, Peru has abandoned CPI in favor of a dollarization approach that makes the Land Bonds virtually worthless, and established the predatory MEF process as the exclusive means of valuing and receiving payment on the Land Bonds. Peru's current position is a *volte-face* from the legal principles it established when Gramercy invested. It has thus substantially interfered with—indeed, totally undermined—Gramercy's legitimate, investment-backed expectations.

3. The Government's Actions Serve No Legitimate Public or Social Purpose and Are Discriminatory

138. The confiscatory character of the 2013 CT Order and the Supreme Decrees further indicates that Peru's conduct amounts to an indirect expropriation. **CE-139**, Treaty, Annex 10-B.

139. Where State actions are geared toward "expropriat[ing] particular alien property interests, and are not merely the incidental consequences of an action or policy designed for an unrelated purpose, the conclusion that a taking has occurred is all the more evident." *Phillips Petroleum Co. Iran v. Iran & Nat'l Iranian Oil Co.* (Award No. 425–39–2), 21 Iran-U.S. Cl. Trib. Rep. 79 (June 29, 1989), **CA-36**, ¶ 97; *see also CME* Partial Award, **CA-14**, ¶ 603 (noting that the "deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law").

140. Peru's measures here are not merely the "incidental consequences" of some legitimate regulatory actions "designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment." *Philips Petroleum Co.* Award, **CA-36**, ¶ 97; **CE-139**, Treaty, Annex 10-B, ¶ 3(b). Instead, the measures are expressly aimed at reducing the value of the Land Bonds comprising Gramercy's investment. The Constitutional Tribunal openly admitted that in its 2013 Decision when it stated that it endorsed the Dollarization method because the use of a CPI method "would generate severe impacts on the Budget of the Republic." **CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013, "Whereas" Section, ¶ 25.

141. Filling a State's coffers to the detriment of an investor is not a permissible State objective. In *Deutsche Bank v. Sri Lanka*, for example, the tribunal rejected Sri Lanka's argument that its expropriation of the claimant's investment in an oil-hedging contract constituted a legitimate exercise of its regulatory powers, where the "entire value of Deutsch Bank's investment was expropriated for the benefit of Sri Lanka itself," and the taking "was a financially motivated and illegitimate regulatory expropriation by a regulator lacking in independence." *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award of October 31, 2012, **CA-20**, ¶¶ 523-524. Similarly, in *Siemens v. Argentina*, the tribunal concluded that there was no evidence of a legitimate public purpose in Argentina's expropriatory conduct where its sole aim was "to reduce the costs to Argentina." *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award of February 6, 2007, **CA-41**, ¶ 273. Peru's conduct, like that of Sri Lanka and Argentina, is purely economically motivated and lacks any legitimate social purpose.

142. Moreover, to the extent the Government has even attempted to articulate a purpose for its actions, its purported reasons are unsubstantiated and even demonstrably false. Specifically, the 2013 CT Order claims that applying CPI would "generate severe impacts" on the Republic's budget, potentially "making impracticable the very payment of the debt," and that Peru's "general welfare" should not be sacrificed "to pay the land reform debt." **CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013, "Whereas" Section, ¶ 25. But the Constitutional Tribunal cited no evidence for these doomsday conclusions. And there was no evidence supporting them, for the MEF has acknowledged that it has conducted no analysis to support this position. **CE-18**, Ministry of Economy and Finance, Memorandum Nº 447-2014-EF/52.04, October 15, 2014, p.2.

143. Multiple experts, in fact, have opined that Peru *is* able to support the debt, even valued using the CPI method. For example, Professor Edwards concluded that:

> [C]ontrary to the Constitutional Tribunal's stated concerns, Peru's economy is strong enough to issue and support the amount of new debt needed to fund the repayment of the bondholders at the CPI [m]ethod-derived updated value of the land bonds.
>
> SE ER ¶ 216.

See also **CE-21**, Moody's Investors Service, FAQs on Peru's *Bonos de la Deuda Agraria*, December 18, 2015; **CE-22**, Egan-Jones Ratings Company, Egan-Jones Assigns A First-time Rating of "BB" To The Republic Of Peru's International Bonds, November 17, 2015, p. 7.

144. Over the past decade, Peru's GDP has more than doubled, reaching nearly US $200 billion in 2015. SE ER ¶ 211. Standard & Poor's and Moody's both project continued growth in Peru's real per capita GDP in the coming years. *Id*. Peru also enjoys a low debt-to-GDP ratio and a low inflation rate, averaging 3.1% over the last decade, and in recent years has posted either a fiscal surplus or a relatively small deficit. *Id*. ¶ 225. Furthermore, Peru has favorable credit ratings that give it easy access to the United States and international capital markets, as well as over US $60 billion worth of foreign-exchange reserves. *Id*. ¶¶ 227-228; **CE-23**, Lyubov Pronina, Peru Sells First Euro Bond in Decade as Funding Costs Fall, Bloomberg, October 27, 2015; **CE-222**, Reserve Bank of Peru, Analysis Notes No. 16 (January 2016), February 29, 2016, January 2016. International capital markets would surely be surprised to learn that Peru claims it cannot afford to pay its existing Land Bond obligation through the issuance of new bonds—especially given that Peru has long touted its economic success

when selling billions of dollars of new bonds to raise capital from the United States and international markets. **CE-204**, ProInversion, Peru at a Glance—Macroeconomic Results, July 7 2015, description of the Peruvian economy. And Peru continues to market its strong economic health and stability to attract foreign investment. Moreover, contrary to the Constitutional Tribunal's assessment, the repayment of the Land Bonds could benefit the Peruvian economy by enhancing investor confidence in Peru and by improving the nation's already healthy credit ratings and thereby reducing its borrowing costs. SE ER ¶¶ 229-241.

145. In *ADC v. Hungary*, the tribunal rejected a similarly pretextual and unsubstantiated public interest rationale in finding that an expropriation occurred. *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of October 2, 2006, **CA-2**, ¶ 429. There, a 2001 Hungarian decree voided the claimants' contracts for the operation and management of the Budapest airport. *Id*. ¶ 190. The Government argued that its measures were part of the harmonization process for Hungary's accession to the European Union and served the State's strategic interests. *Id*. ¶¶ 430-31. But the tribunal disagreed, noting that "[i]f mere reference to '*public interest*' can magically put such interest into existence . . . , then this requirement would be rendered meaningless since the [t]ribunal can imagine no situation where this requirement would not have been met." *Id*. ¶ 432. Likewise, on this barren record, Peru has failed to establish that its actions were driven, in actuality, by anything other than the Government's desire to avoid repaying a debt at the expense of Gramercy and other bondholders.

146. Similarly, in *Abengoa v. Mexico*, the tribunal rejected Mexico's argument that environmental concerns justified its denial of the claimant's license to operate a hazardous waste facility. *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award of April 18, 2013, **CA-1**, ¶¶ 619-620. The tribunal explained that the facility had "all the necessary environmental authorizations, and at no time did the State's competent agencies revoke or question such authorizations." *Id*. ¶ 619. In addition, the tribunal found that the City Council "never had any study performed on the purported hazardousness of the Plant, and there is no evidence that the Plant might have entailed a public health risk." *Id*. So too here, vague, unsubstantiated and false concerns about the "national welfare" cannot immunize Peru. *See, e.g.*, *Tecmed* Award, **CA-42**, ¶¶ 147, 149 (proportionality prevented alleged permit infractions, public health and environment concerns, and public opposition from constituting "sufficient justification to deprive the foreign investor of its investment with no compensation").

147. In assessing the character of the government's actions, tribunals have also considered "whether such actions . . . are

proportional to the public interest presumably protected thereby and to the protection legally granted to investments." *Tecmed* Award, **CA-42**, ¶ 122; *see also Deutsche Bank* Award, **CA-20**, ¶ 522 ("A number of tribunals . . . have adopted a proportionality requirement in relation to expropriatory treatment. It prevents the States from taking measures which severely impact an investor unless such measures are justified by a substantial public interest."); *James and Ors v. the United Kingdom*, ECHR App. No. 8793/79, Judgment of February 21, 1986, **CA-27**, at 19-20 ("Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest,' but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be reali[z]ed."). "[T]he significance of [a measure's negative financial impact on the investment] has a key role upon deciding the proportionality." *Tecmed* Award, **CA-42**, ¶ 122.

148. Peru cannot possibly meet its burden to establish that the measures it adopted are proportionate to their purported objective. Even if Peru's object were legitimately to cure budget shortfalls, Peru could adopt less drastic means to fulfill its goal. It could, for instance, renegotiate the restructuring of the debt in good faith. But Peru has not attempted to do this. Instead, through the issuance of the 2013 CT Order and promulgation of the Supreme Decrees, Peru has stripped Gramercy's investment of all value.

149. Lastly, and as described further in Section V.C below, even if Peru could muster a defensible public purpose, it cannot escape that its actions were discriminatory in that the Supreme Decrees expressly target Gramercy, placing it last in line for payment of the Land Bonds.

150. In short, the facts compellingly establish Peru's campaign to unlawfully expropriate Gramercy's investment, in breach of Article 10.7 of the Treaty.

B. Peru Has Denied Gramercy the Minimum Standard of Treatment in Breach of its Obligation under Article 10.5 of the Treaty

151. By engaging in arbitrary and unjust conduct in contravention of basic notions of due process and Gramercy's legitimate expectations, Peru has breached its obligation to afford the minimum standard of treatment under Article 10.5 of the Treaty.

1. The Treaty Requires Peru to Afford the Minimum Standard of Treatment to U.S. Investors

152. Article 10.5 provides in relevant part:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
>
> **CE-139**, Treaty, Art. 10.5.

153. Appendix 10-A clarifies the State Parties' understanding of "customary international law" and their intention with respect to the content of the protections afforded by Article 10.5 of the Treaty:

> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. *With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to* ***all*** *customary international law principles that protect the economic rights and interests of aliens.*
>
> **CE-139**, Treaty, Appendix 10-A (emphasis added).

154. In international law, the content of the minimum standard of treatment continues to evolve and is shaped by the requirements of fair and equitable treatment included in bilateral investment treaties:

> [T]he [Free Trade Commission] interpretations [of the international minimum standard of treatment made applicable by NAFTA] incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for "fair and equitable" treatment of, and for "full protection and security" for, the foreign investor and his investments.
>
> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award of October 11, 2002, **CA-34**, ¶ 125.

155. Numerous tribunals have concluded that the treaty standard of fair and equitable treatment is no different from the minimum standard of treatment protected by customary international law. To take just one example, in *Biwater Gauff v. Tanzania*, the tribunal observed that "[a]s found by a number of previous arbitral tribunals and commentators, . . . the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law." *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, **CA-9**, ¶ 592; *see also CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of May 12, 2005, **CA-15**, ¶ 284 ("[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law."). After reviewing numerous decisions rendered by both NAFTA and bilateral investment treaty tribunals defining the meaning of the standard, the *Biwater* tribunal concluded that the purpose of the fair and equitable treatment standard was to protect investors' reasonable expectations and that this protection implies "that the conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary." *Biwater Gauff* Award, **CA-9**, ¶ 602 (footnotes omitted).

156. Applying the foregoing principles, the tribunal in *Waste Management v. Mexico* held that a state breaches the minimum standard of treatment when its conduct is arbitrary, grossly unfair, unjust or idiosyncratic and discriminatory, or involves a lack of due process:

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct [*1*] is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or [*2*] involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.
>
> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Award of April 30, 2004 ("*Waste Management II* Award"), **CA-43**, ¶ 98.

157. The "dominant element" of fair and equitable treatment is "the notion of legitimate expectations." *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, **CA-39**, ¶ 302. Thus, when assessing whether a breach of the minimum standard of treatment has occurred, "it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant." *Waste Management II* Award, **CA-43**, ¶ 98. This is consistent with the Preamble to the Treaty, which provides that one of the Treaty's purposes is to "ensure a predictable legal and commercial framework for business and investment." **CE-139**, Treaty, Preamble.

158. While it is not necessary to establish bad faith to find a breach of the minimum standard of treatment, a manifest lack of good faith by the state or one of its organs should be taken into consideration. *Abengoa* Award, **CA-1**, ¶ 644; *see also Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (NAFTA), Award, September 18, 2009, **CA-11**, ¶ 296 (agreeing with "the view that the standard of fair and equitable treatment is not so strict as to require 'bad faith' or 'willful neglect of duty'"); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award of October 3, 2006, **CA-31**, ¶ 129 ("The Tribunal is not convinced that bad faith or something comparable would ever be necessary to find a violation of fair and equitable treatment."); *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (DR-CAFTA), Award of June 29, 2012, **CA-38**, ¶ 219 (finding "that *Waste Management II*

persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard [of treatment]").

159. In disregard of its Treaty obligations, Peru breached the minimum standard of treatment set forth in Article 10.5 by (*i*) encouraging Gramercy to invest in the Land Bonds through the establishment of a robust legal framework promising payment of the Land Bonds at current value, and then taking actions inconsistent with Gramercy's legitimate expectations based on that legal framework and prior assurances; (*ii*) evading payment of the Land Bonds through judicial decisions and regulatory acts that were themselves arbitrary and unjust; and (*iii*) depriving Gramercy of its right to payment of the Land Bonds at current value through procedures that constituted a denial of justice in violation of basic notions of due process.

2. Peru's Conduct Violated Gramercy's Legitimate Expectations

160. By enacting the confiscatory Supreme Decrees and abruptly changing course from its previous assurances to pay the Land Bond debt at current value, Peru has contravened Gramercy's reasonable expectations with regard to the legal framework affecting the Land Bonds.

161. The obligation to protect an investor's legitimate expectations is "closely related to the concepts of transparency and stability." *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award of November 12, 2010, **CA-26**, ¶ 285. As stated by the tribunal in *Frontier Petroleum*:

> Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework. Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected. The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts. Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment.
>
> *Id.*

162. Gramercy invested in reliance on Peru's repeated assurances that it was committed to honoring the Land Bond debt and intended to provide foreign investors with a stable and transparent framework for investment. In the years leading up to Gramercy's investment, multiple branches of the Peruvian government, including Peru's highest courts, repeatedly affirmed Peru's commitment to paying the Land Bond debt at current value. These included, among others, the 2001 CT Decision, which unequivocally established Peru's commitment to update the Land Bonds' value in accordance with the current value principle, the 2004 CT Decision reiterating this principle; a 2005 Congressional Report that deemed it "necessary" to provide current value for the Land Bonds and stated that Peru "could not constitutionally elude" paying the Land Bonds; and multiple decisions by Peruvian courts, including Peru's Supreme Court. *See* **CE-11**, Constitutional Tribunal, Decision, Exp. N° 022-96-I/TC, March 15, 2001; **CE-107**, Constitutional Tribunal, Decision, File N° 0009-2004-AI/TC, August 2, 2004; **CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR N° 11459/2004-CR, and N° 11971/2004-CR, p. 13; *see, e.g.*, **CE-14**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1002-2005 ICA, July 12, 2006; **CE-99**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 2755 – Lima, Aug. 27, 2003; *see also* DR ER ¶ 28 ("[B]y no later than 2006 it was abundantly clear that, under Peruvian law, the payment of the Land Reform Bonds is subject to the Current Value Principle and as such, payment should neutralize the effects of inflation and the loss of the currency's purchasing power in such a way that payment reflects the bonds' original value.").

163. Moreover, the legal framework established prior to Gramercy's investment made clear that CPI was the appropriate method of calculating current value. For example, in 2006 Congress approved a bill mandating the Government to update the value of the Land Bonds using CPI, for which the Executive branch issued a favorable opinion. **CE-115**, Land Bonds Bill, March 27, 2006, Art. 8; **CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR N° 11459/2004-CR, and N° 11971/2004-CR, p. 6. Executive branch members publicly endorsed the use of CPI to update the Land Bonds' value on at least three occasions between 2005 and 2006. *See, e.g.*, **CE-122**, Ministry of Agriculture, Report N° 1328-2006-AG-OGAJ, December 20, 2006, p. 2; **CE-110**, Expreso, INEI: Land Reform Debt Should be recalculated using CPI, March 1, 2005; **CE-121**, Technical Report N° 071-2006-AG-OGPA/OEP, November 23, 2006, Section II.3. Peru also applied a CPI method for updating the Land Bonds' value in proceedings before its Supreme Court. *See, e.g.*, **CE-14,** Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1002-2005 ICA, July 12, 2006. In addition, Lima Courts of Appeals used CPI to update the value of debts.

See, *e.g.*, **CE-79**, Lima Court of Appeals, Fourth Chamber, Appeal on Proceeding N° 1275-95, September 28, 1995. Finally, the Government itself used CPI to update the value of tax liabilities. **CE-90**, Supreme Decree N° 064-2002-EF, April 9, 2002, Article 5.1.

164. The CPI method was so firmly ingrained that the Constitutional Tribunal rejected the Government's prior attempt to impose a dollarization scheme. In October 2000, the Government issued Decree N° 088-2000. **CE-88**, Emergency Decree N° 088-2000, October 10, 2000. That Decree purported to update the Land Bonds by converting to U.S. dollars at the official exchange rate at time of issuance, and then applying a compound 7.5% interest rate to the dollarized principal—updating terms far more generous than the MEF wrote into the 2014 Supreme Decrees. Yet the Constitutional Tribunal held that this Decree could be considered constitutional only if it were treated as an option available to bondholders and not as mandatory or preclusive of seeking redress through the Peruvian courts. *See* **CE-107**, Constitutional Tribunal, Decision, File N° 0009-2004-AI/TC, August 2, 2004; DR ER ¶¶ 31-36.

165. In addition to giving assurances regarding payment of the Land Bond debt in particular, Peru made general representations regarding its intent to provide foreign investors with a stable and transparent framework for investment in order to encourage such investments. These included Peru's execution of dozens of trade and bilateral investment agreements, its establishment of constitutional guarantees of nondiscriminatory treatment to foreign investors, and its sale of sovereign bonds in the global market. *See* **CE-72**, Peru Constitution of 1993, June 15, 1993, Art. 63, 70; **CE-8**, Prospectus Supplement to Prospectus dated January 19, 2005, filed January 31, 2005; **CE-9**, Prospectus Supplement to Prospectus dated January 19, 2005, filed July 15, 2005; **CE-10**, Prospectus Supplement to Prospectus dated January 19, 2005, filed December 14, 2005. In particular, this included the Treaty, which was signed on April 12, 2006. **CE-139**, Treaty.

166. These specific and general assurances were essential in Gramercy's decision to purchase the Land Bonds, as Mr. Koenigsberger confirmed. RK WS ¶¶ 22, 33-35. Specifically, Gramercy relied on (*i*) Peru's multiple representations that it would pay the Land Bonds at current value, along with its repeated indications that the CPI method was the proper measure for updating the current value of the Land Bonds; and (*ii*) a stable and transparent legal framework to govern its investment. *Id.* Gramercy thus had a legitimate expectation that Peru would honor its legal obligation to pay the Land Bonds at current value using the CPI method.

167. After Gramercy made its investment, however, Peru pulled the rug out from under Gramercy's feet, diminishing the value of the Bonds by 99.9% through a new and unjustified payment method pursuant to the Supreme Decrees and the 2013 CT Order, which—in the words of the Constitutional Tribunal Justice who had drafted the 2001 CT Decision that the Tribunal in 2013 professed to enforce—directly contravened the provisions of the March 2001 decision. DR ER ¶¶ 43-44. Peru's repudiation of the legal framework affecting the Land Bonds amounts to an archetypical breach of its fair and equitable treatment obligation under Article 10.5 of the Treaty.

168. Numerous tribunals have held States accountable for breach of the minimum standard of treatment where, like here, their actions undermine the legal framework on which the investor relied at the time of investment. For example, in *Clayton/Bilcon*, a case involving the environmental assessment regulatory process for a proposed coastal quarry and marine terminal project, the tribunal found that the respondent had contravened the investor's legitimate expectations in breach of the minimum standard of treatment by, among others, taking an "unprecedented" approach to conducting the environmental assessment that was inconsistent with the previously existing legal framework for assessment. *Clayton/Bilcon v. Canada*, (PCA) Case No. 2009-04, UNCITRAL (NAFTA), Award on Jurisdiction and Liability of March 17, 2015 ("*Clayton/Bilcon* Award"), **CA-13**, ¶¶ 446-454. In assessing the basis for the investors' legitimate expectations, the tribunal pointed to policy statements and other official issuances by government bodies that encouraged mineral exploration projects as relevant to the reasonable expectations of the claimant in investing. *Id.* ¶¶ 455-460.

169. Similarly, in *OEPC v. Ecuador*, the tribunal found a violation of the fair and equitable treatment standard—which it equated with the minimum standard of treatment under customary international law—when the government unexpectedly changed "the framework under which the investment was made and operate[d]," thus thwarting the legitimate expectations of the claimant at the time of investment. *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, Final Award of July 1, 2004, **CA-35**, ¶ 184. The claimant in that case had entered into a contract with an Ecuadorian state-owned corporation, under which the claimant was entitled to reimbursement of the value-added tax ("VAT") on certain purchases. Subsequently, however, the government reinterpreted the contract and disqualified the claimant from VAT reimbursements, even demanding that the claimant return all VAT reimbursements already received. *Id*. ¶ 3.

170. In *CMS v. Argentina*, the tribunal held that Argentina had violated the fair and equitable treatment standard where its actions

"entirely transform[ed] and alter[ed] the legal and business environment under which the investment was decided and made." *CMS* Award, **CA-15**, ¶¶ 274-75. In that case, the claimant invested largely based on Argentina's new regulatory framework for the gas transportation and distribution sector designed to attract foreign investment. However, in the wake of a severe financial crisis, Argentina took legislative measures that drastically changed the regime governing the investment. *Id*. ¶¶ 64-66. Noting that "fair and equitable treatment is inseparable from stability and predictability"—and that claimant's reliance on guarantees under the legal framework had been crucial to its investment decision—the tribunal held that Argentina had breached the fair and equitable treatment standard. *Id*. ¶¶ 275-276, 281.

171. The tribunal reached a similar conclusion in *BG Group v. Argentina*, another case arising out of substantially the same factual scenario, holding that "[t]he duties of the host State must be examined in light of the legal and business framework as represented to the investor at the time that it decides to invest." *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, **CA-8**, ¶ 298. It found that Argentina's conduct fell below the minimum standard of treatment in that it "entirely altered the legal and business environment by taking a series of radical measures" that were "in contradiction with the established Regulatory Framework as well as the specific commitments represented by Argentina, on which BG relied when it decided to make the investment." *Id.* ¶ 307.

172. So too here, by issuing the 2013 CT Order and the Supreme Decrees while recognizing that CPI is "usually applied for updating debts," Peru fundamentally disrupted the "predictable legal and commercial framework" that Gramercy relied on in investing in the Land Bonds. **CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, "Whereas" Section, ¶ 14; **CE-139**, Treaty, Preamble. In so doing, Peru's conduct violated Gramercy's reasonable and legitimate expectations in breach of Article 10.5 of the Treaty.

3. Peru's Conduct Was Arbitrary and Unjust

173. By sanctioning a payment method that renders Gramercy's investment effectively valueless, Peru also acted in a manner that is "arbitrary, grossly unfair, unjust or idiosyncratic [and] discriminatory." *Waste Management II* Award, **CA-43**, ¶ 98.

174. The essence of arbitrary conduct is that it is not based on reason, or that it is taken for reasons other than those put forward. *See Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of January 14, 2010, **CA-29**, ¶ 262 (describing arbitrariness as including conduct "founded on prejudice or

preference rather than on reason or fact," and measures "taken for reasons that are different from those put forward by the decision maker").

175. The 2013 CT Order is arbitrary in at least two respects. *First*, as discussed previously, the Constitutional Tribunal's basis for rejecting CPI—that it "would generate severe impacts on the Budget of the Republic, to the point of making impracticable the very payment of the debt"—was arbitrary. **CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013, "Whereas" Section, ¶ 25. It is objectively wrong and had no evidentiary foundation. When specifically petitioned to disclose the factual basis for this pivotal statement, the Constitutional Tribunal refused to answer, stating that "said calculations are the responsibility of the [MEF] and not of th[e] Tribunal." **CE-183**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, November 4, 2013, "Whereas" Section, ¶ 8. Yet, for its part, the MEF acknowledged that it had no such calculations. **CE-18**, Ministry of Economy and Finance, Memorandum N° 447-2014-EF/52.04, October 15, 2014, p. 2. Such consequential decision—rejecting the method "usually applied for updating debts" which had been repeatedly used for the past decade—simply cannot rest on supposition or phantom calculations that neither the MEF nor the Constitutional Tribunal can or will provide. **CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, "Whereas" Section, ¶ 14. To the contrary, acting on such an insubstantial basis, without factual support for a distinctly factual proposition, is the essence of arbitrary conduct.

176. *Second*, the Constitutional Tribunal acted outside its own competence and in violation of its procedures in issuing the 2013 CT Order. As explained by Delia Revoredo, former Justice of the Constitutional Tribunal, the Tribunal "lack[ed] jurisdiction to rule . . . in the terms that it did," because "the Constitutional Tribunal did not have the power to reverse or expand the March 2001 Decision." DR ER ¶¶ 40-41. Further, the Order "is arbitrary and fails to state its reasons," and also "lack[ed] the votes necessary to have been approved." *Id.* Thus, the Order was also arbitrary in the sense that it was divorced from the legal framework governing its issuance.

177. The Supreme Decrees, too, are arbitrary. As discussed previously, the updating formula crafted by the MEF has no support in economic literature or logic, and is "arbitrary and indefensible." SE ER ¶ 128. As Professor Edwards concluded, not only does it fail to achieve its stated purpose of reducing the effects of severe inflation, it actually amplifies those effects. *Id.* ¶¶ 123-160. On a basic level, the parity exchange rate used by the MEF breaks down to an equation under which *Soles Oro* per U.S. dollar equates to *Soles Oro*-per-U.S. dollar squared—an equation that amounts to "a completely nonsensical construction that results in economically unreasonable results," and

"yield[s] results that make no sense, have no basis in fact or economic theory and are arbitrarily low." *Id.* ¶¶ 114, 133. In addition, the formula dictates that the Bonds should accrue interest at an "arbitrary, low rate" until 2013, and no interest at all thereafter, again without justification. *Id.* ¶ 123. Finally, the exchange rate used to convert U.S. dollars to *Soles* is among the lowest in recent history, reducing even further the updated value of the Bonds. *Id.* ¶ 157. The net result is that the formula "systematically undervalu[es] any land bond whose value is to be updated." *Id.* ¶ 148. There is no reasonable justification for the formula, nor has the MEF provided any. It is quite literally just made up out of thin air.

178. Tribunals have routinely found that such arbitrary conduct violates the minimum standard of treatment. For example, in *Clayton/Bilcon*, the tribunal found a regulatory agency's conduct to be "arbitrary" and in violation of the minimum standard of treatment where it "effectively created, without legal authority or fair notice to [the investor], a new standard of assessment rather than fully carrying out the mandate defined by the applicable law." *Clayton/Bilcon* Award, **CA-13**, ¶ 591. Similarly, in *Abengoa*, the state's conduct was arbitrary where, notwithstanding the fact that the investor possessed all required permits, its operating license for a waste landfill plant was revoked by the municipal council—a position "totally contrary to the position previously assumed by competent municipal, provincial, and federal authorities." *Abengoa* Award, **CA-1**, ¶¶ 174, 184-85, 192, 277-81, 579-580, 651. As a final example, in *Eureko v. Poland*, the tribunal found a breach of fair and equitable treatment where the respondent "acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character." *Eureko B.V. v. Poland*, Partial Award of August 19, 2005, **CA-22**, ¶ 233.

179. In addition to being arbitrary, the 2013 CT Order and the Supreme Decrees are also unjust, and grossly unfair. While purporting to provide a fair updated value, their combined effect is in fact to eviscerate the Land Bonds' worth by 99.9% of the value under the CPI method. Moreover, although the entire purpose of applying the formula is to update the value of the Land Bonds to present day, the result of this purported "updating" method is a value that is even less than the value of the Land Bonds if the Land Bonds had been converted to dollars at the official exchange rate when issued and never thereafter updated over the next forty years. SE ER ¶ 152. Moreover, and as discussed in more detail in Section V.B.4 below, the Constitutional Tribunal enacted the 2013 CT Order through highly irregular and improper means, involving government interference in the proceedings and even the use of white-out to create a forged "dissent" by one of the Justices. Such conduct is clearly unjust, and also grossly unfair.

180. Finally, not only do the Supreme Decrees destroy the Bonds' value, they also—along with the August 2013 Resolution—provide investors no choice but to submit to their draconian terms. Indeed, the August 2013 Resolution makes the Supreme Decrees mandatory and prevents bondholders from filing new judicial proceedings to seek payment of the Land Bonds. **CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, "Whereas" Section, ¶ 16, "Rules" Section, ¶ 4.d. The Supreme Decrees in turn strip bondholders of all rights by: (*i*) requiring them to waive their right to seek relief in other fora as a prerequisite to participating in the administrative process set forth in the Supreme Decrees; (*ii*) allowing the Government to delay payment indefinitely while the Land Bonds bear no interest; and (*iii*) mandating companies that purchased Land Bonds with "speculative ends"—a provision which presumably applies to Gramercy—to be paid, if at all, after all other bondholders. By placing Gramercy last in line for payment, the Supreme Decrees are discriminatory, as will be discussed further in Section V.C below, in addition to being arbitrary, unjust, and grossly unfair.

181. In issuing the Constitutional Tribunal decision and the Supreme Decrees, Peru acted for "purely arbitrary reasons," and in a manner that was both unjust and grossly unfair. *Eureko* Partial Award, **CA-22**, ¶ 233. Indeed, the MEF surely knew that CPI updating would not break the Peruvian budget, and that its Supreme Decree formula was riddled with basic errors whose only purpose must be to deprive bondholders of the amounts they are owed. As such, Peru's conduct also demonstrates its bad faith. These actions constitute a breach of the minimum standard of treatment, for which Peru must be held liable.

4. Peru's Conduct Constituted a Denial of Justice in Violation of Basic Notions of Due Process

182. By enacting the Supreme Decrees following a deeply tainted judicial process, Peru failed to comport with "the obligation not to deny justice . . . in accordance with the principle of due process embodied in the legal systems of the world," in breach of Article 10.5 of the Treaty. **CE-139**, Treaty, Art. 10.5.

183. Denial of justice is characterized by "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety." *Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award of June 26, 2003, **CA-32**, ¶ 132. It "may occur irrespective of any trace of discrimination or maliciousness, if the judgment at stake shocks a sense of judicial propriety." *Jan de Nul N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award of November 6, 2008, **CA-28**, ¶ 193. Although not

the exclusive test for denial of justice, one occurs when the tribunal "can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable." *Mondev* Award, **CA-34**, ¶ 127.

184. Here, the 2013 CT Order was "improper and discreditable," and produces "manifest injustice." As described in further detail in Section III.G.1(c) above, the Constitutional Tribunal's decision to grant the Executive Branch the power to determine the final procedure and valuation for the Land Bonds was the product of highly irregular procedures, which themselves are currently the subject of criminal proceedings, and demonstrate Peru's bad faith. The 2013 CT Order was drafted following a mysterious visit by President Humala's advisor, falsely attributed to Justice Eto, and surprisingly consistent with the recommendations of an "external advisor" to the MEF—known to the MEF at least two years before the 2013 CT Order. **CE-27**, Register of visitors to the Constitutional Tribunal, July 11, 2013, p. 2; **CE-166**, Ministry of Economy and Finance, Economic Growth with Social Inclusion, Report for Years 2006-2011, p. 86. It was based on the premise that the Government could not afford to pay the value of the Land Bonds under the CPI method—which was never briefed by the parties, was not supported by evidence in the record, is in any case untrue, and is the sort of factual conclusion that the Constitutional Tribunal by the nature of its limited jurisdiction is not supposed to make. DR ER ¶¶ 50-52; **CE-183**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, November 4, 2013, "Whereas" Section, ¶¶ 8, 14; **CE-18**, Ministry of Economy and Finance, Memorandum N° 447-2014-EF/52.04, October 15, 2014, p. 2. It was issued only after Chief Justice Urviola denied one of the other Justices the minimum period that the Tribunal's own rules stipulated to pen a dissent. It also critically depended on a forged "dissent," which was in fact the original draft decision altered by white-out, as a forensic report confirmed. **CE-25**, Institute of Legal Medicine and Forensic Sciences, Expert Report No. 12439 - 12454/2015, pp. 5, 10-29.

185. Using white-out and a typewriter to manufacture a fraudulent dissent—and then to use that phony dissent as the justification to trigger a casting vote—is conduct that "shocks a sense of judicial propriety" in any court, especially a nation's highest constitutional tribunal. When combined with all of the other irregularities surrounding the 2013 CT Order it even more forcefully establishes a denial of justice.

186. Several features of the Constitutional Tribunal's actions are consistent with those previously found to constitute a denial of justice. In *Flughafen Zürich A.G. v. Venezuela*, the arbitral tribunal held that a decision of the Venezuelan Supreme Tribunal constituted a denial of justice where it was adopted *sua sponte* and without hearing from either

party, where it lacked legal reasoning grounded in the existing legal framework to justify its adoption, where the reasons provided were "manifestly insufficient," and where its true objective was actually to advance a policy of the central government. *Flughafen Zürich A.G. v. Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014, **CA-25**, ¶¶ 698, 707-708.

187. Similarly here, the 2013 CT Order was adopted in a manner that violated its own legal framework and internal procedures. *See* DR ER ¶¶ 23, 40, 44, 46, 53-54 (describing multiple defects in the Order, including that the Tribunal "lack[ed] jurisdiction to rule . . . in the terms that it did" and that the 2013 CT Order constitutes "a violation of the principle of *res judicata*" and the "current value principle," that it constitutes "a breach of the fundamental right of due process" and that it "lacks the votes necessary to have been approved"). Further, it failed to provide reasons for its decision other than an assumption which, as previously discussed, is "manifestly insufficient" in that it is not founded in the record and is also untrue. *See id*. ¶¶ 40, 52 (stating that "the decision is arbitrary and fails to state its reasons," and that this lack of support is "clearly contrary to the fundamental right to due process, and common sense"). Finally, its objective was not actually to provide a fair method to assess current value, but—as stated in the 2013 CT Order itself—to establish a method of valuing the Land Bonds that would reduce the amount owed by the Government.

188. A minimum standard of treatment violation "may arise in many forms." *Cargill* Award, **CA-11**, ¶ 285. Among others, "[i]t may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome." *Id.* While any one of these would be sufficient to constitute a violation, Peru's egregious conduct takes all of these forms and, therefore, Peru is liable for breaching Article 10.5 of the Treaty.

C. Peru Has Granted Gramercy Less Favorable Treatment in Breach of its Obligation under Article 10.3 of the Treaty

189. By placing the only known foreign legal entity that owns Land Bonds last in line for payment, Peru violated Article 10.3 of the Treaty, entitled "National Treatment." **CE-139**, Treaty, Art. 10.3.

1. The Treaty Requires Peru to Treat U.S. Investors No Less Favorably than Local Investors

190. Article 10.3 provides, in relevant part:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment,

> acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> **CE-139**, Treaty, Art. 10.3.

191. To establish a breach under this provision, a claimant bears the initial burden to establish a *prima facie* case that local investors in "like circumstances" received more favorable treatment. *Clayton/Bilcon* Award, **CA-13**, ¶¶ 717-718. Once a claimant has done so, the burden shifts to the respondent state to show either the absence of like circumstances or a credible justification for its disparate treatment. *See Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), Award on the Merits of Phase 2 of April 10, 2001, **CA-37**, ¶ 78 (holding that "[d]ifferences in treatment will presumptively violate" national treatment obligations unless the state can prove they have a "reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of [the treaty]."); *see also Clayton/Bilcon* Award, **CA-13**, ¶ 723 (same).

192. Establishing a *prima facie* case for breach of national treatment requires the claimant to satisfy three elements. As expressed by the tribunal in *Corn Products International v. Mexico*:

> First, it must be shown that the Respondent State has accorded to the foreign investor or its investment "treatment . . . with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition" of the relevant investments. Secondly, the foreign investor or investments must be in "like circumstances" to an investor or investment of the Respondent State ("the comparator"). Lastly, the treatment must have been less favourable than that accorded to the comparator.
>
> *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB

(AF)/04/01 (NAFTA), Decision on Responsibility of January 15, 2008, **CA-17**, ¶¶ 116-117.

See Cargill Award, **CA-11**, ¶ 189 (same); *Clayton/Bilcon* Award, **CA-13** (same), ¶¶ 717-18.

2. Gramercy Has Proved its Claim for Disparate Treatment

193. Peru's treatment of Gramercy satisfies all three elements necessary to establish a *prima facie* case for breach of national treatment. *First*, there is no question that the treatment by Peru—consisting of the MEF's issuance of Supreme Decrees that place the claimant last in priority for payment, following the Constitutional Tribunal's authorization to do so—is precisely the type of treatment contemplated by the Treaty. The Treaty requires that Peru accord U.S. investors no less favorable treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." **CE-139**, Treaty, Art. 10.3.2. Measures adopted by Peru in respect of payment of the Land Bonds indubitably meet this criterion.

194. *Second*, Gramercy is "in like circumstances" with Peruvian bondholders. Tribunals have cautioned against reading the "like circumstances" factor too narrowly, emphasizing that the purpose of national treatment is to protect investors. *See, e.g., Clayton/Bilcon* Award, **CA-13**, ¶¶ 692-693 (describing this language as "reasonably broad"); *OEPC v. Ecuador* Award, **CA-35**, ¶ 173 (holding that "in like situations" clause "cannot be interpreted in the narrow sense advanced by [respondent] as the purpose of national treatment is to protect investors as compared to local producers"). The Land Reform Act, promulgated upon the issuance of the Land Bonds, afforded the same guarantee "without reservations whatsoever" of payment to all Land Bonds and made no distinction between bondholders for purposes of payment of the debt. **CE-1**, Decree Law N° 17716, Land Reform Act, June 24, 1969, Art. 175. All of the Bonds—regardless of who owns them—accordingly stipulate that they enjoy the "unreserved guarantee of the State." *E.g.*, **CE-120**, Bond No. 008615, November 28, 1972. In addition, Peruvian law explicitly provides for the free transferability of the Land Bonds pursuant to Decree Law N° 22749 of 1979, such that there would be no principled basis on which bondholders who acquired Land Bonds through a transfer should be treated differently than original bondholders. **CE-16**, Decree Law N° 22749, November 13, 1979, Art. 5 ("The Land Reform Debt Bonds shall be freely transferable.").

195. *Third*, Peru has treated Gramercy less favorably than domestic holders of Land Bonds. The Constitutional Tribunal in the 2013 CT Order authorized the Government to take into account different categories of bondholders. **CE-17**, Constitutional Tribunal of Peru,

Order, July 16, 2013, "Whereas" Section, ¶ 29. The Supreme Decrees in turn provide an order of priority mandating that companies that purchased Land Bonds with "speculative ends" be repaid, if at all, after all other bondholders. **CE-37**, Supreme Decree N° 17-2014-EF, Art. 19.7. Specifically, the Supreme Decrees stipulate that payment shall be in the following order: (*i*) natural persons who are the original bondholders or their heirs and are 65 years or older; (*ii*) natural persons who are the original bondholders or their heirs and are younger than 65; (*iii*) natural persons who are not the original bondholders and are 65 years or older; (*iv*) natural persons who are not the original bondholders and are younger than 65; (*v*) legal entities that are the original bondholders; (*vi*) legal entities that are not the original bondholders and acquired title as payment of obligations required by law; and (*vii*) legal entities who are not original bondholders and acquired the debt for speculative purposes. *Id*. Art. 19.

196. To Gramercy's knowledge, the last category—targeting entities that purchased Land Bonds for "speculative purposes"—does not apply to any domestic legal entities. It applies only to Gramercy. RK WS ¶ 59. Tribunals assessing whether a measure affords "less favorable treatment" "have relied on the measure's adverse effects on the relevant investors and their investments rather than on the intent of the Respondent State." *ADM v. United Mexican States*, ICSID Case No. ARB (AF)/04/05 (NAFTA), Award of November 21, 2007 (redacted version), **CA-3**, ¶ 209.

197. Moreover, while tribunals have held that a claimant is not required to demonstrate discriminatory intent by the respondent state, *Clayton/Bilcon* Award, **CA-13**, ¶ 719; *Feldman v. United Mexican States*, ICSID Case No ARB(AF)/99/1 (NAFTA), Award of December 16, 2002, **CA-24**, ¶ 181, the Government likely intended the last category to apply to Gramercy specifically. It was no secret that Gramercy had acquired a significant Land Bond position. **CE-259**, Reuters, Interview-Peru Court Plans to Clean Up Billions in Land Bonds, November 2, 2012. Indeed, a February 10, 2016 letter from the President of the Audit Commission of Peru's Congress to the MEF explicitly states an intent to discriminate against Gramercy, and to deny Gramercy altogether the right to seek payment of the Land Bonds. **CE-220**, Letter from President of the Audit Commission of Peru's Congress to the Ministry of Economy and Finance, February 10, 2016. Evidence of such intent may be considered along with effects when determining whether an investor has been treated less favorably. *See Corn Products International* Award, **CA-17**, ¶ 138 (holding that while existence of intention to discriminate is not a requirement, evidence of such intent is sufficient to satisfy the third prong of the test); *ADM* Award, **CA-3**, ¶¶ 209-13 (taking discriminatory intent into account when assessing whether measure was discriminatory).

198. Consequently, Peru's conduct also violated its national treatment obligation under Article 10.3 of the Treaty.

D. Peru Has Denied Gramercy Effective Means to Enforce its Rights in Breach of Article 10.4 of the Treaty

1. The Treaty Requires Peru to Afford Gramercy Effective Means to Enforce its Rights

199. The Treaty's most-favored-nation ("MFN") clause, set forth in Article 10.4, requires Peru to grant treatment no less favorable to U.S. investors than that it accords to other foreign investors. **CE-139**, Treaty, Art. 10.4. By failing to provide Gramercy with effective means to bring claims and enforce its rights, a protection guaranteed to Italian investors pursuant to the Peru-Italy Treaty on the Promotion and Protection of Investments of 1994, Peru has breached Article 10.4 of the Treaty.

200. Article 10.4 of the Treaty provides that:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> *Id*. (footnote omitted).

201. It is well-settled that investors may use MFN clauses to import more favorable substantive provisions, including effective means provisions, from other investment treaties entered into by the state. *See White Industries Australia Ltd. v. India*, UNCITRAL, Final Award of November 30, 2011, **CA-44**, ¶ 11.2.1 (holding that effective means clause could be imported from third-party treaty through MFN provision); *see also Daimler Financial Services A.G. v. Argentina*, ICSID Case No. ARB/05/1, Award of August 22, 2012, **CA-19**, ¶ 219 n. 376 (noting that MFN provisions may generally be used to import

substantive protections in other treaties); *Al-Warraq v. Republic of Indonesia*, Final Award of December 15, 2014, **CA-5**, ¶ 551 (holding that MFN clause allowed importation of fair and equitable treatment provision from treaty between state and third party); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, **CA-7**, ¶¶ 227–232 (same); *EDF International, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award of June 11, 2012, **CA-21**, ¶ 931 (holding that MFN clause allowed importation of umbrella clause from treaty between state and third party).

202. The fact that the Treaty's MFN clause explicitly "does not encompass dispute resolution mechanisms, such as those in Section B [Investor-State Dispute Settlement], that are provided for in international investment treaties or trade agreements" also strongly indicates that it *does* encompass substantive provisions describing the "treatment" owed to investors. *See* **CE-139**, Treaty, Art. 10.4 n. 2.

203. Here, Peru has breached its obligation to provide "effective means to bring claims and enforce rights with respect to investments" guaranteed by the Peru-Italy Treaty on the Promotion and Protection of Investments of 1994. The Protocol to the Peru-Italy Treaty on the Promotion and Protection of Investments, which forms an "integral part of the agreement," provides, in pertinent part:

> With reference to Article 2 [Promotion and Protection of Investments] . . . (c) [The contracting party] shall provide effective means of asserting claims and enforcing rights with respect to investments and authorizations related to them and investment agreements.
>
> Peru-Italy Treaty on the Promotion and Protection of Investments, **CA-45**, May 5, 1994, Protocol ¶ 2(c) (unofficial translation).

204. In determining whether a state has breached its obligation to afford effective means, the operative standard "is one of effectiveness." *Chevron v. Ecuador*, UNCITRAL, Partial Award on the Merits of March 30, 2010, **CA-12**, ¶ 248. This standard "applies to a variety of State conduct that has an effect on the ability of an investor to assert claims or enforce rights." *Id.* It consists not only of a negative obligation on the state to avoid interfering with the investor's exercise of rights, but also creates a positive obligation on the state to provide effective means to assert and enforce those rights. *Id*. Further, it requires "both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case." *White Industries*, **CA-44**, ¶ 11.3.2(b). Evidence of government

interference with an investor's attempts to assert claims and enforce rights "may be relevant to the analysis" of whether a breach has occurred, but is not necessary to find a breach of an effective means provision. *Chevron*, **CA-12**, ¶ 248. Finally, while the inquiry is fact-specific, "the question of whether effective means have been provided to the [c]laimants for the assertion of their claims and enforcement of their rights is ultimately to be measured against an objective, international standard." *Id.* ¶ 263; *see also White Industries*, **CA-44**, ¶ 11.3.2(f) ("[w]hether or not 'effective means' have been provided by the host State is to be measured against an objective, international standard.").

205. Tribunals analyzing provisions similar to the one contained in the Peru-Italy Treaty on the Promotion and Protection of Investments have concluded that the "effective means" standard is different from and "potentially less-demanding" than the customary international law test for denial of justice. *Chevron*, **CA-12**, ¶ 244. Thus, while interpretation of an effective means provision is "informed by the law on denial of justice," a failure of the state to enforce rights "effectively" will constitute a violation of an effective means provision, even if it is insufficient "to find a denial of justice under customary international law." *Id.*; *see also White Industries*, **CA-44**, ¶ 11.4.19.

2. Peru's Conduct Violates its Obligation to Provide Effective Means to Gramercy

206. Under any "objective, international standard," Peru's conduct falls short of providing effective means for the enforcement of Gramercy's rights.

207. *First*, the Constitutional Tribunal's sudden change of course to issue the decision endorsing dollarization was beset with procedural irregularities and—in the case of Justice Mesía's purported dissent—outright forgery. Despite these irregularities, as a ruling from Peru's highest constitutional authority, there is no possibility for further appeal against the 2013 CT Order. *See* **CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, "Whereas" Section, ¶¶ 1, 3 (stating that recourse against the 2013 CT Order can only be filed by parties to the proceeding, which do not include Gramercy); **CE-183**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, November 4, 2013, "Whereas" Section, ¶ 1.

208. The dismissal of ABDA's challenge against the Supreme Decrees also establishes that Gramercy has no recourse against the Supreme Decrees. In a ruling issued only three weeks after ABDA's request for relief was received and without any official rebuttal being submitted by the Peruvian government, the Constitutional Tribunal summarily dismissed the challenge, holding that the association of bondholders had no standing to challenge its 2013 CT Order or the

Supreme Decrees—notwithstanding the fact that ABDA's very purpose is to represent bondholders. **CE-40**, Constitutional Tribunal, Writ, April 7, 2015. Moreover, the 2013 CT Order is binding on all Peruvian courts. **CE-106**, Law N° 28301, July 1, 2004, First Final Provision; **CE-108**, Constitutional Tribunal, Administrative Resolution N° 095-2004-P-TC, September 14, 2004, Art. 1.

209. *Second*, in addition to providing a formula that leads to a near-total destruction of the value of the Land Bonds, the Supreme Decrees remove Gramercy's ability to secure current value through the Peruvian judicial system. Gramercy was prosecuting cases in courts across Peru. On August 14, 2014, a court-appointed expert's report in one of those suits used CPI to value the group of just forty-four bonds at issue in excess of US $240 million. **CE-195**, First Specialized Civil Court, Expert Report, File N° 9990-2006-0-1706-JCI-05, August 14, 2014. However, as stated in the August 2013 Resolution, the Supreme Decrees are "mandatory," with the implication that "henceforth the claims for payment of said [Land Reform] debt may only be raised through the abovementioned procedure, and not through a judicial action." **CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, "Whereas" Section, ¶ 16, "Rules" Section, ¶ 4.d. Indeed, the Supreme Decrees explicitly state that "[t]he administrative procedures governed by these Regulations are incompatible with the updating, through the courts, of the debt related to the Land Reform Bonds." **CE-37**, Supreme Decree N° 17-2014-EF, Final Supplemental Provision N° 2. The Supreme Decrees mandate that the formula contained therein "shall be applied in the judicial proceedings," even in proceedings already underway, so long as no ruling has yet been issued. *Id*. Subsequent Peruvian court decisions have confirmed the mandatory nature of the CT's dollarization decision as expressed through the methodology contained in the Supreme Decrees. **CE-218**, Superior Court of Justice of ICA, Mixed Claims Chamber, Resolution, File N° 11253-2011-0-1411-JR-CI-01, January 21, 2016. This edict compromised judicial independence and effectively closed off the Peruvian courts as a means of redress.

210. *Finally*, the administrative procedure set forth in the Supreme Decrees otherwise fails to provide Gramercy with an effective means of enforcing its rights under the Land Bonds. To cite just a few examples, the process requires a burdensome registration procedure for all bondholders, even those who have already been litigating their claims for years; it provides no clarity as to when, if at all, bondholders in lower categories of priority will receive payment; and it provides multiple bases upon which proceedings may be delayed indefinitely by the government, including if the MEF believes the "fiscal equilibrium" of Peru could be compromised if the Bonds are paid. **CE-37**, Supreme Decree N° 17-2014-EF, Art. 17.1.

211. Peru's conduct goes further than that of Ecuador in *Chevron* and of India in *White Industries*. In *Chevron*, the tribunal found a breach of the effective means provision where Ecuadorian courts had delayed deciding seven cases brought by the claimant to enforce rights under its contractual agreements for at least 13 years (and in some cases more). Finding that there was no reasonable basis for these delays, the tribunal noted that "it is the nature of the delay, and the apparent unwillingness of the Ecuadorian courts to allow the cases to proceed that . . . amounts to a breach" of the effective means provision. *Chevron* Award, **CA-12**, ¶ 262. Similarly, in *White Industries*, the tribunal found that India's failure to resolve the claimant's jurisdictional claim in relation to set-aside proceedings for an arbitration award for nine years breached the effective means standard. *White Industries* Award, **CA-44**. As in *Chevron* and *White Industries*, Peru has repeatedly demonstrated its unwillingness to allow Gramercy to enforce its rights under the Land Bonds. However, Peru's conduct goes beyond just delaying judicial proceedings—rather, it bars altogether Gramercy's ability to access the courts to obtain payment of the Land Bonds at current value.

212. Here, the 2013 CT Order, along with its clarifying resolutions, and the Supreme Decrees—taken individually or collectively—deprive Gramercy of any effective means of bringing claims or enforcing rights under the Land Bonds. Thus, Peru has breached its obligations under Article 10.4 of the Treaty.

VI.

DAMAGES

A. Customary International Law Requires Full Reparation for Damages Resulting from Breach of an International Obligation

213. The customary international law standard for full reparation was articulated by the Permanent Court of International Justice in the seminal *Chorzów Factory* case:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that *reparation must, as far as possible, wipe-out all the consequences of the illegal act* and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in

> kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.
>
> *Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17, Claim for Indemnity-The Merits, September 13, 1928, **CA-23**, ¶ 125 (emphasis added).

214. The *Chorzów Factory* standard is widely recognized as the prevailing standard for compensation for breaches of international investment obligations. It is further codified in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which provides that:

> The state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby. . . . The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.
>
> U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), **CA-46**, Art. 36; *cf. id.* Art. 31 (setting forth the requirement of "full reparation").

215. The customary international law standard is not limited to reparation for unlawful expropriations, but rather applies to all host State treaty breaches. *See Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of March 28, 2011, **CA-30**, ¶ 149 (applying *Chorzów* to breach of the fair and equitable treatment standard even where such breach "does not lead to a total loss of the investment"); *BG Group*, **CA-8**, ¶¶ 421-429 (applying the *Chorzów* principle as a matter of customary international law and noting that "the Arbitral Tribunal may have recourse to such methodology as it deems appropriate in order to achieve the full reparation for the injury").

216. In other words, the purpose of an award of damages is the same irrespective of the nature of the host State's breaches of international obligations: to fully wipe out the consequences of the stated illegal acts and to provide full reparation so as to place the claimant in the same position in which it would have been if the State had not violated the applicable treaty.

B. Gramercy Is Entitled to Compensation in an Amount Equal to the Current Value of the Land Bonds

217. Full reparation requires payment of the Land Bonds at genuine current value. Whether this is seen as restitution in kind, or as a sum equivalent to restitution in kind, the result is the same. Gramercy's expert, Professor Sebastian Edwards, has calculated the current value of the Land Bonds held by Gramercy to be in excess of US $1.6 billion.

218. Assessing the compensation due to Gramercy in this arbitration is conceptually straightforward. The Land Bonds in which Gramercy invested have a true current value of approximately US $1.6 billion. However, through illegal measures, Peru has made the Land Bonds worth, at most, a mere $1.1 million, if Peru elects to pay at all—essentially nothing. Gramercy is entitled to the difference between what it had but for the illegal measures—Land Bonds worth US $1.6 billion—and what it has as a result of the Supreme Decrees—Land Bonds worth effectively zero. Accordingly, to provide full reparation and wipe out the consequences of the illegal acts, Peru must pay Gramercy US $1.6 billion.

219. In his report, Professor Edwards explains in detail how he calculated the current value of Gramercy's Land Bonds. He starts with the face value of each Land Bond, or whatever percentage of its original coupons it still has, and multiplies that principal amount by the change in the Peruvian CPI—as calculated by the Peruvian Central Bank—from the issuance date to the present.

220. Using CPI to update the value of the Land Bonds is justified not only because that is what Peruvian law requires and what Gramercy legitimately expected, but also because it is the most straightforward and prevalent method for updating bonds and similar instruments. *See* SE ER ¶¶ 52-55 (providing an overview of the CPI method and describing it as "sensible and conceptually straightforward"). The use of CPI as an updating method has been widespread throughout Latin America, including in Peru. *Id.* ¶¶ 56, 58. The principle methodology for establishing the current value of debts in Peru has long been CPI, as illustrated in detail in Sections III.D and III.F above. As Professor Edwards explains:

> The ubiquitous use of CPIs and comparable inflation indices to update nominal values is attributable not only to the method's conceptual validity, but also to its relative simplicity, utilization of readily available data, and freedom from subjective or potentially speculative assumptions. For these reasons, it is my opinion

> that the value of the land bonds should be updated based on the CPI Method, using the Lima CPI.
>
> *Id.* ¶ 60.

221. To value Gramercy's investment, Professor Edwards then includes interest to account for bondholders' foregone opportunity to invest the money that was promised to them but was never paid. *Id.* ¶¶ 44-51. The fact that current value must include interest cannot be seriously contested, and is even recognized—albeit imperfectly—by both the Supreme Decrees and the 2013 CT Order. **CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013, "Whereas" Section, ¶ 24; **CE-38**, Supreme Decree N° 19-2014-EF, Annex 1.

222. In order to provide full reparation, interest must compensate Gramercy for the lost opportunities that would have been available had the government paid in cash. Professor Edwards explains why the most appropriate interest rate in the circumstances is one that tracks the foregone opportunity to invest in Peru, and hence can be conservatively assumed to be the Peruvian real rate of interest on debt. He then describes how he used standard economic techniques to determine that this rate is 7.45%. SE ER ¶¶ 166-200.

223. Further, the interest rate should be applied on a compounding basis. Professor Edwards explains that:

> In updating the value of the land bonds, the assumption of compound interest is appropriate, insofar as a bondholder would have expected to (1) earn periodic returns on his or her investment, and (2) be able to re-invest those returns to earn further returns. The assumption of simple interest would be tantamount to denying a bondholder the ability to re-invest his or her returns, and would therefore underestimate the appropriate amount of compensation. The use of compound interest is prevalent throughout the financial world and, most pertinently, bond markets.
>
> *Id.* ¶¶ 47-48.

224. Compounding is consistent with the vast majority of arbitral awards in recent years, which have concluded that it is necessary to award compound interest in order to provide full reparation to the claimant. *See, e.g.*, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of April 4, 2016, **CA-18**, ¶ 935 (finding a "clear trend in recent decisions in favor of the award of compound interest").

225. Unlike the illogical and inexplicable Supreme Decrees formula, Professor Edwards's approach to calculating current value is reasonable, coherent, transparent and based on standard economic techniques. It is a reliable basis on which to compute the reparation due to Gramercy. Applying the methodology set forth by Professor Edwards in accordance with these conclusions, the current value of the Land Bonds is US $1.6 billion as of April 30, 2016. SE ER ¶ 74.

C. Gramercy Is Entitled to Arbitration Costs and Expenses

226. The principle of full reparation also requires that Gramercy be made whole for the costs of the arbitration proceedings and its legal expenses.

227. International tribunals have increasingly applied the principle that the non-prevailing party should bear the costs of arbitration and the prevailing party's reasonable costs of representation as part of full reparation. *See, e.g.*, *British Caribbean Bank Ltd v. Belize*, PCA Case No. 2010-18, UNCITRAL, Award, December 19, 2014, **CA-10**, ¶¶ 317, 325 (holding that "the general principle should be that the 'costs follow the event,' save for exceptional circumstances" and awarding claimant costs of arbitration and costs of legal representation and assistance in the arbitration proceedings).

228. In addition, the Treaty provides that the Tribunal "may also award costs and attorney's fees in accordance with [Section 10.26] and the applicable arbitration rules." **CE-139**, Treaty, Art. 10.26. Article 42 of the UNCITRAL Arbitration Rules—the applicable rules in this arbitration—in turn provides that "[t]he costs of the arbitration shall in principle be borne by the unsuccessful party or parties." **CE-174**, United Nations Commission on International Trade Law - Arbitration Rules, 2013, Art. 42.

229. Gramercy will submit a statement of its fees and costs at an appropriate time, as the Tribunal may order.

VII.

PROCEDURAL REQUIREMENTS

230. If "a disputing party considers that an investment dispute cannot be settled by consultation and negotiation," Article 10.16.1 of the Treaty provides in pertinent part:

> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach[.]

CE-139, Treaty, Art. 10.16.1(a).

231. The investor may submit such a claim to arbitration under the UNCITRAL Arbitration Rules. *See, id*. Art. 10.16.3(c), 10.16.4(c).

232. Article 10.17 stipulates that Peru "consents to the submission of a claim to arbitration under this Section in accordance with" the Treaty. *Id*. Art. 10.17.1.

233. In addition, the Treaty sets out specific requirements that the claimant must satisfy before submitting its claim to arbitration—all of which have been satisfied by Gramercy.

a. *First*, Gramercy delivered its requisite Notice of Intent to Peru—and Peru received the Notice—on February 1, 2016. Gramercy reserved its right to amend or supplement the Notice, and did so on April 15, 2016. Thus, Gramercy has complied with Article 10.16.2, which requires the claim to be submitted to arbitration "at least 90 days" after the filing of the written Notice of Intent. *Id*. Art. 10.16.2.

b. *Second*, over two years have passed since the Constitutional Tribunal rendered the 2013 CT Order and the MEF enacted the expropriatory 2014 Supreme Decrees. Accordingly, "six months have elapsed since the events giving rise to the claim" and Gramercy's submission of the claim to arbitration, as required under Article 10.16.3. *Id*. Art. 10.16.3.

c. *Third*, Gramercy first acquired constructive or actual knowledge of Peru's breaches on or after July 16, 2013, the date of the 2013 CT Order. Therefore, the submission of Gramercy's claim falls within the statute of limitations set forth in Article 10.18.1, which requires that no "more than three years" may "have elapsed from the date on which the claimant first acquired, or should

have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant . . . has incurred loss or damage." *Id*. Art. 10.18.1.

d. *Fourth*, Gramercy has not submitted its claims for Treaty violations to Peru's courts or administrative tribunals or any other applicable dispute settlement procedure, thereby satisfying Article 10.18.4(a), which requires that the claimant cannot have "previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure." *Id*. Art. 10.18.4(a).

e. *Fifth*, Gramercy has attempted in good faith to negotiate an amicable settlement of this claim with Peru for years, including since serving its Notice of Intent. Gramercy has therefore satisfied Article 10.15, which requires that "the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation." *Id*. Art. 10.15.

f. *Sixth*, Gramercy hereby appoints ~~the Honorable Charles N. Brower~~Stephen Drymer as its party-appointed arbitrator as required under Article 10.16.6(a). ~~Judge Brower~~Mr. Drymer may be contacted at: ~~20 Essex Street Chambers, 20 Essex Street, London WC2R 3AL, England; +44 (0)20 7842 1200; cbrower@20essexst.com.~~Woods LLP, 2000 McGill College Ave., Suite 1700, Montreal, Quebec, H3a 3H3, Canada; +1 514-370-8745; sdrymer@woods.qc.ca.

g. *Seventh*, Gramercy consents to arbitration in accordance with the procedures set out in the Treaty as required under Article 10.18.2(a). *Id*. Art. 10.18.2(a).

h. *Eighth*, GFM hereby waives "any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16." *Id*. Art. 10.18.2(b). Notwithstanding this waiver, GFM "may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of [Peru], provided that the action is brought for the sole purpose of preserving

[GFM]'s rights and interests during the pendency of the arbitration." *Id.* Art. 10.18.3.

i. ~~h.~~ *Finally*, ~~as required under Article 10.18.2(b) and 10.18.3, GPH and GFM each~~GPH hereby waives ~~its~~ "any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to~~" the measures~~ any measure alleged to constitute a breach referred to in Article 10.16~~, in particular the 2013 CT Order and the Supreme Decrees, except for proceedings for "~~." *Id.* Art. 10.18.2(b). Notwithstanding this waiver, GPH "may initiate or continue an action that seeks interim injunctive relief~~," and does not ~~involving "~~involve the payment ~~or~~of monetary damages~~[,]~~ before a judicial or administrative tribunal~~"~~ of [Peru], ~~and except that, to the extent the Tribunal declines to hear any claims asserted herein on jurisdictional or admissibility grounds, GPH reserves the right to bring such claims in another forum for resolution on the merits. *Id.* Art. 18.2(b),~~provided that the action is brought for the sole purpose of preserving [GPH]'s rights and interests during the pendency of the arbitration." *Id.* Art. 10.18.3.

234. Lastly, Gramercy proposes that the arbitral proceedings be conducted in English, and that the place of arbitration be fixed as New York, New York, United States of America. *See* **CE-174**, United Nations Commission on International Trade Law—Arbitration Rules, 2013, Art. 3.

VIII.

REQUESTED RELIEF

235. Gramercy is entitled to relief that would wipe out the effects of the 2013 CT Order and the Supreme Decrees and restore Gramercy's right to obtain full compensation for the Land Bonds.

236. To this end, Gramercy respectfully requests the Tribunal to issue an award:

a. Declaring that Respondent:

i. unlawfully expropriated Gramercy's investment in breach of Article 10.7 of the Treaty;

ii. failed to accord the minimum standard of treatment to Gramercy's investment in breach of its obligations under Article 10.5 of the Treaty;

iii. subjected Gramercy to treatment that was less favorable than the treatment granted to its own investors in breach of its obligations under Article 10.3 of the Treaty; and

iv. denied Gramercy effective means in subjecting Gramercy to treatment that was less favorable than the treatment granted to investors of other nations in breach of its obligations under Article 10.4 of the Treaty.

b. Ordering Respondent to pay Gramercy the value of the Land Bonds that is the contemporary equivalent of the Bonds' value at the time they were issued, which is approximately US $1.6 billion as of April 30, 2016 and will be further updated as of the date of the award;

c. Ordering Respondent to pay all the costs of the arbitration, as well as pay Gramercy's professional fees and expenses;

d. Ordering Respondent to pay interest at commercial, annually compounding rates on the above amounts from the date of the award until full payment is received; and

e. Ordering any other such relief as the Tribunal may deem appropriate.

237. Gramercy reserves its right under the UNCITRAL Arbitration Rules to modify its prayer for relief at any time in the course of the proceeding if the circumstances of the case so require.

Respectfully submitted,

(Add)

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